

2 April 2009

Mr Arthur McFarlane

Email [request-8794-c37xxxxx@xxxxxxxxxxxxxxxxxxx](mailto:request-8794-c37xxxxx@xxxxxxxxxxxxxxxxxxx)

Dear Mr McFarlane,

### **Your request for information**

I refer to your email of 4 March 2009, which has been considered in line with the Freedom of Information (Scotland) Act 2002 (FOISA).

### **Request for copies of comeback/challenge complaints submitted to SPSO**

We have given very careful consideration to whether it is appropriate for SPSO to release these documents. These documents are:

- Letters submitted to SPSO by individual members of the public (or their representatives)
- Expressions of disagreement by individual members of the public (or their representatives) with the decision reached on their complaint about an authority in SPSO's jurisdiction

Given that these documents typically include the complainant's name and address, we have considered this request on the assumption that this information would be redacted (in line with section 38(1)(b) of FOISA).

In considering whether it would be appropriate to release redacted versions of the requested correspondence, we have taken account of the following:

- FOISA
- Data Protection Act 1998 (DPA)
- Scottish Public Services Ombudsman Act 2002 (SPSOA), section 19
- Scottish Information Commissioner's Decision reference 080/2008, Mr Frank French and SPSO (SIC Decision)

The most relevant of these is the SIC Decision. Although this decision was taken in the context of SPSO *service complaint letters*, we consider there to be sufficient similarities to justify applying the same principles to *challenge/comeback complaint letters*. The main similarities are:

- Letters submitted to SPSO by members of the public (or their representatives)
- Letters containing expressions of personal views
- Letters often containing accounts of personal or sensitive experiences
- An expectation of confidentiality and/or no expectation that their correspondence would be put in the public domain

With this in mind, we do not feel it would be appropriate to release redacted versions of the requested correspondence.

To explain this, I would like to refer you to the SIC decision, paragraph 30. Having examined a sample of SPSO *service complaint letters*, the Commissioner states that "*It is clear that all of the letters from individuals to the SPSO are comprised of the personal views of that individual, and many of the complaints contain biographical information relating to the complainant or other third parties. On many occasions, this*

*includes detailed information about a person's medical condition. The Commissioner is satisfied that the content of all of the letters written to the SPSO by individuals constitute personal data, in that the information is comprised of data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the data controller, i.e. the SPSO. In some cases (e.g. where there is a reference to medical information), the personal data is sensitive personal data as defined by section 2 of FOISA."*

In paragraph 33 of his decision he further confirms, "*In summary, the Commissioner is satisfied that all of the letters to the SPSO from individual complainants constitute personal data in their entirety.*"

In paragraph 49 of the SIC Decision, he goes on to conclude that "*the personal data is exempt in terms of section 38(1)(b) of FOISA*".

Given the terminology used and the conclusions reached by the Commissioner in this case, we feel it would be inappropriate to release redacted versions of the challenge/comeback complaint letters, as they would be exempt from FOISA in terms of section 38(1)(b) for the same reasons.

If you disagree with our decision to apply the same principles to this request, you may request a review (see below for details).

### **Request for copies of comeback/challenge response letters produced by SPSO**

These documents are:

- Written by SPSO, to individual members of the public (or their representatives)
- Responses to expressions of disagreement from individual members of the public (or their representatives) with the decision reached on their complaint about an authority in SPSO's jurisdiction.

Given that these documents typically include the complainant's name and address, we have considered this request on the assumption that this information would be redacted (in line with section 38(1)(b) of FOISA).

In considering whether it would be appropriate to release redacted versions of the requested correspondence, we have taken account of the following:

- FOISA
- Data Protection Act 1998 (DPA)
- Scottish Public Services Ombudsman Act 2002 (SPSOA), section 19
- Scottish Information Commissioner's Decision reference 080/2008, Mr Frank French and SPSO (SIC Decision)

We have taken particular account of the SIC decision. Although this decision was taken in the context of SPSO *service complaint response letters*, we consider there to be sufficient similarities to justify applying the same principles to *challenge/comeback response letters*. The main similarities are:

- Letters written by SPSO to individual complainants
- Letters often including expressions of the complainants' personal views (either in quotation or paraphrased form)
- Letters containing information that could otherwise identify the complainant
- Letters containing information identifying the authority complained about or about the nature or subject of the initial complaint

- Letters identifying the member of staff who has considered the challenge to the decision (Complaints Investigator, Manager, Deputy Ombudsman, Director or Ombudsman)

In order to consider this request thoroughly, it is important to address each of the above.

