

Decision Notice

Decision 087/2017: Mr A and the University of Strathclyde

Forensic testing of semen

Reference No: 201700654

Decision Date: 31 May 2017



Scottish Information
Commissioner

Summary

The University received a request for information about dating semen samples. The University responded that it held no information that fell within the request

The Commissioner investigated and found that the University had correctly given notice that it did not hold any information covered by the request, and had provided reasonable advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 73 (definition of "information") (Interpretation)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 22 January 2017, Mr A made a request for information to the University of Strathclyde (the University). Mr A asked for the following information under FOISA:
 - Is it possible to tell how old a semen sample is?
 - What conditions would enhance the accuracy or deteriorate the sample?
 - How accurate would these tests be?
2. The University responded on 14 February 2017 stating that it did not hold a record of the information requested. The University explained that FOISA only applies to recorded information and does not apply to someone's opinion, unless that opinion has been put on record. For this point, the University referred to the Commissioner's published guidance¹.
3. On 26 February 2017, Mr A wrote to the University requesting a review of its decision. He thought the University would have a department, whether medical or forensic, that would be able to provide the information he had requested. Should the University still be unable to provide the information he had requested, he believed it would have failed in its duty under section 15 of FOISA by failing to advise and assist him where the information could be found. Mr A informed the University that he was currently a prisoner and therefore did not have access to any information on the internet.
4. The University notified Mr A of the outcome of its review on 24 March 2017. The University stated that it had consulted its Department of Pure and Applied Chemistry, where a course in

¹ <http://www.itspublicknowledge.info/YourRights/WhatCanIAskFor.aspx>

Forensic Science is taught, and confirmed that it did not hold any information covered by Mr A's request.

5. On 3 April 2017, Mr A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr A was dissatisfied with the outcome of the University's review because he believed the University must have staff – such as those who give evidence at trial – who could have answered his request and provided information that a layperson could understand.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr A made 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.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The University 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

8. In coming to a decision on this matter, the Commissioner considered all relevant submissions, or parts of submissions, made to her by both Mr A and the University. She is satisfied that no matter of relevance has been overlooked.
9. Section 1(1) of FOISA creates a general entitlement to be given information held by a Scottish public authority, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1. Section 8 of FOISA sets out the requirements that a request for information must meet if it is to be dealt with under section 1(1) of FOISA. In terms of identifying what the applicant seeks, all that is necessary in terms of section 8(1)(c) of FOISA is that the request "describes the information requested". In this context, information is defined in section 73 of FOISA as "information recorded in any form".
10. Mr A framed his request as a series of questions, which could be seen as seeking an opinion rather than recorded information. However, it is clear that Mr A intended to make an information request: his request refers to FOISA and seeks information under this legislation. Whilst making reference to FOISA does not, in itself, guarantee that a question will be a valid request in terms of section 1 of FOISA, it does indicate a requester's intent to obtain recorded information from a Scottish public authority through the statutory regime.

Section 17(1) - Notice that information is not held

11. The University submitted that it held no recorded information that fell within the terms of Mr A's request, and that it had complied with its obligation to advise and assist Mr A.
12. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.

13. The University gave Mr A notice that it did not hold the information he requested. The question for the Commissioner is whether the University complied with FOISA in responding in this way to Mr A's request, or whether the University held any recorded information that fell within his request.
14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
15. The University was asked to explain how it had satisfied itself that it held no information falling within Mr A's request. The University explained that it had discussed the request with experts in its Department of Pure and Applied Chemistry (this department offers courses in Forensic Science and Forensic and Analytical Chemistry and was identified by the University as the area most likely to hold any relevant information). Staff there had confirmed there was no recorded information held by the University that would provide a direct response to Mr A's questions. The University explained that no searches of emails/servers were felt necessary as the request was for information that the relevant staff immediately knew was not recorded by the University.
16. When undertaking the University's review of its response to Mr A's request, the Department of Pure and Applied Chemistry identified some slides, used as a teaching resource, which referred to the analysis of semen. The University explained that the slides are accompanied by relevant teaching and additional study in this complex area; without the complementary explanations and context delivered and discussed in lectures and tutorials, the information on the slides could easily be open to misinterpretation. However, the University qualified this by stating that, fundamentally, the slides did not provide answers to the questions which Mr A had asked. The University supplied a copy of the slides to the Commissioner for the purposes of her investigation.
17. Also at review, the University explained that a number of articles in scientific articles are referenced for those studying this topic within the University. To assist Mr A, the University provided the citation of one such article. However, these articles are not held by the University, but instead are accessed by University staff or students under licence agreement with the respective publisher. The University therefore did not hold the information in these articles.
18. Having considered the submissions received from the University, the Commissioner accepts on the balance of probabilities that the University does not hold recorded information that answers the three questions in Mr A's information request. The Commissioner accepts that the University has taken adequate and proportionate steps to establish if it holds any recorded information that falls within the scope of Mr A's request.
19. In reaching this conclusion, the Commissioner has taken into account that the academic slides identified by the University at review, and supplied to the Commissioner, do not fall within Mr A's request. As described, these are teaching slides about semen analysis, but the information recorded there does not answer Mr A's questions. The University was therefore correct to assess whether the information fell within Mr A's request, and also to conclude that it did not.
20. Similarly, the University consulted the academic staff most knowledgeable on the subject (a specific identifiable research topic). These individuals were likely to be aware of any relevant

