

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2017

Public Authority: House of Commons

Address: London
SW1A 0AA

Decision (including any steps ordered)

1. The complainant requested an electronic copy of Erskine May's Treatise on the Law, Privileges, Proceeding and Usage of Parliament. The public authority withheld a copy of the book in reliance on the exemption contained at sections 21(1) and 43(2) FOIA.
2. The Commissioner has concluded that the public authority was entitled to withhold the information requested on the basis of the exemption contained at section 21(1).
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 7 February 2017 in the following terms:

"Please provide me with an electronic copy of the current (24th?) edition of Erskine May: Parliamentary Practice. My preference is for a PDF format with searchable text."
5. The public authority provided its response in March 2017¹. It explained that it considered the current (24th) edition of Erskine May's Treatise on the Law, Privileges, Proceeding and Usage of Parliament² exempt from disclosure, firstly on the basis of the exemption contained at section 21 (1) and (2)(a) FOIA. Additionally, on the basis of the exemption contained at section 43(2) FOIA.
6. The complainant requested an internal review of the public authority's decision on 6 March 2017.
7. The public authority wrote back to the complainant on 3 April 2017 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 3 April 2017 to complain about the way his request for information had been handled. He disagreed with the public authority's decision to withhold the requested information.

Reasons for decision

Section 21(1) - Information accessible to applicant by other means

9. The Commissioner initially considered the application of this exemption to the requested information.
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¹ The actual date is not clear from the documents supplied by the complainant pursuant to the Commissioner's investigation.

² Erskine May: Parliamentary Practice

10. Section 21 states:

- 1) "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- 2) For the purposes of subsection (1)—
 - a. information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - b. information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- 3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

The Public Authority's Position

11. The public authority's submissions in support of its position that Erskine May: Parliamentary Practice is reasonably accessible to the applicant and therefore exempt from disclosure under the FOIA are summarised below.
12. The book is publicly available to the applicant from a number of sources. For example, it is available to purchase from bookshops on the high street and online. It is also available to access by loan arrangement from a public library.
13. Erskine May is produced by the May Memorial Fund, a registered charity which is independent of Parliament and is not a public authority for the purposes of the FOIA. The trustees of the May Memorial Fund hold the copyright to the publication. It is published by Lexis Nexis UK under the terms of a commercial publishing contract with the trustees. The public authority holds copies of Erskine May, which it has purchased from the publisher for use by its staff.
14. The public authority's Publication Scheme is clear that Erskine May "is not a House publication and is not available through this Publication

Scheme. It is published by Lexi Nexis UK and is available through reference libraries and booksellers.”³

15. The public authority accepts that the cost of the publication and its availability does create issues for some requesters. However, the master document is not held by Parliament and is not considered the property of Parliament by the authors or editors but the property of the May Memorial Fund, which also hold the copyright. This point is reinforced by the fact that Parliament buys its own copies for reference purposes only.
16. More generally, the public authority also considered the impact of it providing free electronic copies of a commercial publication under the FOIA and concluded that would be damaging to the commercial interest of both the Fund and the publisher.
17. Finally, the public authority is working with the May Memorial Fund and Lexis Nexis to make the next (25th) edition of Erskine May: Parliamentary Practice more readily accessible to the general public by publishing it freely online. This will be subject to the necessary contractual agreement about intellectual property being reached between the trustees and Lexis Nexis.

