



Scottish Information
Commissioner

**Decision 086/2005 - Mr Edward Milne and the
Scottish Court Service**

Request for information relating to the applicant

**Applicant: Mr Edward Milne
Authority: Scottish Court Service
Case No: 200502142
Decision Date: 20 December 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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KY16 9DS



Decision 086/2005 - Mr Edward Milne and the Scottish Court Service

Request for information relating to the applicant – section 17 – information not held – content of certain notices under section 19 of the Act – failure to respond to the request for review within the 20 working day timescale set out in section 21(1) of the Act.

Facts

Mr Milne wrote to the Sheriff Clerk at Forfar Sheriff Court requesting all of the information held that related to him. The Scottish Court Service asked Mr Milne to clarify the information he sought in order to determine whether the request should be treated under the Freedom of Information (Scotland) Act 2002 (FOISA) or the Data Protection Act 1998 (DPA) and to enable the Scottish Court Service to carry out a search in the appropriate court records.

Mr Milne initially refused to clarify his request but subsequently listed a number of court proceedings in which he had been involved from 1989 onwards. He also emphasised that he wished his request to be dealt with under FOISA. The Scottish Court Service advised Mr Milne that the documentation he had requested was no longer available since it had been destroyed in line with its records management procedures under the provisions of the Disposal of Court Records (Scotland) Regulations 1990. Mr Milne was dissatisfied with this response and asked for a review. He received no response within the statutory 20 working day time limit and applied to the Scottish Information Commissioner for a decision.

Outcome

The Commissioner found that the Scottish Court Service had complied with section 1(1) of FOISA by issuing a notice under section 17 of FOISA, informing Mr Milne that the information he had requested was not held.

However, the Commissioner found that the Scottish Court Service had failed to provide Mr Milne with information about his right to a review and his right to appeal to the Commissioner as required by section 19 of FOISA.



The Commissioner also found that the Scottish Court Service failed to respond to Mr Milne's request for a review within the 20 working day timescale set out in section 21 of FOISA. However, the Commissioner was satisfied that steps had been taken by the Scottish Court Service to improve procedures and no further action was required in response to these breaches.

Appeal

Should Mr Milne or the Scottish Court Service wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 5 May 2005, Mr Milne requested all information relating to him held by the Sheriff Clerk at Forfar Sheriff Court. The Scottish Court Service, which is responsible for the administration of the Sheriff Courts and is an Executive Agency of the Scottish Executive, acknowledged receipt of Mr Milne's request on 16 May 2005. In its letter the Scottish Court Service asked Mr Milne to clarify his request by describing the nature of business conducted at the Court which formed the basis of his enquiry.
2. Mr Milne repeated his request on 17 May 2005, refusing to provide any further clarification. On 1 June 2005, the Scottish Court Service replied to Mr Milne, asking him to define the information sought in order to determine whether the request should be treated under the Freedom of Information (Scotland) Act 2002 (FOISA) or the Data Protection Act 1998 (DPA) and to enable the Scottish Court Service to carry out a search in the appropriate court records.
3. Mr Milne responded on 2 June 2005, listing a number of court proceedings in which he had been involved from 1989 onwards. In his letter he emphasised that he wished his request to be dealt with under FOISA.



4. The Scottish Court Service informed Mr Milne, on 27 June 2005, that court records such as summary complaints and minutes of proceedings are absolutely exempt in terms of FOISA. It did however state that any ancillary documentation such as minutes of meetings, internal memoranda and e-mails would not be exempt in terms of the legislation. However, the Scottish Court Service also advised Mr Milne that such documentation was no longer available since it had been destroyed in line with the current schedule on destruction of court records under the provisions of the Disposal of Court Records (Scotland) Regulations 1990.
5. Mr Milne was not content with this response and applied to me for a decision on 28 June 2005. However, he was advised that his application was not valid under section 47 of FOISA since he had not requested a review from the Scottish Court Service. On 1 July 2005, Mr Milne wrote to the Scottish Court Service requesting a review. No response was received in relation to the request for review and Mr Milne applied to me for a decision after the 20 working day period had elapsed for the Scottish Court Service to reply, on 3 August 2005. The case was assigned to an investigating officer.

The Investigation

6. Mr Milne's appeal was validated by establishing that he had made a written request for information to a Scottish public authority, and had appealed to me only after requesting a review from the authority.
7. The Scottish Court Service was contacted by my investigating officer on 10 August 2005. It was asked to comment on the case and to provide documentation which would enable the investigation to proceed. It was also asked to provide details of how it had ascertained that none of the information requested by Mr Milne was in fact held by the Sheriff Clerk's Office and to explain why it had failed to carry out a review.
8. The Scottish Executive's Legal and Parliamentary Services department replied on behalf of the Scottish Court Service, on 5 September 2005. It stated that the exemption referred to in the Sheriff Clerk's response to Mr Milne, dated 27 June 2005, concerning court records under section 37 of FOISA, was simply mentioned in order to set out the factual position regarding court records and FOISA. It also recognised that the exemption under section 37 cannot apply to information that is not held.
9. The Legal and Parliamentary Services department also noted that the request from Mr Milne was expressed in terms which are usually regarded as constituting a subject access request under the DPA.



10. The Legal and Parliamentary Services department stated that the documentation Mr Milne requested was no longer available as it had been destroyed in line with the current schedule on destruction of court records under the provisions of the Disposal of Court Records (Scotland) Regulations 1990. A search of the court record depository was carried out by the Scottish Court Service in order to ascertain whether it actually held the documentation requested. The outcome of the search confirmed that the documents Mr Milne requested were not held by the Scottish Court Service.
11. Details were provided of an additional search carried out by the Sheriff Clerk that had uncovered 3 letters dating from 2003 which related to Mr Milne. These letters also concerned a request from Mr Milne for paperwork relating to court proceedings in which he was involved. In one of the letters from the Sheriff Clerk to the Scottish Criminal Cases Review Commission, dated 17 September 2003, it was stated that no documentation existed because 10 years had elapsed since the proceedings had taken place. It was conceded by the Scottish Court Service that these documents should have been provided to Mr Milne in response to his request under FOISA.