The fact that the letters have been produced by SPSO, rather than by members of the public, means that it would not be appropriate to automatically withhold them in their entirety. We appreciate there is a general interest in how we deal with expressions of dissatisfaction about our decisions. We therefore feel it is generally appropriate to release them, but we must consider whether they should be released in their entirety or in a further redacted form. I have already explained that names and addresses of complainants must be redacted in line with section 38(1)(b) of FOISA.

The SIC Decision indicates that expressions of the personal views of individual complainants, biographical information relating to complainants or third parties and any information about a person's medical history are classed as 'personal data'. Based on the SIC Decision, we therefore consider this information to be exempt from FOISA under section 38(1)(b) and that it should be redacted from any correspondence before it is released.

Letters falling within the scope of the request, by their nature, often refer back to the original complaint on which the decision being challenged was reached. The letters therefore often, if not always, contain references to the authority or subject of the original complaint, or to information that the complainant has provided in the course of our consideration or investigation of the complaint. Paragraph 77 of the SIC Decision states,

*"The Commissioner accepts that, under section 19 of the SPSO Act, the SPSO has no power to disclose information which was originally obtained by it in respect of a complaint or a request made to it under section 2 of the SPSO Act. As is to be expected, in many cases the service complaints made to the SPSO (which the Commissioner has found, except in a very limited number of cases, to be exempt from disclosure under section 38(1)(b) in any event) repeat information which was provided to the SPSO in the initial complaint. Similarly, it is common for the response to the service complaint to contain information which was provided to the SPSO in the initial complaint. In both of these cases, the Commissioner is satisfied that disclosure of the information is prohibited by section 19(1) and is, accordingly, exempt from disclosure under section 26(a) of FOISA."*

Although this decision was clearly reached in the context of *service complaints* and their corresponding responses, we believe that *challenge/comeback response letters* often contain the same kind of information and that this would similarly be exempt under section 26(a) of FOISA. We therefore conclude that any references of this nature should be redacted from any documents that are released.

Finally, we have considered whether it would be appropriate to identify the member of staff involved in considering the challenge to the decision. Once again we have taken the SIC Decision into account on this point, and determined that while it is reasonable to identify members of senior management, for example, a Deputy Ombudsman, Director, or the Ombudsman herself, it is not appropriate to identify members of staff such as Complaints Investigators, support/admin staff or Investigation Team Managers. The reason for this can be explained by paragraphs 47 and 48 of the SIC Decision, which state,

*“47. [...] it will normally be the case that the higher the position and the greater the authority of an individual, the greater is the argument for openness, transparency and accountability and the more likely it is that disclosure of their names, etc. would be fair. In this case, the correspondence makes reference to more junior SPSO staff (such as investigative officers and personal assistants), senior SPSO staff (such as the Service Quality Manager) and officeholders including the Ombudsman herself and the (then) Deputy Ombudsmen.*

*48. The Commissioner has concluded that it would be unfair to disclose the names of junior members of SPSO staff (such as investigative officers, personal assistants or complaints managers), as they would have no expectation that they would be identified in relation to the type of correspondence in question. However, the Commissioner does not consider that it would be unfair to disclose the names of senior SPSO staff or officeholders in the SPSO.[...]*”

With this in mind we believe information relating to the identities of complaints investigators, support/admin staff and investigation team managers to constitute personal data which is exempt under section 38(1)(b) of FOISA and must therefore be redacted from any documents that are released. We believe this is supported by paragraph 49 of the SIC Decision.

With all of the above in mind we have decided that it may be appropriate for SPSO to release copies of challenge/comeback response letters, subject to the redaction of the aforementioned information. Given the extent to which the correspondence would need to be redacted, we have considered the time and resources that would be required to prepare the documents for publication.

According to Annex 3 of 'The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002' (from here on referred to as the Section 60 Code), a public authority is entitled to charge a fee for processing certain requests made under FOISA. In very broad terms (precise details can be found in the Section 60 Code itself), these requests are those which are projected to involve processing costs of between £100 and £600. The Section 60 Code states that requests incurring costs of less than £100 should be processed free of charge, those over £600 do not have to be processed, and that those in between can incur a charge which represents 10% of the difference between £100 and the projected cost of complying with the request.