The Complainant's Position

18. The complainant's submissions in support of his position that Erskine May: Parliamentary Practice is not reasonably accessible to him and is therefore not exempt on the basis of section 21(1) are summarised below.
19. The Speaker of the House of Commons's Digital Democracy Commission (the Commission), a Parliamentary body, has explicitly stated that Erskine May: Parliamentary Practice is not reasonably accessible to citizens. The Commission's 2015 report at paragraph 11.6 and recommendation 32 states: "At present you can get Erskine May only as an expensive hardcover book, which makes it inaccessible not only to the average citizen but also to many parliamentary staff. We recommend that Erskine May, the definitive guide to parliamentary procedure, should be freely available online by the time the next edition is produced.”⁴

³ <https://www.parliament.uk/documents/foi/Publication-Scheme-and-Guide-to-Information-for-the-House-of-Commons-Oct2015.xlsx>

⁴ <http://www.digitaldemocracy.parliament.uk/chapter/11-a-fully-digital-parliament>

20. The adverb “reasonably” in section 21(1) qualifies the word accessible. It means that concept of accessibility, in the FOIA, is not to be interpreted merely formalistically but with a common-sense approach. Reasonableness applies not only to the ease with which one can access the requested information but to the relationship between the ease and the importance of the information itself. Erskine May contains information vital to the functioning of our democracy. It is a part of our constitution. It has the force of law in Parliament. Its important nature renders the lengths to which a citizen would have to go to access a copy of it unreasonable within the terms of the FOIA.
21. Erskine May is currently available for £381. “This is far beyond my budget.”⁵
22. Although copies may be available in libraries, this would involve travel and most probably, time off work. In addition, he argued that reliance on a library copy of the book would severely hamper his ability to access and refer to information.

The Commissioner’s Position

23. The Commissioner does not consider that the intention behind section 21 was to place a requirement on public authorities to copy and disclose copies of all published books they hold, particularly those which are available from other sources, whether published by the authority or not regardless of commercial considerations (albeit other exemptions could be applied).
24. To the extent that the book is available in libraries, the Commissioner considers that it is reasonably accessible to the applicant regardless of possible restrictions (including copyright) on its use and that such availability would not result in the complainant owning a copy. In the Commissioner’s view, information disclosed under the FOIA can still be subject to copyright restrictions in relation to its use. This could either be a public authority’s or a third party’s copyright. In any event, the question, in the Commissioner’s view, is whether the book is available in a location (including a library) that is reasonably accessible to the applicant. The Commissioner has found no reason to believe that is not the case. In her view, the time and effort required on the complainant’s part to access a library copy of the book is not disproportionate for her

⁵ The complainant voluntarily provided a brief breakdown of his income and expenditure which the Commissioner has chosen not to reproduce here.

to conclude that it is not reasonably accessible to him within the meaning of section 21(1).

25. The Commissioner does not share the view that in the context of section 21(1), "reasonably accessible" applies not only to the ease with which one can access information but also to the relationship between the ease and the importance of the information itself. Even if she is wrong on this point, the current edition of Erskine May remains accessible to the complainant by virtue of the fact that it is available for use in public libraries.
26. Finally, the Commissioner does not accept that the Commission's report undermines her position. The exemption at section 21 was not intended to make it possible for applicants to receive books for free that would otherwise be available for purchase on the open market. Even if unintended, such an outcome would clearly have damaging consequences on the commercial interests of publishers and booksellers.
27. In any event, the Commission was set up to find ways of making the rules, procedures and practices of Parliament more accessible to the public in a digital age. To that end, it recommended that Parliament's copy of the next edition of Erskine May should be made more accessible by making it freely available online. The public authority is committed to achieving this. However, as it has pointed out, online accessibility would also be bound by copyright restrictions to protect the intellectual property of the May Memorial Fund and Lexis Nexis.
28. In the Commissioner's view, there is no conflict between the Commission's recommendations and the intended purpose of section 21(1) as it applies to the circumstances of this case.
29. She has therefore concluded that the public authority was entitled to rely on the exemption at section 21(1).
30. In light of her decision, the Commissioner did not consider the applicability of the exemption at section 43(2) to the particular circumstances of this case. However, having noted more generally that there would be a risk to commercial interests in making books freely available under FOIA, it is more likely than not that disclosure of a copy of the book would also engage the exemption at section 43(2).

Right of appeal

31. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Terna Waya
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