

Decision Notice

Decision 022/2017: Mr X and the Scottish Ministers

Guidelines for “Moving Forward: Making Changes” programme

Reference No: 201601271

Decision Date: 14 February 2017



Scottish Information
Commissioner

Summary

The Scottish Ministers (the Ministers) were asked for information from Moving Forward Making Changes, a treatment programme for adult male sex offenders. The Ministers withheld the information, arguing that it could be used to manipulate the outcome of the programme. The Commissioner accepted that most of the information was correctly withheld, but ordered disclosure of information describing the programme modules.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 35(1)(c) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 12 May 2016, Mr X made a request for information to the Ministers. He asked for “the guide lines of the Moving Forward Making Changes [MFMC] booklet”. MFMC is a programme for the treatment of adult male sexual offenders. Mr X also asked the Ministers to “forward the relevant paperwork persons who is deemed unsuitable to participate in this MFMC, prisoners who maintain their innocence”.
2. The Ministers responded on 7 June 2016. They withheld information under section 35(1)(c) of FOISA, on the grounds that its disclosure would, or would be likely to, prejudice substantially the administration of justice. The Ministers provided Mr X with an excerpt from the MFMC guidance about whether offenders who deny their offence should be admitted to the programme.
3. On 13 June 2016, Mr X wrote to the Ministers requesting a review of their decision to withhold information. He asked some questions about access to the MFMC programme, particularly in relation to prisoners who maintain their innocence or who have been deemed to be of no risk to the community.
4. The Ministers notified Mr X of the outcome of their review on 29 June 2016. They upheld the decision to withhold information under section 35(1)(c) of FOISA, and found that the public interest in doing so outweighed the public interest in disclosure.
5. On 11 July 2016, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated that he was not asking for the questions or the answers to the MFMC programme: all he was requesting was “the guidance booklet...who is eligible and who is not eligible to do this programme”.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 18 August 2016, the Ministers were notified in writing that Mr X had made a valid application. They were asked to send the Commissioner the information withheld from Mr X. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr X and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Information covered by Mr X's request

10. The information withheld by the Ministers was the manual for the MFMC programme, which was prepared for practitioners. As Mr X had stated that he did not require the questions or answers to the programme, but simply the guidance booklet, Ministers were asked to confirm whether they held any such booklet.
11. The Ministers provided a leaflet giving a short overview of the MFMC programme, which was provided to Mr X. Mr X was asked whether this was the information he required. On 2 November 2016, he stated that he wanted "a download of the different modules they have mentioned in this leaflet".
12. The modules are part of the information withheld by the Ministers under section 35(1)(c) of FOISA. Although it is doubtful whether Mr X's description of the information he required ("the guide lines") closely matches the information which he has now confirmed he required, the Commissioner accepts that this did not prevent the Ministers from identifying the information when responding to his request. She therefore accepts that Mr X's request of 12 May 2016 should be understood to be a request for information about the modules in the MFMC programme, and will consider whether this information was correctly withheld under section 35(1)(c) of FOISA.

Section 35(1)(c) – Law enforcement

13. Under section 35(1)(c), information is exempt if its disclosure would, or would be likely to, prejudice substantially the administration of justice. The term "administration of justice" is not defined in FOISA, but the Commissioner considers that it refers widely to matters relating to the working of the courts and of tribunals. Examples might include principles such as the right to a fair trial and ensuring that individuals have access to justice.
14. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. The Ministers described the MFMC manuals as operational tools that offer guidance in the effective administration of the MFMC programme, the aim of which is to "assist offenders to lead a satisfying life that does not involve harming others". They had never intended sharing the manuals with programme participants, either in community or custody settings, or more widely.
16. The Ministers explained that the manuals would give potential participants prior knowledge of what the MFMC programme entails, and submitted that early access to these materials could

allow participants to anticipate programme sessions and prepare for these in advance. They gave the example of the Psychometrics battery applied to the MFMC programme, and argued that if a participant had prior knowledge of this, they could prepare responses in their favour.

17. The Ministers argued that disclosure of the manuals could lead to the information being shared with other participants, which would undermine the integrity of programme sessions. This would also “compromise the wider rationale that underpins the MFMC programme around participants acknowledging their offending behaviours at the start of the programme sessions and taking steps to address these behaviours during their programme attendance”.
18. The Ministers considered that disclosure of the manuals would be comparable to providing exam answers to a student before an exam.
19. The Ministers argued that disclosure of the information would not only affect the reformation of the individual offender, but could have major consequences for wider public safety. They explained an offender’s involvement in the MFMC programme and its results are relied upon when decisions are taken about the onward movement of offenders and, eventually, their release.
20. For the most part, the Commissioner accepts that the information about the modules which is found in the MFMC manuals would enable offenders to subvert the aims of the programme by preparing for sessions in advance and possibly identifying responses which would give a misleading impression of their true progress. Given that progress in the MFMC programme is taken into account when considering an offender’s onward movement and release, the Commissioner accepts that disclosing information about the modules would, or would be likely to, prejudice substantially the administration of justice.
21. The Commissioner has identified a small amount of information in the MFMC manuals which provides a short description of the aim of each module. She does not consider that this information would be capable of causing the harm identified by the Ministers and discussed above. During the Commissioner’s investigation, the Ministers acknowledged that this information did not fall within the exemption. She therefore finds that this information is not exempt from disclosure under section 35(1)(c) of FOISA, and requires the Ministers to disclose it to Mr X. (The Commissioner has provided the Ministers with a marked-up copy of the information in question.)
22. In relation to the information to which the exemption in section 35(1)(c) applies, the Commissioner must go on to consider the public interest test required by section 2(1)(b) of FOISA.

Public interest test

23. Section 2(1)(b) of FOISA requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
24. The Ministers acknowledged that there is always a public interest in disclosing information as part of open, transparent and accountable government. However, they considered that, on balance, the public interest lay in withholding the information covered by Mr X’s request. It would not be in the public interest to disclose information which could enable a participant in the MFMC programme to manipulate the outcome of the programme and lead the

programme practitioners to believe that they had engaged fully and successfully, when in fact they could still present a risk to the public.

25. The Commissioner has considered the public interest in disclosure of information about the modules in the MFMC programme, but finds that this would be met by disclosure of the information she has already identified. She accepts that the remaining information is capable of subverting the MFMC programme, and considers this would be strongly against the public interest.
26. The Commissioner therefore accepts that, with the exception of the information identified in paragraph 21, the Ministers were correct to withhold information about the MFMC modules under section 35(1)(c) of FOISA.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Ministers (the Ministers) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X.

The Commissioner finds that the Ministers correctly withheld information under section 35(1)(c) of FOISA. However, this exemption was wrongly applied to some information covered by Mr X's request.

The Commissioner therefore requires the Ministers to provide Mr X with the information which was wrongly withheld by **31 March 2017**. The Commissioner has provided the Ministers with a marked up version of the information to be disclosed.

Appeal

Should either Mr X or the Ministers wish to appeal against this decision, they have the right to 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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

14 February 2017

Appendix 1: 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (c) the administration of justice;

...

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