

Decision 001/2005 – Mr L and the Lothian & Borders Safety Camera Partnership

Refusal to release a copy of a safety camera calibration certificate

Applicant: Mr L

Authority: Lothian & Borders Safety Camera Partnership

Application: 200501096

Date of Decision: 17 May 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 001/2005 – Mr L and the Lothian & Borders Safety Camera Partnership

Safety camera calibration certificate - refusal of access - section 25 - whether information is otherwise accessible.

Facts

Mr L wrote to the Lothian & Borders Safety Camera Partnership asking to see the calibration certificate for equipment used in an alleged speeding offence. Although the information was eventually provided by the public authority after he lodged an application with the Scottish Information Commissioner, Mr L has asked for a decision as to whether the authority acted correctly in response to his initial request and subsequent request for review.

Decision

The Commissioner found that the authority has not dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). The authority should put in place procedures to conform with the provisions of FOISA particularly with respect to Sections 16,19,21, and with reference to paragraphs 63-71 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, relating to these sections.



Background

1. On 17 February 2005, the applicant made a request to the Lothian & Borders Safety Camera Partnership (“the Partnership”) to see the calibration certificate for a safety camera used in relation to an alleged speeding offence committed by the applicant. He argued that he should be able to view the certificate under the Freedom of Information (Scotland) Act 2002 (FOISA), notwithstanding that the Partnership stated, in a “most commonly asked questions” sheet which accompanied the Notice of Intended Prosecution, that it was not possible for him to see the certificate.
2. On 23 February 2005, the Partnership wrote to the applicant refusing to send him a copy of the certificate on the basis that it constituted police evidence and would be produced in court if required. The Partnership however indicated that the certificate could be viewed on the Lothian and Borders Police website.
3. The applicant sought an internal review of this decision and wrote to the Partnership on 28 February 2005, asking it to reconsider the decision to withhold the information he had requested. The Partnership responded on 3 March 2005, stating that a copy of the calibration certificate could not be sent out in the post, and instead referring the applicant to the Safety Camera Partnership’s website where examples of the certificate could be found.
4. The applicant then applied to me for a review of the Partnership’s refusal to provide him with the information requested, in a letter dated 18 March 2005.
5. The case was then allocated to an Investigating Officer.

The Investigation

6. The applicant’s appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to the Commissioner only after requesting the authority to review its decision to withhold information. Although none of this is disputed it is worth noting that The Lothian and Borders Safety Camera Partnership is comprised of the City of Edinburgh Council, West Lothian Council, Scottish Borders Council, Lothian and Borders Police and the Scottish Executive. These are all public authorities covered by FOISA and the information was regarded as being held by a public authority for the purposes of the legislation.



7. A letter was sent from my office to the Partnership on 8 April 2005, informing it that an appeal had been received and that an investigation into the matter had begun.
8. The Partnership was asked to provide:
 - Copies of any internal guidance or policy relied on by Lothian & Borders Safety Camera Partnership relating to the release of safety camera calibration certificates to the public;
 - Copies of any internal documents or correspondence relating to the applicant's request for information dated 17 February 2005, or his subsequent request for review of 28 February 2005. This was to include any e-mails, minutes of meetings, briefings, notes of conversations, or memos that refer to the request and the Safety Camera Partnership's response;
 - Details of the process followed in responding to the applicant's letter of review dated 28 February;
 - Copies of the information requested to enable the Commissioner to consider whether the information should be released or withheld; and
 - Any other information relevant to this case.
9. The Partnership provided:
 - An extract from the Partnership's Information Audit which included guidelines on how to respond to requests for certain types of information (such as calibration certificates);
 - A copy of an internal e-mail dated 17 February 2005, confirming that calibration certificates had been uploaded to the Partnership website;
 - Copies of correspondence sent to the applicant (including a copy of the calibration certificate sent to him on 14 April 2005) and a copy of the applicant's original request;
 - A copy of the Notice of Intended Prosecution and a sheet outlining the applicant's case history; and
 - Copies of certificate print outs from the website.



