

Decision Notice 045/2021

Court documents

Applicant: The Applicant

Public authority: Scottish Courts and Tribunals Service

Case Ref: 202001442



Scottish Information
Commissioner

Summary

The Applicant asked the SCTS for copies of court documents held in relation to a specified criminal case. The SCTS told the Applicant that the information was exempt from disclosure. Following an investigation, the Commissioner agreed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(d) (Effect of exemptions); 37(1)(a) (Court records, etc.)

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 28 October 2020, the Applicant made a request for information to the Scottish Courts and Tribunals Service (the SCTS). He asked for a record of the hearing of a specified criminal case which had taken place in 2014.
2. The SCTS responded on 11 November 2020. It advised the Applicant that the information was exempt from disclosure under section 37 (Court records, etc.) and section 38(1)(b) (Personal information) of FOISA.
3. On the same day, following receipt of the response, the Applicant wrote to the SCTS requesting a review of its decision. He did not agree either of the exemptions should apply.
4. The SCTS notified the Applicant of the outcome of its review on 3 December 2020. The SCTS upheld its reliance on section 37 of FOISA. It clarified that it was not applying the exemption in section 38(1)(b) of FOISA at this stage, but that that exemption would only take effect upon the expiry of the exemption in section 37(1) (i.e. after 15 years).
5. Later, on the same day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the SCTS withholding the information because the case would have been held in an open court with members of the public and journalists present. He strongly felt that the information should be disclosed in the public interest.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 16 December 2020, the SCTS was notified in writing that the Applicant had made a valid application. The case was then 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 SCTS was invited to comment on this application.
9. Both the SCTS and the Applicant provided comments to the Commissioner in support of their positions.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the SCTS. He is satisfied that no matter of relevance has been overlooked.

Section 37: Court records

11. Under section 37 of FOISA, information is exempt from disclosure if it is contained in a document:
 - lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter (section 37(1)(a)(i)) or
 - served on, or by, a Scottish public authority for the purposes of such proceedings (section 37(1)(a)(ii)); or
 - created by a court or member of its administrative staff for the purposes of, or in the course of, such proceedings (section 37(1)(a)(iii)) andprovided the authority holds the information solely because it is contained in such a document.
12. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA. This means that the Commissioner is not required to (and, indeed, cannot) go on to consider whether the public interest in disclosing the information is outweighed by that in maintaining the exemption. So, provided the information falls into one of the categories listed in section 37, it will be exempt from disclosure.
13. The Commissioner is satisfied that the information held by the SCTS falls into one or more of the categories of documents in section 37(1)(a) and that the SCTS holds it solely because it is contained in such a document.
14. As the SCTS submitted, the exemption in section 37(1)(a) applies for 15 years. (The hearing took place in 2014.)
15. The Commissioner is therefore satisfied that the information is exempt from disclosure under section 37 of FOISA.

Section 38(1)(b): Personal information

16. The Applicant did not agree that the information was exempt from disclosure under section 38(1)(b) of FOISA. However, as the SCTS clarified to the Applicant in its review response, it was not applying the exemption in section 38(1)(b) to his request, given the exemption in section 37(1)(a) of FOISA.
17. As the Commissioner has concluded that the information is exempt from disclosure under section 37(1)(a) (and since the SCTS has not applied the exemption in section 38(1)(b)), he has not gone on to make any formal findings in relation to the exemption in section 38(1)(b) of FOISA.
18. However, in correspondence with the Commissioner, the Applicant specifically questioned the applicability of section 38(1)(b). In the circumstances, the Commissioner confirms that, if the exemption had been applied by the SCTS, he would have been bound to find that the information (personal data relating to criminal offences) was also exempt from disclosure under section 38(1)(b) of FOISA for the reasons set out in the SCTS's review response.

Decision

The Commissioner finds that the Scottish Courts and Tribunals Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the SCTS 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

29 March 2021

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.

...

- (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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (d) section 37

...

37 Court records, etc.

- (1) Information is exempt information if it is contained in-

- (a) a document-
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or

...

and a Scottish public authority holds the information solely because it is contained in such a document.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info