recorded information, and also to understand what information would answer Mr A's request. Such staff would be best placed to assess the information held by the University. This reduced the likelihood of relevant information being overlooked.

21. Finally, the Commissioner acknowledges the University's comment that the information requested by Mr A relates to a complex topic where no simple, definitive answers yet exist. The Commissioner accepts that the subjective nature of the conclusions on these matters may be a relevant factor in deciding whether recorded information is held. The Commissioner accepts the University does not hold any information which would provide the definitive answers Mr A appears to be seeking.

Advice and assistance

22. Section 15(1) of FOISA provides that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. In the case of *Glasgow City Council v The Scottish Information Commissioner* [2009] CSIH 73², the Court stated [at paragraph 45]:

"If there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15. That is reflected in the Code of Practice issued by Scottish Ministers under section 60 of the Act"

23. At review, Mr A expressed dissatisfaction that he had not been assisted by the University: he believed he should have been directed to where he could find the information he required, if the University did not hold it. In his application to the Commissioner, Mr A stated his belief that the University must have staff, such as those who give evidence at trial, who could answer his request and provide information that a layperson could understand.
24. The University was asked what it had done to comply with section 15 of FOISA. The University explained that it felt Mr A was requesting an opinion, which may not be held in a recorded format, and had tried to explain to Mr A that a person cannot obtain an opinion (which has not been recorded) under FOISA, in case this was his intention. From the information the University had available, it felt that this was the most appropriate course of action, rather than to refuse the request as invalid.
25. The University considered that its responses to Mr A were written in easy-to-understand terms. The University commented that those expert in the area did not agree with Mr A that the questions he has asked were simple: instead, they believed that this is a complex scientific area which requires expert analysis and is subjective. Whilst the University fully acknowledged its obligations to advise and assist under section 15 of FOISA, it did not believe that this extended to academic staff having to provide expert comment, analysis and explanations in relation to scientific matters. The University added that forensic experts may well be called to testify to juries and explain complex topics to juries; however, this was not relevant to its obligations under FOISA in this situation. In addition, the University said it had assisted Mr A by supplying a reference to an academic paper which is referenced when teaching this subject.
26. In the circumstances of this case, the Commissioner does not find any failure on the part of the University, in relation to the advice and assistance that was provided to Mr A.

² <http://www.scotcourts.gov.uk/search-judgments/judgment?id=cc8f86a6-8980-69d2-b500-ff0000d74aa7>

27. Firstly, the University advised Mr A that FOISA only related to requests for recorded information. The University was correct to do so. The duty under section 1(1) of FOISA to disclose information extends only to recorded information. It does not place an obligation on a public authority to answer questions generally or to create information that is not held in recorded form at the time of the request (section 1(4) of FOISA).
28. FOISA does not require a Scottish public authority to create information in response to an information request; however, the Commissioner does not accept that all opinions and views automatically fall outside the scope of an information request under FOISA. The issue is whether the relevant opinions and views have been recorded. If so, the information is held. If not, the information is not held for the purposes of FOISA.
29. Mr A has expressed dissatisfaction that the University has not provided him with information in a way that a layperson could understand. This is going beyond what FOISA requires from Scottish public authorities: there is no absolute obligation to explain the information an authority holds, unless that explanation is recorded information falling within the terms of the request.
30. The Commissioner does not accept that the complexity of information is a relevant factor to consider in determining whether information falls within the scope of a request. The University's response to Mr A implied that it would not provide him with information which only specialists could understand. When responding to an information request, the focus should be on establishing what recorded information is held (irrespective of its specialist content or complexity). The perceived ability of the applicant to understand the information is not a relevant factor. However, in this case, the Commissioner accepts that the University does not hold any recorded information captured by the terms of Mr A's request.
31. The Commissioner is satisfied that the University explained to Mr A why it did not hold information which would provide a simple, factual response to his questions.
32. On balance, the Commissioner accepts that the University has complied with its duty to provide reasonable advice and assistance under section 15(1) of FOISA.

Decision

The Commissioner finds that the University of Strathclyde complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr A.

Appeal

Should either Mr A or the University 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
Acting Scottish Information Commissioner
31 May 2017

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.

...

- (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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

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.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info