

18 December 2014

Kevin Stewart MSP  
Convener of the Local Government and Regeneration Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

Dear Convener,

**Petition 1538**

Thank you for the Committee's letter of 9 December 2014 asking us to comment on the petition.

The petition asks the Committee to ask the Scottish Government to alter our legislation to include new requirements about the sharing of documents. I have attached a note to this letter which includes detailed information about the current position.

When the current legislation, the Scottish Public Services Ombudsman Act 2002, was introduced in the first session of the Scottish Parliament, the policy memorandum to the Bill noted that the guarantee of confidentiality helps to ensure that any authority or person from whom the Ombudsman seeks evidence will give it fully and freely, in the knowledge that it will be only be used for the Ombudsman's investigation. Attention was also drawn to the fact that information is already available, or subject to restrictions on disclosure, through other legislation and it would not be appropriate for a complaint to the Ombudsman to be used to circumvent another statutory provision.

Having considered all relevant matters, Parliament decided that the legislation struck an appropriate balance between the need to ensure fairness in decision-making and to protect potentially very sensitive information. It may also be helpful to note that, in the event that the Parliament decided to change the protections and safeguards in the legislation, there would be practical, resource implications for our office.

Yours sincerely

Jim Martin  
Ombudsman

## **Annex A Note on information sharing and the Scottish Public Services Ombudsman**

### **Our ability to access information.**

We have very broad legislative powers to require the production of information and that information is subject to very broad legislative protection.

We have the same powers of the Court of Session to request evidence under section 13 of the Scottish Public Services Ombudsman Act 2002 ("the 2002 Act"). However, it is worth noting that documents that could be withheld from a court because of official secrecy, or that the UK or Scottish Government could withhold from the courts because of a legal privilege they may have, *do not* apply to SPSO. This means, in some cases, that we can access information that would not be available to a court. Comments to us are protected by absolute privilege by the 2002 Act, which means they are not subject to the laws of defamation.

### **Requirements on us to share information**

There are legal requirements in place which mean that we must share information for comment prior to making a decision in a particular case and that a decision must include all the information we have relied upon. These requirements are not legislative, but established by common law rules of natural justice.

We also are subject to the Data Protection and Freedom of Information regimes. The natural justice requirements directly impact on the investigation so I will deal with those first.

#### *Natural Justice*

As an organisation subject to judicial review and the supervision of the courts, we need to comply with common law rules of natural justice. This requires us to ensure that parties have the chance to comment on material evidence before we make a final decision. We also need to ensure that our decision includes the evidence used and explains how that evidence has been used – so the evidence we use will be in our decisions and available for comment.

Our lawyers have assessed our general approach to the release of information and they have agreed that we are acting in a way compatible with the rules of natural justice.

Given the extent of the information we can access, section 19 of our legislation limits what we release. We need to be able to demonstrate *any information* we release for comment during an investigation – which are the points the petitioners are making are necessary *for the purposes of that investigation*. This means we cannot simply release information because we hold it. Equally, we do have to release information if we intend to use it.

When deciding what to release for comment prior to making a decision, we take into account:

- whether this evidence is already known and commented upon previously;
- whether the evidence is new and will be important for the decision;
- when we release information, we focus the attention of parties on any new and critical information by being very clear what we are asking them to comment on. This also ensures we are acting within the powers that we have; and
- the new information goes beyond documents we get from the organisation and complainant and may include information we may have about legislation, policy etc that appear not to have been considered.

**Under section 19 of our legislation we can, and at times do, release information that would not have been available to the individual under the Data Protection Act 1998 (DPA) or the Freedom of Information (Scotland) Act 2002 (FOISA).**

We have a power to release information for the purposes of an investigation, which means we could release information that we are using in reaching a decision, but which the individual who made the complaint would not otherwise be able to access. For example:

- Access to social work records after a person has died is very limited – we have taken a complaint from a nephew who wanted to complain about a discharge of his Aunt who had died. The Council could not release social work records to him. We accessed those records and he was given the opportunity to comment on those parts which were included in the decision.
- An advocate complained on behalf of a women with learning difficulties who had died in hospital. There was no family to consent to the release of clinical records. We accepted and investigated this complaint.
- At times, we will include some sections of legal advice obtained by organisations which they have been happy to provide us with in response to a complaint.

**Some categories of information we hold that would not necessarily be releasable under DPA or FOISA, subject to the application of legal tests in those Acts.**

- Information relating to someone who has died – in some cases relatives can access this, but that is not always the case (such a disclosure would not be made under FOI or DPA).
- Confidential information about legal advice that qualifies for legal professional privilege obtained from an organisation.
- Information provided in confidence where disclosure would be an actionable breach of confidence (information protected by the Scots common law of confidence)
- Information that would not normally be released by the Scottish or UK governments even to a court
- Information provided in confidence to a Prison Disciplinary Committee
- Information (including health or social services information) where disclosure could result in harm or other detriment
- Information relating to third parties available on file this may be:
  - Information about people who have raised neighbour concerns in a complaint relating to anti-social behaviour
  - Information about the contact between a planning authority and a company/person in a complaint about enforcement, sometimes this relates to very sensitive financial data.

As we have said above, if we consider it is necessary to release such information to comply with the rules of natural justice, we can do so. However a blanket obligation to share all of this would mean someone would be able to access information they would not be entitled to under DPA or FOISA (and that might be specifically protected under the DPA) and which they do not need to see, given that we are not using it to make a decision on the complaint

It could be argued that the 2002 Act could be changed to limit what information we could access, so that we would only access information that should be accessible to the

complainant. However, that would not improve the quality of our investigations and would limit the complaints we could look at. It would arguably shift the balance of our investigations in favour of the organisations.

### **Our obligations under the Data Protection legislation.**

An individual can make a subject access request to us under the DPA. In these circumstances, our practice is to release what we can to complainants about their complaint unless there are valid reasons not to. This may include information not released as part of the investigation but which contains personal data. However, it is worth noting that, if that is the case, none of this additional information will have been relied upon in the decision. On this point, it may also be worth noting that the court process would not accept documents in their process which do not relate to the arguments being made.

It should be noted that the DPA contains a specific exemption at section 31 (Regulatory Activity) which provides that personal data being processed by the Scottish Public Services Ombudsman for the purpose of discharging the functions conferred upon the Ombudsman by the 2002 Act are exempt from the 'subject information provisions' in the DPA (which include the right to request personal data under the DPA), to the extent that the application of those provisions would be likely to prejudice the proper discharge of the Ombudsman's functions. Corresponding provisions in relation to the Parliamentary Commissioner for Administration, the Commission for Local Administration in England, the Health Service Commissioner for England, the Public Services Ombudsman for Wales, the Assembly Ombudsman for Northern Ireland and the Northern Ireland Complaints Commissioner are also included in the exemption for Regulatory Activity in section 31 of the DPA.

It is important that a right to access information is separate from the information we are relying on and using in the investigation. This means we can correctly manage the information we hold. There will be some circumstances where we have released information in a decision letter or report which we could not release in relation to a subject access request. That information may be part of a larger bundle of information and we need to be sure we do not release anything additional in error.