The Commissioner's Analysis and Findings

12. To date, Mr Milne has made a number of applications to me for a decision. In each of the cases, Mr Milne has generally formulated his request in the following way:

“I require all information that relates to me, Edward Milne, and which includes minutes of meetings, internal memos, correspondence and e-mails.”
13. It is my view that this constitutes a request for all of the information that is held by the authority which is about Mr Milne. In other words, it is a request for personal information which should be dealt with under the terms of the DPA. Indeed, the long title of the DPA states that it is an Act to make provision for “the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information.”
14. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject.



15. The term “personal data” is defined in section 1(1) of the DPA as:
- “data which relate to a living individual who can be identified:
- a) from those data, or
 - b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...”
16. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In this decision, the Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual’s involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person’s privacy whether in his or her personal or family life, business or professional capacity.
17. In my view, Mr Milne’s request for all of the information held that related to him and his subsequent clarification concerning legal proceedings in which he was involved constituted a request for personal information. The Scottish Executive’s Legal and Parliamentary Services department was correct to suggest that information requested in these terms would normally be exempt from release by virtue of section 38(1)(a) of FOISA. This is because Mr Milne’s request constituted a request for personal data of which he was the data subject.
18. However, the Scottish Court Service decided not to treat Mr Milne’s request as a subject access request and instead responded in terms of FOISA. It referred to section 37 of FOISA, stating that court records such as summary complaints and minutes of proceedings are absolutely exempt from release. Under section 37(1)(a) of FOISA, information is exempt if it is held by a Scottish public authority solely because it is contained in a document that has been:
- lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings.



19. If the Scottish Court Service had indeed held such information it would have been exempt under the section 37 exemption. However, as the Scottish Executive's Legal and Parliamentary Services department pointed out, such an exemption cannot apply where the information is not held by an authority. Instead, all that was required was a notice issued under section 17 of FOISA, which stated that the information was not held.
20. The Scottish Court Service's letter of 27 June 2005 constituted such a notice. It also stated that a search of the relevant court record depository had confirmed that the information was not held. The Scottish Court Service assured me that the information was destroyed in line with the current schedule on destruction of court records under the provisions of the Disposal of Court Records (Scotland) Regulations 1990. Under that legislation records that relate to summary complaints are held by a court for a period of 10 years prior to destruction.
21. The Scottish Court Service also provided a copy of its Circular 02/2004 which details the procedures set out by the Keeper of the Records for the preservation and destruction of court records in line with the Disposal of Court Records (Scotland) Regulations 1990. On the basis of the evidence presented to me, I am satisfied that the information sought by Mr Milne had been destroyed prior to him making his request, in accordance with the above procedures.
22. However, in its response to Mr Milne, the Scottish Court Service failed to provide him with details of its procedure for dealing with complaints about the way it handled requests for information. It also failed to inform Mr Milne about his right of application to the Scottish Court Service for a review of its decision and of his right to apply to me for a decision should Mr Milne be dissatisfied with the outcome of the review (or where no review has been carried out within the statutory timescale). The requirement to provide an applicant with these particulars is set out in section 19 of FOISA.
23. The Scottish Court Service has an internal system for processing applications for the review of decisions under FOISA and it acknowledged that on this occasion the correct form of response was not used. Accordingly, Mr Milne was not informed of his right to such a review or of his subsequent right of appeal to me.
24. The Scottish Court Service also failed to respond to Mr Milne's request for a review within 20 working days as specified under section 21(1) of FOISA. In its response to the investigating officer's inquiry into the matter, the Scottish Court Service stated the Sheriff Clerk's Office at Forfar could find no evidence of Mr Milne's fax having been received. It stated that, had the fax been received, it would have been forwarded for processing in accordance with the internal review procedures at the Scottish Court Service.



25. Forfar Sheriff Court also provided the investigating officer with details of its procedure for the handling of documentation received by fax. The fax machine is located in the general administration office and is periodically checked throughout the day by administration staff. Any items received are passed to the appropriate officer for attention.
26. Requests for information are handled by the Sheriff Clerk personally and such documentation would be passed to him personally for attention. This was the first occasion an occurrence of non receipt of faxed correspondence had occurred before or since 1 July 2005. The Sheriff Clerk has assured me that had any such item been received it would immediately have been passed to the Freedom of Information Officer at the Scottish Court Service headquarters in accordance with its procedures.
27. I am satisfied that the Scottish Court Service has acknowledged that problems existed with its procedures and that steps have been taken to improve the way that information requests are dealt with and to ensure that the relevant timescales within FOISA are complied with. I am also satisfied with the procedures that are in place at Forfar Sheriff Court for the processing of requests that are received by fax.

Decision

I find that the Scottish Court Service complied with section 1(1) of FOISA by issuing a notice under section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA), informing Mr Milne that the information he had requested was not held.

However, I find that the Scottish Court Service failed to provide Mr Milne with information about his right to a review and his right to appeal to me as required by section 19 of FOISA.

I also find that the Scottish Court Service failed to respond to Mr Milne's request for a review within the 20 working day timescale set out in section 21 of FOISA. However, I am satisfied that steps have been taken by the Scottish Court Service to improve procedures and I require no further action in respect of this Decision Notice.

Kevin Dunion
Scottish Information Commissioner
20 December 2005