

# Decision Notice 001/2021

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## **Allegations of bullying or inappropriate behaviour**

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**Applicant: The Applicant**

**Public authority: St Mary's Kenmure**

**Case Ref: 20200786**



Scottish Information  
Commissioner

## Summary

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St Mary's Kenmure was asked about action taken following allegations of bullying or inappropriate behaviour from members of staff in April 2020.

St Mary's Kenmure stated it did not hold the information requested.

The Commissioner investigated and found that St Mary's Kenmure had partially complied with FOISA in responding to the request. While he was satisfied, by the end of the investigation, that St Mary's Kenmure did not hold any relevant information, he found that it had failed to carry out adequate searches prior to responding to the request and requirement for review, and that the review outcome had failed to meet certain notice requirements of FOISA.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 19 (Content of certain notices); 21(4), (5) and (10) (Review by Scottish public authority)

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.

## Background

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1. On 11 May 2020, the Applicant made a request for information to St Mary's Kenmure. The information requested was:  
*All information on action taken following allegations of bullying or inappropriate behaviour from members of staff in April 2020. This should include details of the consequential changes to management personnel, though I am content that you inform me of the post involved, and not necessarily the person's name.*
2. St Mary's Kenmure responded on 2 June 2020 stating it was not aware of any such allegations from staff members in April 2020 and, had there been, disclosure of such information was not in the public interest. Given the size of the organisation, St Mary's Kenmure stated it would be unable to disclose any posts, under any circumstances, as this would identify the employees involved.
3. On 9 June 2020, the Applicant again wrote to St Mary's Kenmure, requesting a review of its decision to withhold the information requested. He submitted that St Mary's Kenmure did hold the information, as he had been told by the Care Inspectorate on 30 April 2020 that it was *aware of the proposed management change at this care service and we are in regular contact with them*. He also believed St Mary's Kenmure's response was incompetent under FOISA in that it had failed to explain why it was withholding the information by not citing any exemptions or how it had applied the public interest test.
4. St Mary's Kenmure notified the Applicant of the outcome of its review on 10 July 2020, upholding its original decision to refuse the request. It informed the Applicant:

*As stipulated in section 17 of the FOI Act, your request cannot be fulfilled on the grounds set out in section 38. As previously acknowledged, you have already sourced this information elsewhere. For information, this was released by the Scottish Government and not the Care Inspectorate.*

5. On 21 July 2020, 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 St Mary's Kenmure's review because:
  - it failed to confirm if a review had been carried out, rather it merely stated the request had been refused and made "meaningless" mention of section 38.
  - it suggested the Applicant had "already sourced this information elsewhere". Acknowledging that the Scottish Government had provided him with a response on the same issue, the Applicant could not be sure if it comprised all the information he had requested from St Mary's Kenmure and, further, this did not absolve St Mary's Kenmure from its responsibilities under FOISA.
  - it failed to provide the information requested.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
7. On 10 August 2020, St Mary's Kenmure was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. St Mary's Kenmure was invited to comment on this application and to answer specific questions. These focused on the searches carried out by St Mary's Kenmure to identify whether it held any information falling within the scope of the request. St Mary's Kenmure was also asked to comment on its handling of the review outcome.

## **Commissioner's analysis and findings**

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9. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and St Mary's Kenmure. He is satisfied that no matter of relevance has been overlooked.

### **Does St Mary's Kenmure hold the information?**

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
13. In his application to the Commissioner, the Applicant explained that he had been contacted by persons concerned about what had taken place around April 2020 at St Mary's Kenmure, Scotland's biggest secure unit for young people. He stated it was alleged that bullying of staff had taken place and that, as a result, leading personnel had either been suspended or removed from their post. He considered he would have a better chance of establishing the facts by making an information request under FOISA.
14. In its submissions to the Commissioner, St Mary's Kenmure stated it wished to rely on section 17(1) of FOISA, as it held no allegations of bullying or inappropriate behaviour for April 2020 and, as a result, it held no information on consequential changes to management personnel.
15. St Mary's Kenmure submitted that the information disclosed by the Scottish Government (referred to by the Applicant) on 12 June 2020, and published on the Scottish Government's website<sup>1</sup> on 24 June 2020, included information on the processes put in place, due to the absence of the then Senior Management Team, to satisfy both management and legislative requirements. These, it explained, were reported to and agreed by the Scottish Government, the Care Inspectorate and the Chief Social Work Officer. St Mary's Kenmure stated that these were not consequential changes to management personnel in respect of allegations, but due to senior management absences.
16. St Mary's Kenmure initially submitted that, as there were no allegations of bullying or inappropriate behaviour in April 2020, it considered there was no requirement to carry out searches for any information held. It confirmed, at that time, that it was unable to provide any evidence of searches, given it was of the view that none were required.
17. Following notification (by the Investigating Officer) of the requirement to carry out full and thorough searches for any relevant information, St Mary's Kenmure then explained and provided supporting evidence of searches (covering the period 1 to 30 April 2020) it had undertaken during the Commissioner's investigation to establish whether it held any information falling within the scope of the request. These included:
  - searches of the Director's electronic files and incoming mail file: no information was identified therein.
  - searches of the HR Manager's email account. St Mary's Kenmure explained that the HR Manager had responsibility for staff welfare relating to employment conditions and law, and was the person staff would contact should they have an issue in the absence of their respective line manager.

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<sup>1</sup> <https://www.gov.scot/publications/foi-202000035576/>

- searches of the Administration email account. St Mary's Kenmure explained that this was a generic mailbox for internal and external correspondence, with any correspondence being redirected to the relevant individual for attention and/or action.
18. St Mary's Kenmure explained that keyword searches of these email accounts had been carried out using the search terms "bullying", "harassment", "whistleblowing", "anonymous allegations", "aggression" and "inappropriate actions", and provided screenshots of the search results in evidence of these. It confirmed that any email identified as a result of these searches had been opened and viewed, but none fell within the scope of the request.
  19. St Mary's Kenmure explained that, generally speaking, "whistleblowing" allegations would be sent to either the Administration mailbox, HR Manager, Line Manager (by email) or, if anonymous, by post. It confirmed it kept no record of incoming mail, and mail was not "opened and recorded", rather it was passed to the relevant individual. St Mary's Kenmure submitted that it intended to implement a new mail recording system as a result of this application.
  20. In conclusion, St Mary's Kenmure believed it had undertaken a comprehensive search.
  21. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, St Mary's Kenmure took adequate, proportionate steps in the circumstances to establish whether it held any recorded information that fell within the scope of the request. He has considered the reasons provided by St Mary's Kenmure to explain why the information is not held.
  22. The Commissioner is satisfied that the searches described by St Mary's Kenmure, carried out during his investigation, would have been capable of identifying any information falling within the scope of this request.
  23. As explained previously, the Commissioner can only consider what relevant information is actually held by St Mary's Kenmure (or was held, at the time it received the Applicant's request). He cannot consider what information it should hold, or what the Applicant believes it should hold.
  24. The Commissioner is therefore satisfied, on the balance of probabilities, that St Mary's Kenmure does not (and did not, on receipt of the request) hold any recorded information falling within the scope of the request. He finds that St Mary's Kenmure was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.
  25. However, in failing to carry out adequate searches for any such information prior to responding to the Applicant's request and requirement for review, the Commissioner finds that St Mary's Kenmure failed to comply with section 1(1) of FOISA. Given that St Mary's Kenmure had, by the end of the investigation, carried out adequate searches, the Commissioner does not require it to take any action in relation to this failure.

## **Handling issues**

### *Review outcome*

26. The review outcome issued by St Mary's Kenmure was somewhat confusing, in that it cited section 17(1) of FOISA alongside an exemption. The Commissioner would stress that, where an authority does not hold information, it must give notice under section 17(1). The exemptions detailed in Part 2 of FOISA (sections 25 to 41) can only be applied to information that is held, but is not being disclosed.

27. The Commissioner is further concerned to note that the review outcome issued by St Mary's Kenmure did not appear to meet the notice requirements set out in section 21(4) and (5) of FOISA. These provide that the review outcome must inform the requester what steps the public authority has taken (i.e. confirm its original decision; substitute a different decision, or reach a decision where no decision had been reached) (section 21(4)), and why it has taken these steps (section 21(5)). Nor did the review outcome contain particulars of the requester's rights of application to the Commissioner and of appeal to the Court of Session, as required by sections 19 and 21(10) of FOISA.
28. St Mary's Kenmure acknowledged its response lacked consistency, and that there were failings in not providing the required notices. It submitted that, in any future FOI requests, it would ensure it responded appropriately and in accordance with FOISA, and that additional training would be afforded to its FOI Officer.
29. The Commissioner has issued guidance on the content of notices<sup>2</sup> which sets out what information authorities must include in a review outcome.
30. St Mary's Kenmure failed to include this information in its review outcome, so the Commissioner must find that it failed to comply with sections 19 and 21(4), (5) and (10) of FOISA in these respects.
31. Given that the Applicant was able to submit a valid application to the Commissioner, the Commissioner does not require St Mary's Kenmure to take any action in response to these failures. However, he has noted the authority's handling of the review outcome, in the above respects, in his case management system.
32. The Commissioner would draw St Mary's Kenmure's attention (and that of all Scottish public authorities) to Module 5 of the Self-Assessment Toolkit "Conduct of Reviews"<sup>3</sup>. This resource provides guidance to assist authorities in carrying out an effective review of its response to a request, including good review practice and learning for future requests.

#### *Searches*

33. The Commissioner is concerned that it took a number of attempts during the investigation for St Mary's Kenmure to provide him with adequate submissions on the searches carried out, which led it conclude that it held no information falling within the scope of the request. He is further concerned that St Mary's Kenmure considered it was able to reach this conclusion without carrying out any searches, not only at the point of response to the Applicant's request and requirement for review, but also early in his investigation.
34. Section 6 of Part 2 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004<sup>4</sup> (the "Section 60 Code") provides good practice advice on searching for information, advising on factors to be considered in relation to the scope and focus of searches, and on maintaining records of searches carried out.

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<sup>2</sup> [https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content\\_of\\_notices.aspx](https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content_of_notices.aspx)

<sup>3</sup> <https://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Module5ConductOfReviews.aspx>

<sup>4</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

35. Conducting thorough and focused searches, identifying and retrieving all relevant information at an early stage, and retaining records of searches carried out, can save a lot of time and work in the longer run. An unnecessary application to the Commissioner may be avoided in this way. If there is an application, adequate records of earlier searches will provide evidence and reduce the amount of work required during the Commissioner's investigation.
36. The Commissioner would also draw St Mary's Kenmure's attention (and indeed that of all Scottish public authorities) to Module 2 of the Self-Assessment Toolkit "Searching for, Locating and Retrieving Information"<sup>5</sup>. This resource is intended to assist authorities by giving them a tool which they can use to evaluate and, where necessary, improve practice in searching for, locating, identifying and retrieving information.
37. St Mary's Kenmure took the view that it responded accordingly to the information sought in the Applicant's request. It acknowledged, however, that the initial response to the Applicant could have been handled in a better manner, and was now taking a pro-active approach in sourcing training for staff on how to better respond to any future information requests. It apologised if had not followed due process.
38. While the Commissioner welcomes the steps to be taken by St Mary's Kenmure to improve practice in handling information requests, he would ask it to reflect carefully on the points above.

## Decision

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The Commissioner finds that St Mary's Kenmure partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that St Mary's Kenmure was correct to notify the Applicant, in line with section 17(1) of FOISA, that it held no information falling within the scope of the request, and so complied with Part 1 in that respect.

However, the Commissioner also finds that St Mary's Kenmure did not carry out adequate searches to determine what recorded information it held before it responded to the Applicant's request and requirement for review and, in so doing, failed to comply with section 1(1) of FOISA.

He further finds that, by failing to meet certain notice requirements in terms of sections 19 and 21(4), (5) and (10) of FOISA, St Mary's Kenmure also failed to comply with Part 1 of FOISA.

Given that adequate searches were carried out by the end of the investigation, and the Applicant was able to submit a valid application to the Commissioner, the Commissioner does not require St Mary's Kenmure to take any action in respect of these failures, in response to the Applicant's application.

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<sup>5</sup> <https://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Module2SearchingFor,LocatingAndRetrievingInformation.aspx>

## **Appeal**

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Should either the Applicant or St Mary's Kenmure 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**  
**Head of Enforcement**

**7 January 2021**



### 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.

...

#### 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.

...

#### 19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and  
(b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

...

## **21 Review by Scottish public authority**

...

- (4) The authority may, as respects the request for information to which the requirement relates-
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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