

23 September 2014

David Stewart MSP
Convenor
Public Petitions Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Mr Stewart,

I would like to make the following submission in respect of Petition PE01512.

I share Mr Chisholm's frustration and empathise with his experience. I also find myself in near full agreement with the Scottish Information Commissioner (SIC).

My concern is that no enforcement action has ever been taken under Section 65 of FOISA and that as things stand it's inconceivable this will change. I urge this Committee to consider the reasons for that and draw your attention to a recently concluded independent investigation commissioned by a local authority (which examined their handling of my freedom of information requests).

I had submitted six freedom of information requests to that local authority during 2013. This resulted in the Scottish Information Commissioner issuing four formal decisions in my favour (as a result of three technical investigations & one substantive investigation into three of my requests).

The key information I'd requested on 26 February 2013 was only provided on 24 December 2013 (once the SIC's substantive investigation was under way).

The 98 records provided on 24 December 2013 evidenced the local authority's statutory obligations - to properly appoint (after consultation with the Sheriff Principal) a panel of Curators ad litem and Reporting Officers (for a maximum term of 3 years) for cases of adoption or where applications for parental rights in favour of a local authority are being sought – had been fulfilled up to February 2011 and again from September 2013, but that there were no records to show those statutory obligations had been fulfilled during the intervening period.

During the ten months in which the authority senior legal officers steadfastly maintained an absurd position - that it did not have any records to demonstrate compliance - it was impossible to tell who the panel members were or when any individual panel member's term was due to end. Once the 98 records were provided however, the glaring gap in the evidence the authority needed to demonstrate having fulfilled its statutory obligations – by properly appointing panel members in accordance with the Act - was immediately and starkly obvious.

In a letter dated 20 February 2014, the Council Chief Executive invited me to meet her and the Head of Corporate Governance. She acknowledged the Council's responses to my requests for information could have been handled better and offered the Council's apology.

At the meeting on 8 April 2014, I presented the Council Chief Executive with correspondence and records which made a sufficiently compelling case - of Council Officers' inescapable awareness of apparent non-compliance with statutory obligations (for which they were also responsible) and of them having misled me whilst failing to provide records (which they could hardly be unaware of) I'd requested under FOISA - that the Chief Executive undertook to commission an independent investigation into the matters arising from my freedom of information requests.

I did not request that meeting nor did I suggest that she commission an independent investigation. The CEO apparently concluded only an investigation could be defended.

Previously however, I had offered up the same information and arguments to the Scottish Information Commissioner's investigating officer and suggested to him that the case be considered under Section 65 of FOISA.

The SIC investigating officer left me with a clear impression that pursuing a case under Section 65 of FOISA was virtually impossible, had never been done, and would require me to have already provided him with firm supporting evidence of 'criminal intent to withhold' on the part of one or more individuals.

I wonder if that approach is realistic or if it unintentionally places an impossible burden of proof on the person with no power (beyond FOISA itself) to investigate, and turns the SIC investigating officer into the ultimate arbiter when that ought to be the role of the courts. It seems to altogether negate both the investigative and questioning powers the police have and the assessment role of the prosecutor. Can what's happened in this case help shed light on why no enforcement action has ever been taken under Section 65 of FOISA?

I imagine the Committee may be as perplexed as I am to discover a member of the public requesting information under FOISA can end up with the relevant authority initiating and retaining complete control of an investigation into its own highly questionable affairs after the official regulator has declined to investigate the authority based on the same evidence.

Yours sincerely

Roy Mackay

References:

Local authority freedom of information cases referred to:
5352, 5483, 5807, 5883, 5892, 6105

Scottish Information Commissioner decisions referred to:
125/2013, 255/2013, 058/2014, 068/2014

Legislation referred to (panel members):
Curators ad Litem and Reporting Officers (Panels)(Scotland) Regulations 2001