10. It was noted that the Partnership had not cited any exemptions under FOISA when refusing the request and it was therefore asked to set out in terms of the Act the exemption(s) that apply to the information withheld, why the exemption(s) apply and its analysis of the public interest test in relation to each exemption applied (where appropriate).
11. The Partnership Manager phoned my Office on 13 April 2005 in response to this letter and acknowledged that an error had been made. He stated that a letter of apology would be sent to the applicant along with a copy of the calibration certificate that had been requested.
12. The Partnership sent a copy of the calibration certificate to the applicant on 14 April 2005, acknowledging in its covering letter that it had been “inconsistent” in respect of the applicant’s request to see the certificate.
13. In some cases when an authority provides disputed information during the course of an investigation this may be done as part of a settlement procedure where the applicant agrees to withdraw the related appeal to the Commissioner. However there was no such agreement in this case. Rather the applicant wrote to my Office on 16 April 2005, indicating that although he had received a copy of the calibration certificate he still wished a decision to be made in relation to his original application. He stated that he was unhappy with the way his request had been dealt with by the Partnership and wanted to ensure that this would not happen again to anyone else.
14. On 26 April 2005 the Partnership provided information in response to the request by my Office, with the exception of a copy of the request for review from the applicant which the Partnership was unable to produce and which it presumed had been misfiled. It confirmed at the same time that no exemptions were being claimed, as there was now no intent to withhold the information in this case. However, it was also stated that, due to the application of old guidelines, the exemption the Partnership had intended to use had not been cited, namely Section 25 – information otherwise accessible.

The Commissioner’s Analysis and Findings

15. The main issue of substance to be addressed is whether procedurally the Partnership has properly dealt with the applicant’s application under FOISA. However before I do so, I want to comment upon the Partnership’s claim that the information need not have been supplied as it was otherwise accessible by virtue of being posted on their website thus qualifying for exemption under Section 25. I believe it is worth doing so as this is likely to be claimed in other instances, notwithstanding that the information in dispute in this particular case has been provided to the applicant.



Was the information reasonably accessible?

16. The Partnership stated, as noted above, that it would have intended to have claimed an exemption under Section 25 of FOISA on the basis that the information is otherwise accessible, by virtue of being available on the Partnership's website.
17. It stated that an example calibration certificate had been published on its website in December 2004 and the site was updated on 17 February 2005, including all 22 certificates.
18. The Partnership also provided copies of an example certificate from the site as well as the specific certificates of conformity and calibration data as requested by and supplied to the applicant.
19. Previously, the Partnership website listed the cameras with their calibration due dates. Individual calibration certificates were provided within two pdf files (one for fixed cameras and one for mobile cameras). These files (14 pages and 5 pages respectively) contained the certificates of calibration for each fixed camera and four certificates of conformity for each mobile camera. However, only one of the corresponding calibration data sheets for the four mobile cameras was present.
20. The calibration data sheets describe in detail the checks that have been carried out on the cameras to ensure that they conform to requirements (such as distance checks, optical power output tests, pulse repetition frequency tests and speed simulation tests). In my view that without the data sheet there is no detailed calibration data available for a member of the public to inspect in order to check the basis upon which the certificate of conformity has been issued. In other words, there would be no evidence that the camera had actually passed the relevant tests other than the existence of a covering certificate.
21. At the time of the applicant's request the calibration data sheet for the camera that concerned him (serial number 448164) was not present on the website although the covering certificate of conformity was (the only mobile camera calibration data sheet available at that time related to camera 448166).
22. In my view the information which the applicant wanted (the detailed calibration data sheet for a specific camera) was held by the Partnership but was not otherwise accessible and so exemption under Section 25 would not have applied to his application. The applicant could only have obtained or viewed a copy of the relevant data sheet by making a request for the information under FOISA, and being provided with a copy.
23. But even if the specific calibration sheet had been on the site would it be regarded as otherwise accessible?



24. The Partnership argues that as most people have access to the internet then information posted on a website is accessible. However the most recent information on data trends available from the Scottish Household Survey¹ published by the Scottish Executive shows that in Scotland only 45% of adults make use of the internet for personal use.
25. This hides a wide disparity between income groups and types of household. The Social Justice Annual Report for 2003 provides percentages of households with home internet access by interim Scottish Multiple Index of Deprivation. Access in the least deprived households is 51%; for the most deprived 20%. As might be expected an even greater disparity is evident when specific household income is considered. 63% of households with income of over £20,000 have home internet access. This falls to only 11% for households with an income of less than £6000. Finally the type of household also has a bearing. Only 27% of single parents have home internet access whilst single pensioners barely register with 3%.
26. In my view therefore it is not yet possible to say that information which is solely provided on a website is reasonably accessible to people in Scotland. Public authorities also have a duty to provide information in any format requested by the applicant, where reasonably practicable, under section 11 of FOISA. An authority may prefer as its primary source to make it available on a website but where it receives a request for the information to be made available in another format, e.g. in paper form posted to a home address, then it should do so unless there are overriding technical or cost implications.
27. It was also incorrect of the Partnership to consider the public interest test in relation to their intended use of the Section 25 exemption. The Partnership stated "We find that the Public Interest Test applies on the following grounds: most people have access to the Internet, it saves the public purse to refer to the web site instead of sending out copies, it also increases our organisations [sic] transparency to publish the certificates on the web site and by referring to the web site, we can also better interact with our various audiences." The Section 25 exemption is an absolute exemption and therefore the public interest test does not apply.
28. In this case a request for a printed copy of a calibration certificate is not unreasonable, especially where an applicant cannot find the electronic version of the document required on the organisation's website.
29. The Partnership's website has been amended since the date that the applicant's appeal was initiated. The web page that contains references to the calibration certificates now consists of two tables with a list of fixed and mobile camera serial numbers and their individual

¹ Scottish Household Survey: Data Trends (up to, and including, the third quarter of 2004).
<http://www.scotland.gov.uk/Topics/Statistics/16002/11658>.



calibration dates. A link to the calibration certificate for each camera is also provided and the documents can be viewed in pdf format. A corresponding data sheet is now available for each mobile camera.

