

Decision Notice



Decision 121/2011 Ms Margaret Sutor and Social Care and Social Work
Improvement Scotland

Failure to respond

Reference No: 201100673
Decision Date: 16 June 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

This decision considers whether Social Care and Social Work Improvement Scotland (SCSWIS) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to an information request made by Ms Margaret Sutor.

Background

1. This case concerns an information request that was made to the Scottish Commission for the Regulation of Care (known as the Care Commission) in January 2011. On 1 April 2011, the work of the Care Commission passed to a new body, Social Care and Social Work Improvement Scotland (SCSWIS).
2. Since SCSWIS is the successor to the Scottish Commission for the Regulation of Care, and for the sake of clarity, this decision refers to the public authority to which Ms Sutor's request was made as SCSWIS throughout.
3. On 17 January 2011, Ms Sutor wrote to SCSWIS requesting information relating to a complaint she had made, and in particular for the evidence used in its investigation.
4. SCSWIS wrote to Ms Sutor on 17 February 2011, indicating that the information falling within the terms of her request was being reviewed. It indicated that Ms Sutor's request was being handled as a subject access request made under the Data Protection Act 1998, and a response would be supplied as soon as possible.
5. SCSWIS wrote again to Ms Sutor on 28 February 2011. It provided some information, comprising notes made by the investigating officer regarding the matters raised. However, it indicated that, having reviewed her request for the evidence used in its investigation, given the content of the documents, it had reached the view the request should be processed by the local authority which had supplied it. It provided an inventory of the information to enable Ms Sutor to request this information from that authority.
6. On 1 March 2011, Ms Sutor wrote to SCSWIS, requesting a review of its decision not to supply the documentation.
7. SCSWIS contacted Ms Sutor on 18 March 2011, indicating that it was in the process of reviewing its decision and awaiting comments from the Council that had supplied the information to it.



8. Ms Sutor received no further response to her request for review and, on 6 April 2011, wrote to the Commissioner, stating that she was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Ms Sutor had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

10. On 4 May 2011, SCSWIS was notified in writing that an application had been received from Ms Sutor and was invited to comment on the application.
11. SCSWIS responded on 18 May 2011. It indicated that it had been dealing with Ms Sutor's information request in terms of the DPA rather than FOISA, and as a result it did not consider any procedural breach had occurred in respect of FOISA.
12. However, it acknowledged that it would have been good practice in these circumstances to issue a notice to Ms Sutor indicating that it considered the information she had requested to be exempt from disclosure under section 38 of FOISA. It indicated that its processes had been amended accordingly.

Commissioner's analysis and findings

13. Under section 1(1) of FOISA, a person who requests recorded information from a public authority is entitled to receive it, except (given the provisions set out of section 1(6)) if the information is exempt from disclosure or the right of access is otherwise negated by one of a number of provisions in Part 1 of FOISA.
14. Where a request is refused, other provisions in Part 1 of FOISA oblige an authority to give notice of that refusal in particular terms.
15. In this case, SCSWIS received a request for recorded information, which was valid for the purposes of FOISA. It issued a response to that information request, but did so apparently without having considered the request in terms of FOISA. Instead, it considered the request in terms of the DPA, having judged Ms Sutor's request to be a subject access request, made on behalf of the person whose care she had complained about.



16. Where a person seeks their own personal data (or they seek another person's personal data on their behalf), the subject access right within the DPA is undoubtedly the appropriate route for doing so. Section 7 of the DPA gives a right to access their own personal data, subject to certain restrictions.
17. Information that is the personal data of the applicant (or the person on behalf of whom the applicant makes their request) is absolutely exempt from disclosure under section 38(1)(a) of FOISA. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data under section 7 of the DPA. The exemption ensures that such information is disclosed to the data subject (rather than to the world at large, which is the effect of disclosure under FOISA) under a regime designed for such purposes.
18. However, the existence of this exemption does not stop an information request seeking personal data from also being a valid request for information under FOISA.
19. Technically, a public authority which concludes that all information that has been requested is the personal data of the requestor (or the person on behalf of whom they made their request) should nonetheless respond to that request within the timescale required by FOISA, indicating that the information is exempt from disclosure.
20. This approach allows the requestor to challenge that decision, should they take the view that the information they seek is not entirely their own personal data.
21. Ms Sutor's dissatisfaction in this case relates to SCSWIS's failure to respond to her request for review. In the light of the comments above, the Commissioner cannot accept that there was no breach of the requirements of FOISA in this case.
22. Section 21(1) of FOISA gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case.
23. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
 - a. confirm a decision complained of, with or without such modifications as it considers appropriate;
 - b. substitute for any such decision, a different decision; or
 - c. reach a decision, where the complaint is that no decision has been reached.
24. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under section 21(4) and a statement of its reasons for so doing.
25. Since SCSWIS did not supply any response to Ms Sutor's request for review within the required timescale, the Commissioner must find that it failed to comply with the requirements of section 21 of FOISA, in particular by failing to conduct a review and provide notice of its outcome in terms of section 21(4) and (5) of FOISA, within the timescale specified in section 21(1).



26. The Commissioner recognises that SCSWIS has thus far considered Ms Sutor's request only in terms of the DPA, and it has been conducting a review also in those terms. In order to comply with Part 1 of FOISA, the Commissioner requires the SCSWIS to conduct a review of its handling of her request in terms of FOISA, in line with section 21(4), and notify her of the outcome of this review in line with section 21(5).

DECISION

The Commissioner finds that Social Care and Social Work Improvement Scotland (SCSWIS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Ms Sutor, in particular by failing to respond to Ms Sutor's requirement for review within the timescale laid down by section 21(1) of FOISA.

In order to comply with Part 1 of FOISA, the Commissioner requires the SCSWIS to conduct a review of its handling of her request in terms of FOISA, in line with section 21(4), and notify her of the outcome of this review in line with section 21(5) by 3 August 2011.

Appeal

Should either Ms Sutor or SCSWIS wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
16 June 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-

- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached.

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...