

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2014

Public Authority: House of Commons
Address: London
SW1A 0AA

Decision (including any steps ordered)

1. The complainant requested a copy of the 24th edition of Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament. The public authority refused to comply with the request on the basis of the exemptions at sections 21(1) and 43(2) FOIA.
2. The Commissioner's decision is that the public authority is entitled to withhold the book on the basis of section 21(1) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 28 September 2013, the complainant wrote to the public authority and requested information in the following terms:
'.....I am asking for a copy of the 24th edition (released 2011) of Erskine May Parliamentary Practice.'
5. He added; *'You may tell me that Erskine May is available through the House of Commons' publication scheme. However, you may be surprised to discover (as I was) that in fact only the 23rd edition is available as such.....Therefore, as the 24th edition of Erskine May Parliamentary Practice is not accessible to me through your publication scheme, and it is information you hold, sections 1 and 21 of the Freedom of Information Act 2000 require you to provide it to me. I would prefer an electronic copy if this possible, but am happy to receive a printed one if you can explain why this is not practicable...'*

6. The public authority responded on 30 September 2013. It confirmed that it held copies of *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Erskine May Parliamentary Practice). However, it claimed that the book was exempt from disclosure on the basis of the exemptions at sections 21(1) and (2)(a) FOIA.
7. The complainant requested an internal review on 30 September 2013.
8. Following an internal review the public authority wrote to the complainant on 25 October 2013. It explained that it held purchased copies of the 24th edition of Erskine May Parliamentary Practice and upheld the original decision to withhold it on the basis of the section 21 exemption. It also considered that the book was exempt on the basis of the exemption at section 43(2) FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 28 October 2013 to complain about the way his request for information had been handled. He challenged the application of exemptions on a number of grounds which are addressed further below.
10. The scope of the investigation therefore was to consider whether the public authority is entitled to withhold the 24th edition of Erskine May Parliamentary Practice on the basis of the exemptions at sections 21(1) and 43(2).

Reasons for decision

Section 21(1)

11. Section 21 states:

'(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1) –

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise

than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Complainant's arguments

12. The complainant's arguments in support of his view that the 24th edition of Erskine May Parliamentary Practice is not exempt from disclosure on the basis of section 21(1) are summarised below. The arguments which the Commissioner considers relevant to the application of section 43(2) have not been included.
13. The 24th edition book is not included in the public authority's publication scheme. Only the 23rd edition of the book is mentioned in the publication scheme. In fact Erskine May Parliamentary Practice is listed as an alternative publication in the scheme. It cannot therefore be reasonably accessible within the meaning in section 21.
14. It would cost an estimated £300 to purchase the book. Whereas the only fee that the public authority could charge under the FOIA would be for reproduction charges and staff time. This would not exceed £25 (calculated at a cost of 5p per sheet for 500 pages). Comparing the costs of obtaining the book outside the FOIA and under the FOIA demonstrates that it is not reasonably accessible within the meaning in section 21.
15. Relying on a copy of the book owned by the library – likely to be an academic reference library to which a special entrance clearance would be required – restricts its use and is therefore not reasonably accessible. Theoretically, he could take a photocopy of the book, but this could breach copyright restrictions and most libraries do not allow extensive photocopying of their stock. It is therefore not reasonably accessible within the meaning in section 21.

Public authority's arguments

16. The public authority's arguments in support of its position are summarised below.

17. At the time of the request the publication scheme referred to the 23rd edition of the book even though a 24th edition had published. However, it has now been updated to reflect the basic premise in the publication scheme which is that, *Erskine May Parliamentary Practice is an alternative publication available through sources other than the House of Commons.*¹ Nevertheless, information is either exempt or not. Its inclusion in a publication scheme can indicate that it is publicly available, but it will not determine whether exemptions otherwise apply. It has always been clear that the book has never been made available through the publication scheme. It is referred to in the publication scheme to assist members of the public by explaining that there are alternative sources of information about how the House of Commons works.
18. Erskine May is produced by the May Memorial Fund, a charitable trust, which is a completely separate entity from the public authority and is not a public authority under the FOIA. It is published by Butterworths Law under the terms of a commercial publishing contract with the trust. While the public authority holds copies, it does so purely because it has purchased them from booksellers in order to be used by staff.
19. The book is available by loan arrangement from a public library albeit with restrictions on its use. It is nonetheless available as defined by section 21 FOIA.

Commissioner's position

20. The Commissioner agrees with the public authority that it is Erskine May Parliamentary Practice publications that are exempt from disclosure regardless of the edition.
21. In any event, the fact that the book is not included in the public authority's publication scheme is not relevant to the application of section 21(1) in the circumstances of this case. Section 21(3) would only become relevant if the public authority considered that the book was reasonably accessible simply because it holds it, and is prepared to disclose it but the public authority has not included the book in its publication scheme. In other words, it would be relevant so as to disapply s21(1) only if a public authority is willing to provide information on request but does not include that information in its publication scheme.

¹ House of Commons publication scheme:
<http://www.parliament.uk/documents/foi/20130102%20Publication%20scheme%20V.2.pdf>

22. In this case, the public authority is not willing to disclose its copy of the book. In fact, in addition to section 21, the authority considers that the book is exempt from disclosure on the basis of section 43(2) (prejudice to commercial interests). The public authority considers that the book is reasonably accessible to the applicant because it is available on the open market at a commercial price. In the particular circumstances of this case – in particular, taking into account the publication in question – the Commissioner considers this to be sufficient for section 21(2)(a) to be satisfied. The Commissioner does not consider that the intention behind section 21 was to place a requirement on public authorities to copy and disclose copies of all published books they hold, particularly those which are available from other sources, whether published by the authority or not regardless of commercial considerations (albeit other exemptions could be applied).
23. To the extent that the book is available in libraries, the Commissioner considers that it is reasonably accessible to the applicant regardless of possible restrictions (including copyright) on its use and that such availability would not result in the complainant owning a copy. In the Commissioner's view, information disclosed under FOIA could still be subject to copyright restrictions in relation to its use. This could either be a public authority's or a third party's copyright. In any event, the question, in the Commissioner's view, is whether the book is available in a location (including a library) that is reasonably accessible to the applicant. The Commissioner has found no reason to believe that is not the case. This is sufficient for section 21(1) to be satisfied.
24. In view of the above, the Commissioner finds that the public authority is entitled to withhold its copy of the 24th edition of Erskine May Parliamentary Practice on the basis of the exemption at sections 21(1) FOIA.
25. Having found that section 21(1) was correctly engaged, the Commissioner did not need to consider the alternative exemption at section 43(2).

Right of appeal

26. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF