



Scottish Information
Commissioner
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Decision Notice 027/2025

Email relating to a complaint

Applicant: The Applicant
Authority: Midlothian Council
Case Ref: 202400663

Summary

The Applicant asked the Authority for a copy of a specific email. The Authority provided some information but refused to provide a copy of the document, as well as claiming that the Applicant had made a repeated request. The Commissioner investigated and found that the Applicant had not made a repeated request and that the Authority was not entitled to withhold the information requested. The Authority provided the Applicant with the information following the submission of their application.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 14(2) (Vexatious or repeated requests); 16(1) and (6) (Refusal of request); 19 (Content of certain notices); 21 (Review by Scottish public authority); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 12 December 2023, the Applicant made a request for information to the Authority. He asked for a copy of a particular email from a named member of staff.
2. The Authority responded on 12 December 2023. It refused to provide the information on the basis that the Scottish Information Commissioner had ruled that there was no entitlement under Freedom of Information (FOI) to an actual document but rather to the information in that document (which, it advised, had already been provided).

3. On 12 December 2023 the Applicant asked the Authority for assistance identifying the ruling of the Commissioner it had referred to in its response to him, asking for a link to the relevant part of the Commissioner's website or for a copy of the ruling.
4. On 13 December 2023 the Authority provided the Applicant with a copy of the [Commissioner's Guidance "Does FOI give a right to information or to copies of documents?"](#)¹
5. On 14 December 2023, the Applicant wrote to the Authority requesting a review of its response. The Applicant stated that he was dissatisfied with the response because, on viewing the "ruling", it seemed clear to him that the Authority's refusal to provide the requested information was likely to be in breach of FOISA. He clarified that his request was for a copy of the email as previously stated, and that he wished a copy of all of the information in that email (and in any related emails, notes or other correspondence). He stated that his request was made in terms of paragraphs 16 and 17 of the "ruling", and that he would draw the Authority's attention to paragraphs 24 and 25, as well as paragraphs 19, 20, 21 and 22. He requested the information, in the form of the actual email, which seemed to him the most appropriate form.
6. The Authority notified the Applicant of the outcome of its review on 15 January 2024. It noted that the effects of paragraphs 16 and 17 were that a reference to a document should be treated as a properly made FOISA request, which in the Authority's view it had done, albeit that the request was subsequently refused as a repeated request. It upheld its position that there was no requirement to provide a copy of the email as all of the relevant information had been relayed to him.
7. On 10 May 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not consider his request was a repeated request and he did not agree that he was not entitled a copy of the email he had requested

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 3 June 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant.
10. On 13 June 2024, the Authority changed its position and provided the Applicant with a copy of the email he had requested.
11. The Applicant confirmed to the Commissioner that he wished to continue with his application.
12. The Authority provided the Commissioner with the information that had been withheld from the Applicant and the case was allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the reasons for refusing to provide the Applicant with a copy of the document he had requested and its reasons for informing the Applicant that his request was repeated.

¹ [RighttoInformationorCopies \(1\).pdf](#)

14. The Applicant was also given the opportunity to provide his comments to the Commissioner which he did. He indicated that, having been provided with the document he requested by the Authority, he considered the information within the email was significantly different to the information that he was previously given.

Commissioner's analysis and findings

15. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling of the request

Failure to comply with section 19 of FOISA

16. The Applicant had been engaged in the Authority's complaints procedure and as such had been in correspondence with the Chief Executive's office. As part of this ongoing conversation, the Applicant asked for a copy of the email in question on 7 December 2023. This was refused by the Authority on 12 December 2023, with the Applicant being referred to the Scottish Public Services Ombudsman if he remained dissatisfied with the Authority's handling of his complaint.
17. The Authority stated that all correspondence with the Applicant in relation to this matter up until 12 December 2023 had been in terms of its Complaints Procedure and not on the basis of FOI.
18. The Applicant was unhappy with the response he received from the Authority and, on 12 December 2023, asked for his request for a copy of this particular email to be treated as an FOI request.
19. The Authority's response (of 12 December 2023) to the Applicant's FOI request (of 12 December 2023) refused to disclose the email, on the basis that it was not required to provide the Applicant with an actual document, but rather just the information in that document, and referred to a ruling by the Scottish Information Commissioner to this effect. This communication did not contain details of the Applicant's right to:
 - (i) ask for a review or
 - (ii) appeal to the Scottish Information Commissioneras is required by section 19 (Content of certain notices) of FOISA.
20. The Authority confirmed that it had not advised the Applicant of his right to request a review as part of the response. It explained that the staff member who provided the response was new to the organisation at the time.
21. It is a matter of fact that in responding to the Applicant's information request of 12 December 2023, the Authority did not inform him of his right to request a review or to appeal to the Commissioner.
22. As a consequence, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA as the refusal notice issued by it, in accordance with section 16(1), did not comply with section 16(6) as it did not contain the rights required by section 19 of FOISA.

Failure to comply with section 21

23. The Commissioner also notes that the response to the Applicant's requirement for review erroneously included his right to submit a requirement for review, but did not include his right to appeal to the Court of Session (in accordance with section 56(1) of FOISA).
24. The Commissioner therefore finds that the Authority failed to comply with Part 1 of FOISA as its review outcome did not include the particulars about the right of appeal conferred by section 56 of FOISA, and so did not comply with section 21(10) of FOISA.

Business as usual vs FOI

25. In its submissions, the Authority explained that this matter (leading up to the submission of the FOI request) evolved from its complaint process by way of a "business as usual" response to a Freedom of Information issue, without a clear break to distinguish the procedures.
26. The Authority confirmed that the complaint process closed on 28 November 2023 and that the response on 4 December 2023 could have been dealt with as an FOI request, but that it was clear that it was instead dealt with under "business as usual".
27. The Commissioner has fully considered the Authority's submissions surrounding the circumstances of the correspondence with the Applicant which led to the submission of his information request.
28. It is a matter of fact that in his email of 7 December 2023, the Applicant asked the Authority for recorded information (which by default is a request for information under FOISA), and that the Authority did not provide everything the Applicant had requested. Even although it considered it had provided all of the relevant information from the email concerned, it was reasonably foreseeable that the Applicant might be dissatisfied that he had not received the complete email he had requested.
29. In those circumstances, the Authority should have provided details to the Applicant of his right to request a review and to make an appeal to the Commissioner. It is important that all staff within an organisation are able to recognise a request under FOISA and take the appropriate action.

Documents or Information?

30. Under section 1(1) of FOISA, a person who requests information from a Scottish public authority which holds it is entitled to be given the information by the authority. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is the information held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable in this case.
31. The definition of "information" in FOISA is wide. It means information recorded in any form.
32. Courts both north and south of the border have concluded that FOI provides a right to receive information, rather than a right to receive copies of documents. However, the Court of Appeal commented that there would be cases where it is necessary in practice to disclose the record (document) itself in order to communicate all of the information contained within it.
33. The Authority's position in its review outcome was that it had provided the Applicant with all the relevant information from the email he had requested, in its response to him of 4

December 2023. It therefore did not consider there was any requirement in terms of the [Scottish Information Commissioner's guidance](#)² to provide him with a copy of the email.

34. In its submission to the Commissioner, the Authority contended that had the information from the email been contained within the response of 12 December 2023, it would have been entitled in terms of case precedent not to release the e-mail. It accepted however that the [Section 60 Code of Practice](#)³ recommends that documents be released and that there was no necessity in this case not to do so. Accordingly, it confirmed that it subsequently provided the email in question to the Applicant in full, with no information withheld, on 13 June 2024.
35. The Applicant, in his request for review, stressed that he wished all of the information in the email he had requested (and in any related emails, notes or other correspondence). He asked again for the actual email, which seemed to him the most appropriate form.
36. The Applicant commented to the Commissioner that he was concerned the Authority was using this reason to deny valid requests for information. He considered the information provided to him on 4 December 2023 was significantly different to the content of the email.
37. The Commissioner has considered the comments made by both the Applicant and the Authority. He notes that there is nothing to stop public authorities from providing copies of documents in response to a request. In many cases, it will be much easier for a public authority to provide a copy of a document rather than to try to describe the information, copy the information into another document, or transfer it into another format.
38. The Commissioner's guidance states that where a public authority chooses not to provide copies of original documentation, it must ensure that any information which falls within the scope of the request, and which is contained in the document, is disclosed completely and accurately.
39. In the circumstances of this case, the Commissioner can see no justification for refusing to provide the email the Applicant asked for at the time of his request, and would agree with the Applicant that the limited information the Authority provided to him did not accurately reflect the content of the email he asked for.
40. The Commissioner therefore finds that by failing to provide the Applicant with all of the information it held falling within the scope of his request (or issuing him with an appropriate refusal notice under section 16 of FOISA), the Authority failed to comply with section 1(1) of FOISA in responding to the Applicant's request.
41. As it has already provided the email to the Applicant, no further action is required.

Section 14(2) – Repeated request

42. Section 14(2) of FOISA provides that, where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.
43. For section 14(2) to apply, therefore, the following needs to be considered:

² <https://www.foi.scot/sites/default/files/2022-03/RighttoInformationorCopies%20%281%29.pdf>

³ [Code of Practice under section 60 of FOISA](#)

- (i) Whether the Applicant's previous request was identical or substantially similar to the request under consideration here;
 - (ii) Whether the Authority complied with the previous request; and, if so
 - (iii) Whether there was a reasonable period of time between the making of the original request and the making of the subsequent request.
44. In its review outcome, the Authority referred to its response to the Applicant of 4 December 2023 as being a response to his FOI request, and further commented that the Applicant had asked for the email concerned on 7, 11 and 12 December 2023. Its view was that the same information was contained in the email as in its response and so it was satisfied that this was a repeated request.
45. The Applicant considered the Authority's position that his request of 12 December 2023 was a repeated request was incorrect. He explained that he had been in correspondence with the Chief Executive regarding ongoing concerns he had, and that he had asked two questions to clarify a response he had received, but that those questions were not made as FOI requests but as part of an ongoing query about Authority procedures.
46. The Commissioner has considered the submissions made by both the Authority and the Applicant as well as the circumstances of the Applicant's communication with the Authority leading up to his request of 12 December 2023.
47. In the Commissioner's view, the Authority cannot have things both ways. It failed to recognise that the Applicant had made a request for recorded information that it held (on 7 December 2023), before he specifically asked for his request to be looked at as an FOI request (on 12 December 2023). It cannot then determine that when he asked for the same information earlier, in the Authority's view as part of the Complaints process, this request (of 7 December 2023) could now be considered in terms of FOISA and therefore lead to his request of 12 December 2023 being deemed to be a repeated request.
48. The Authority and Applicant have agreed that the request of 12 December 2023 was the first to be recognised as an FOI request under FOISA; it cannot, therefore, be a repeated request.
49. As such, the Commissioner finds that the Authority was not entitled to rely on section 14(2) of FOISA in relation to the Applicant's request.
50. As the Authority has already provided the Applicant with the information he was seeking, no further action is required.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Specifically, it failed to;

- provide the Applicant with all of the information falling within the scope of his request (or to rely on an exemption(s) in FOISA for refusing to disclose this to him) (section 1(1))

- inform the Applicant of his right to request a review and appeal to the Commissioner in its response (section 19), and
- to inform the Applicant of his right of appeal to the Court of Session in response to his requirement for review (section 21(10)).

The Commissioner also finds that the Authority was not entitled to apply section 14(2) of FOISA to the Applicant's request of 12 December 2023.

Given that the Authority has already provided the Applicant with the information he requested, the Commissioner does not require the Authority to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

5 February 2025