

Decision Notice

Decision 145/2014 Mr Niall MacKinnon and Social Care and Social Work Improvement Scotland

Complaint and inspection report

Reference No: 201400786

Decision Date: 2 July 2014



Scottish Information
Commissioner

Summary

On 6 November 2014, Mr MacKinnon asked Social Care and Social Work Improvement Scotland (SCSWIS) for information relating to a specific complaint and inspection report. In response, SCSWIS told Mr MacKinnon it did not hold some of the information he had asked for. SCSWIS also withheld other information because it considered disclosure would be substantially prejudicial to an investigation. The Commissioner accepted these arguments from SCSWIS.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 35(1)(g) and (2)(a), (b), (c) and (d) (Law enforcement)

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

Background

1. On 6 November 2013, Mr MacKinnon wrote to SCSWIS and, in relation to a Care Commission (SCSWIS's predecessor) inspection carried out in 2006, requested information which included the following:
 - a) A copy of the related complaint;
 - b) A copy of the comments from the Care Commission Officer on the first draft inspection report.
2. SCSWIS responded on 6 December 2013. SCSWIS informed Mr MacKinnon that it was withholding the copy of the complaint (request a)) under section 35(1)(g) of FOISA, on the basis that it considered disclosure likely to prejudice substantially the exercise of its investigatory functions. In relation to request b), SCSWIS informed Mr MacKinnon that it did not hold information.
3. On 4 February 2014, Mr MacKinnon wrote to SCSWIS requesting a review of its decision. He disagreed with SCSWIS's conclusions in respect of both requests.
4. SCSWIS notified Mr MacKinnon of the outcome of its review on 5 March 2014. It upheld the original response and also applied the exemption in section 38(1)(b) of FOISA (Personal information) to request a).
5. On 1 April 2014, Mr MacKinnon wrote to the Commissioner, stating that he was dissatisfied with the outcome of SCSWIS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr MacKinnon made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 14 April 2014, SCSWIS was notified in writing that an application had been received from Mr MacKinnon and was asked to provide the Commissioner with the information withheld from him. SCSWIS provided the information and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted SCSWIS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SCSWIS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. SCSWIS responded with submissions in support of its reliance on section 35(1)(g) of FOISA (for request a)), and also as to the searches carried out in relation to request b).

Commissioner's analysis and findings

10. 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 MacKinnon and SCSWIS. She is satisfied that no matter of relevance has been overlooked.
11. The Commissioner will first of all consider whether SCSWIS was correct to give Mr MacKinnon notice that it did not hold information falling within the scope of request b). She will then consider the application of exemptions to the information held relating to part a) of the request.

Information held by SCSWIS

12. Under section 1(1) of FOISA, a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority *should* hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
14. Mr MacKinnon believes that SCSWIS must hold information falling within the scope of request b). He has explained that the information concerns a joint report involving both HMIE (now Education Scotland) and SCSWIS, so SCSWIS should hold a copy.
15. Mr MacKinnon also noted that the information requested from SCSWIS (in request b)) was held by Education Scotland, and so SCSWIS could obtain it from them. The Commissioner must point out, however, that FOISA does not require a Scottish public authority to create information or obtain information that it does not already hold.
16. In its submissions to the Commissioner, SCSWIS explained the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of request b). It described the paper and electronic filing systems it had searched, confirming that it held no information falling within the scope of this request.

17. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that SCSWIS interpreted Mr MacKinnon's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held and which fell within the scope of the request. Given the explanations provided, she is satisfied that SCSWIS does not hold the information requested by Mr MacKinnon. As indicated above, it was not obliged to obtain it from elsewhere.
18. The Commissioner is therefore satisfied that SCSWIS was correct to give Mr MacKinnon notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of request b).

Section 35(1)(g) – Law enforcement

19. SCSWIS submitted that the information it held falling within the scope of request a) was exempt from disclosure in terms of section 35(1)(g) of FOISA, read in conjunction with section 35(2) as outlined below.
20. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. SCSWIS argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of its functions for four of the purposes specified in section 35(2), that is to ascertain:
 - whether a person has failed to comply with the law (section 35(2)(a));
 - whether a person is responsible for conduct which is improper (section 35(2)(b));
 - whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 35(2)(c));
 - a person's fitness or competence in relation to –
 - (i) the management of bodies corporate; or
 - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on (section 35(2)(d)).
21. SCSWIS is a Scottish public authority for the purposes of FOISA.
22. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of "substantial prejudice", but the Commissioner's view is that the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
23. The Commissioner must therefore consider three separate matters to determine whether this exemption applies:
 - does SCSWIS have a function in relation to one or more of the purposes mentioned in section 35(2)?
 - if it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, SCSWIS's ability to exercise one or more of these function(s)?