30. I find that the information should have been released and **recommend** two further improvements.
31. Firstly, on 10 May 2005, the applicant supplied me with a copy of the “most commonly asked questions” sheet that accompanied his Notice of Intended Prosecution. The sheet stated that the certificates could not be viewed: “The Police **will not** provide this documentation at this stage. If the matter proceeds to a full Court hearing the necessary documentation will be produced then.” This should be updated with immediate effect to reflect the right to access such information as conferred by FOISA.
32. Secondly, where a Notice of Intended Prosecution is issued it would be of assistance to members of the public if the serial number of the certificate/camera involved was clearly stated alongside details of where to view copies of it. Providing details of the exact page on the Partnership website where copies of calibration certificates can be found would also be useful rather than simply citing the main address of the website.
33. I will now turn to the matter which needs to be decided.

Were procedures for responding to the request adequate?

34. The applicant made his request for information on 17 February 2005. The response from the Partnership was very prompt, dated 23 February 2005, well within the 20 working days required under FOISA. However it fell well short of conformity with FOISA in two key respects.
35. The Partnership refused to provide the information without specifying a claimed exemption, stating that the calibration certificate was police evidence and would be produced in court if required. As the Partnership has itself subsequently recognised, this is incorrect. But even if it had been correct the authority would have to then specify the exemption under FOISA which it claimed encompassed such a reason to allow the information to be refused. No such exemption was identified in response to the applicant, which under the terms of FOISA should have constituted a refusal notice. Furthermore, the Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (“the Section 60 Code”) requires authorities to inform applicants of their right to a review of this refusal. The Partnership did not inform the applicant of this option.



36. Although the letter of refusal did not indicate a procedure for requesting a review of the decision the applicant wrote on 28 February 2005 asking the Partnership to reconsider its decision.
37. I regard this as constituting a requirement for review under FOISA. The applicant does not have to cite the Act or employ specifically the term 'review'. Where the applicant expresses his dissatisfaction with the refusal this should be regarded as a request for a review especially where amplified by asking the authority to 'reconsider', 'look again' etc.
38. The response to the request for a review was also unsatisfactory. It was sent out in the same name of the officer who issued the initial refusal. The Section 60 Code says 'the review should generally be handled by staff who were not involved in the original decision.' By not having in place a review procedure which allows for the matter in dispute to be considered afresh, it is likely that the applicant will not regard the procedure as fair and impartial, as expected by the Code. It is also bound to increase the likelihood that the original decision will simply be upheld even if it is in error or is deficient. What did not become obvious in this case until the Partnership subsequently informed us was that it was an Administrative Assistant who dealt with the original enquiry and responded in the name of her line manager, the Deputy Manager. Subsequently even though the Deputy Manager upheld the original decision, made in her name, she still did not make any reference to the Freedom of Information (Scotland) Act nor cite any exemptions. Furthermore in maintaining the refusal she has not appreciated that in confirming the Partnership's original decision she is obliged to inform the applicant of his right to appeal to the Commissioner and the time limits within which this should be done.

Decision

I find that the authority has not dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paras 34-38 above. The authority should put in place procedures to conform with the provisions of FOISA particularly with respect to Sections 16,19,21, and with reference to the paragraphs 63-71 of the Section 60 Code relating to these sections. These procedures should, through staff training and revisions to the authority's processes:

- ensure that a request for information is recognised as a request to be dealt with under FOISA;



- ensure that refusals conform with Section 16 of FOISA by stating that an exemption is being claimed;
- specify the exemption and state why the exemption applies;
- ensure that the applicant is informed of the right to a review of such a decision .

The procedures for carrying out a review should meet good practice by providing that the review is conducted by someone other than the member of staff who originally refused the application. If the decision of the review is to confirm the previous decision of the authority then the notice to the applicant must contain particulars about:

- the right of application to the Commissioner; and
- the right of appeal as required by Section 21(10) of FOISA.

The Partnership should take steps to put in place improvements with immediate effect. It should implement the necessary staff training and improvements to procedures no later than 3 months from the date of this notice.

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17 May 2005

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