

Decision Notice

Decision 080/2015: Mr Stewart Mackenzie and the Scottish Public Services Ombudsman

Correspondence regarding a complaint

Reference No: 201500348

Decision Date: 17 June 2015



Scottish Information
Commissioner

Summary

On 10 December 2014, Mr Mackenzie asked the Scottish Public Services Ombudsman (the SPSO) for correspondence sent to and received by the SPSO during its investigation of a complaint.

The SPSO withheld the information under section 26(a) of FOISA, on the basis that its disclosure was prohibited by other legislation. The SPSO also notified Mr Mackenzie that much of the information he requested contained his own personal data and, while this was exempt from disclosure under section 38(1)(a) of FOISA, he could obtain it by requesting it under the terms of the Data Protection Act 1998 (the DPA).

Following a review, Mr Mackenzie remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the SPSO was entitled to withhold the requested information under section 26(a) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure)

Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19 (Confidentiality of information)

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 10 December 2014, Mr Mackenzie made a request for information to the SPSO. He asked for:
 - (i) Copies of all correspondence and emails that have occurred and have been exchanged between the SPSO and Perth and Kinross Council, regarding a specific complaint Mr Mackenzie had made to the SPSO.
 - (ii) Copies of all correspondence and emails that have occurred and have been exchanged between the SPSO and a named Independent Reviewer for the SPSO, regarding a specific complaint Mr Mackenzie had made to the SPSO.
2. The SPSO responded on 13 January 2015. In its response, the SPSO notified Mr Mackenzie that under section 19 of the SPSO Act, information it obtained with respect to a complaint could only be disclosed in certain circumstances. Releasing the information under FOISA was not one of those circumstances. The information was therefore exempt from disclosure under section 26(a) of FOISA, which exempts information if its disclosure is prohibited by or under another enactment.

3. The SPSO also told Mr Mackenzie that much of the information he had requested contained his own personal data, and while this was exempt from disclosure under section 38(1)(a) of FOISA, it could be disclosed to him under the terms of the DPA.
4. On 5 February 2015, Mr Mackenzie wrote to the SPSO requesting a review of its decision. Mr Mackenzie argued that he did not want to obtain information under the DPA. He wanted his request to be handled under FOISA, and he wanted to be sent all documentation allowable under FOISA.
5. The SPSO notified Mr Mackenzie of the outcome of its review on 16 February 2015. In its review outcome, the SPSO reiterated that Mr Mackenzie could obtain much of the information he requested under the DPA, and it upheld its previous reliance on section 26(a) of FOISA to withhold the requested information.
6. On 19 February 2015, Mr Mackenzie wrote to the Commissioner. Mr Mackenzie applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Mackenzie stated he was dissatisfied with the outcome of the SPSO's review because, regardless of any entitlement under the DPA, he considered that he was entitled to receive some information under FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Mackenzie made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 2 March 2015, the SPSO was notified in writing that Mr Mackenzie had made a valid application. The SPSO was asked to send the Commissioner the information withheld from him. The SPSO provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPSO was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

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 Mackenzie and the SPSO. She is satisfied that no matter of relevance has been overlooked.
11. In its submissions, the SPSO stated that it was relying on the exemptions contained in sections 26(a) and 38(1)(a) of FOISA to withhold information from Mr Mackenzie.

Section 26(a) - Prohibitions on disclosure

12. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure of the information is prohibited by, or under, any enactment. This is an absolute exemption, in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA. In this case, the SPSO argued that such a prohibition was created by section 19(1) of the SPSO Act (which is reproduced in Appendix 1).

13. Section 19(1) of the SPSO Act provides that information obtained by the Ombudsman, or any of the Ombudsman's advisers, in connection with any matter in respect of which a complaint or a request has been made must not be disclosed, except for a limited range of purposes specified elsewhere in section 19 (see Appendix 1 for details). These purposes do not include disclosure of information under FOISA.
14. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on the disclosure of information that engages section 26(a) of FOISA. Section 19(1) clearly states that the prohibition relates to information "obtained" by the Ombudsman or any of his advisers in connection with any matter in respect of which a complaint or a request has been made.
15. Having considered the information withheld in this case, the Commissioner is satisfied that the information under consideration was obtained by the SPSO during its investigation of a complaint and is information to which the prohibition in section 19(1) applies. The Commissioner therefore accepts that the SPSO was entitled to apply the exemption in section 26(a) of FOISA to all of the information requested by Mr Mackenzie.
16. As the Commissioner has found that the withheld information has been correctly withheld under section 26(a) of FOISA, there is no requirement for her to consider the application of section 38(1)(a) of FOISA in this case.

Decision

The Commissioner finds that the Scottish Public Services Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Mackenzie.

Appeal

Should either Mr Mackenzie or the Scottish Public Services Ombudsman 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

17 June 2015

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 -

...

- (b) section 26;

...

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

Scottish Public Services Ombudsman Act 2002

19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are-
 - (a) the purposes of-
 - (i) any consideration of the complaint or request (including any statement under section 11),
 - (ii) any investigation of the matter (including any report of such an investigation),
 - (b) the purposes of any proceedings for-
 - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
 - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
 - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
 - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of individuals (in particular or in general), the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health or safety of the particular individuals or, as the case may be, individuals in question.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must-
 - (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
 - (b) inform the person from whom the information was obtained of the disclosure.
- (4A) The duty under subsection (4)(a) to inform a person about the identity of a person to whom information has been disclosed does not apply where informing the former person is likely to constitute a threat to the health and safety of the latter person.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.

- (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to-
- (a) any document or information specified in the notice, or
 - (b) any class of document or information so specified,
- that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.
- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from -
- (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
 - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),
- is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.
- (9) In relation to such information, subsection (2)(a) has effect as if-
- (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
 - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.
- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.

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