In calculating the projected costs of processing your request, we considered the following actions:

- time taken to locate and print/copy the relevant documents
- time taken to redact the documents in line with sections 38(1)(b) and 26(a) of FOISA
- A cost of 5p per printed page for paper, printing and scanning costs

Although our preference is to publish the redacted documents in electronic form, it is still necessary to print the documents in order to redact them, therefore the printing and scanning costs have been taken into account. To try to redact the documents electronically without printing would, in our view, take longer and therefore incur additional costs.

Given the sensitive nature of some of the information that needs to be redacted, we feel it is imperative that this is done by a member of staff with experience in performing this task, and as such we feel we are entitled to calculate projected costs using a rate of £15 per hour.

You have requested response letters for challenges/comebacks that were received between April 2007 and the end of October 2007. Having checked our database we can see that 128 cases are within the scope of your request. Based on a sample of challenge response documents, we have projected the costs of complying with your request as follows:

- Cost of time to locate, print and redact the relevant documents – approx £256.00
- Cost for paper, printing and scanning – average 2 pages per letter x 128 cases, approx £13.00

The total projected cost would therefore be approximately £269.00 and in accordance with the Section 60 Code, we would like to ask you to make a contribution of £16.90 towards the cost of processing your request.

If you agree to this please submit a cheque payable to 'Scottish Public Services Ombudsman' within 3 months of receiving this letter. Since this figure has been calculated based on the 'projected costs' of complying with your request, please be aware of the following:

- If the actual costs turn out to be lower than projected, you WILL be refunded accordingly
- If the actual costs turn out to be higher, we WILL NOT ask you to make a further contribution

To eliminate any unnecessary use of resources or costs we have decided that, if the information is to be released, we will make it available on the SPSO website, rather than supplying paper copies directly to you. The first reason for this is that it makes the information available to other members of the public who may be interested in it. The second reason for this is that since you submitted your request electronically, we feel it is reasonable to assume you will be able to access the information online. If this assumption is incorrect and you are unable to access the information from our website, please do let us know and we will provide the information either in printed form, or by sending you the information by email in PDF format – whichever would be most convenient for you.

If you decide you would prefer not to pay this contributory fee, we would ask that you instead consider narrowing the scope of your request. The scope of your current request extends to 128 cases spanning 7 months. We would, for example, be happy to provide 3 months worth of information at no cost, as we estimate that the resources involved would fall under the £100 limit as stated in the Section 60 code of practice.

Your request will be fully processed, subject to the specified redactions, upon clearance of your payment or receipt of notification that you would prefer to narrow the scope of your request.

If you would not like to narrow the scope of your request, but are still unwilling to pay the contributory fee, you may request a review of this decision (see below for details).

## **YOUR RIGHT TO REQUEST A REVIEW**

You have a right under section 20(1) of FOISA to request a review of any part of this decision. If you wish to exercise this right, you must write to the SPSO to request a

review within forty working days of receipt of this decision. In your request for a review you must specify your name and address for correspondence. You must also identify the decision that you wish reviewed which could be any or all of the following:

- Decision to withhold challenge complaint letters in their entirety
- Decision to redact challenge decision letters in terms of section 38(1)(b) of FOISA (personal data)
- Decision to redact challenge decision letters in terms of section 26(a) of FOISA (with reference to section 19 of SPSOA - information obtained by the Ombudsman for the purpose of considering or investigating a complaint)
- Decision to charge a contributory fee for complying with your request

Should you wish to request a review, please address your request to:

David Robb  
Director of Policy and Development  
Scottish Public Services Ombudsman  
4 Melville Street  
Edinburgh  
EH3 7NS  
Email: xxx@xxxx.xxx.uk

## **YOUR RIGHT OF APPEAL**

If you are dissatisfied with the outcome of any review carried out by the SPSO, you have a right under FOISA to appeal to the Scottish Information Commissioner. If you wish to do so, you must appeal to the Commissioner within six months following the date of receipt of the review notice. The Commissioner's contact details are as follows:

The Scottish Information Commissioner  
Kinburn Castle  
Doubledykes Road  
St Andrews  
KY16 9DS  
Email: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)  
Tel: 01334 464610

Yours sincerely,

Louise Rae

Information Analyst

References:

SIC Decision - <http://www.itspublicknowledge.info/UploadedFiles/Decision080-2008.pdf>

SPSOA - [http://www.opsi.gov.uk/legislation/scotland/acts2002/asp\\_20020011\\_en\\_1](http://www.opsi.gov.uk/legislation/scotland/acts2002/asp_20020011_en_1)

Section 60 Code - <http://www.scotland.gov.uk/Publications/2004/09/19894/42618>