- if such prejudice would, or would be likely to, occur, whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

The functions of SCSWIS

24. SCSWIS submitted that its powers and functions are derived from the Public Services Reform (Scotland) Act 2010 (the PSR)¹. In particular, SCSWIS directed the Commissioner to sections 53, 58 and 79 of the PSR. These sections cover complaints to and inspections by SCSWIS. This would include investigation of the complaint to which request a) relates.
25. Having considered the functions of the SCSWIS under the PSR, the Commissioner is satisfied that the information under consideration here relates to the performance of these functions. She also accepts that the functions exercised in relation to the complaint in question could be said to fall within the scope of paragraphs (a), (b), (c) and (d)(ii) of section 35(2) of FOISA.

Would substantial prejudice occur, or be likely to occur?

26. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of SCSWIS's functions for the purposes listed in section 35(2)(a), (b), (c) or (d)(ii).
27. SCSWIS submitted that individuals would be likely to be dissuaded from co-operating with SCSWIS investigations in future, if they thought their evidence (which was considered to be provided in confidence) would find its way into the public domain through disclosure under FOISA. It further submitted that disclosure would cause significant distress for families complaining about care services, which in turn would lead to wider public concern at that lack of confidentiality for those confiding in SCSWIS.
28. The result of this, the SCSWIS submitted, would be a loss of trust, to the extent that it was left unaware of serious care concerns requiring regulatory action. This would endanger the care of all those relying on regulated care services.
29. The Commissioner is satisfied, in the circumstances, that disclosure of the information requested in this case would make it much less likely that potential complainers would be willing to provide information about care concerns, to the substantial prejudice of SCSWIS's ability to protect the welfare of those receiving care services.
30. Having considered all the relevant submissions and the information withheld in this case, the Commissioner is satisfied that disclosure of the requested information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by SCSWIS of its functions for the purposes listed in section 35(2)(a), (b), (c) and (d)(ii) of FOISA, and so SCSWIS was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.

The public interest test

31. As noted above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, although the Commissioner has accepted that the information is exempt from disclosure under section 35(1)(g) of FOISA, she must still order the information to be disclosed unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.

¹ <http://www.legislation.gov.uk/asp/2010/8>

32. SCSWIS acknowledged a public interest in disclosing information where withholding it might cover up serious wrongdoing or incompetence, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. It also accepted a public interest in its actions being scrutinised. SCSWIS made it clear that it did not consider any of these considerations to apply here.
33. SCSWIS further submitted that it was in the public interest that its reputation as a trusted confidant be maintained and that its function as an effective regulator was not undermined, as explained above.
34. Mr MacKinnon provided the Commissioner with a background to the complaint and related inspections and complaints to other agencies. He submitted that the inspection and complaints processes of a number of agencies were not functioning effectively, with what he considered to be a mismatch of evidence and inspection reporting. On the other hand, he accepted the SCSWIS findings and report (on the complaint which was the subject of request a)) as fair.
35. Whilst noting that Mr MacKinnon has a personal and professional interest in the information requested, the arguments were more of a personal nature. She further notes that Mr MacKinnon has previously been provided with a complaint resolution letter which was issued to him in response to the complaint. Taking this into account, any personal interest in the withheld information appears to have been met.
36. The Commissioner believes there to be a strong public interest in maintaining the exemption in section 35(1)(g) in this case, in order to maintain the effectiveness of SCSWIS's investigative processes. In the circumstances, she considers there would need to be a compelling public interest in disclosure to outweigh that in maintaining the exemption. SCSWIS plays a very important role, investigating concerns about the treatment of the some of the most vulnerable people in society.
37. Taking account of all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. Consequently, she finds that SCSWIS was entitled to withhold the information under section 35(1)(g) of FOISA. As such, she is not required to, and will not go on to, consider whether the exemption in section 38(1)(b) also applies.

Decision

The Commissioner finds that Social Care and Social Work Improvement Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr MacKinnon.

Appeal

Should either Mr MacKinnon or Social Care and Social Work Improvement Scotland 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.

Margaret Keyse
Head of Enforcement
2 July 2014

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.

...

- (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.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

35 Law enforcement

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

...

- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

...

(2) The purposes are-

- (a) to ascertain whether a person has failed to comply with the law;
- (b) to ascertain whether a person is responsible for conduct which is improper;
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- (d) to ascertain a person's fitness or competence in relation to-
 - (i) the management of bodies corporate; or
 - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;

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