

Decision Notice



Decision 026/2014 Mr Stewart V Mackenzie and Perth and Kinross Council

Investigations carried out by the Safer Communities Team

Reference No: 201302200

Decision Date: 13 February 2014

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
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Summary

On 31 July 2013, Mr Mackenzie asked Perth and Kinross Council (the Council) for information relating to investigations concerning anti-social behaviour. The Council informed Mr Mackenzie that it was not obliged to comply with his request as to do so would require it to create new information.

Following an investigation, the Commissioner found that the Council was not obliged to provide the information in the format requested by Mr Mackenzie. She also found that the Council had incorrectly informed Mr Mackenzie that it did not hold the requested information and had failed to provide adequate advice and assistance to him. The Commissioner did not require the Council to take any action, for reasons explained in the decision.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) General entitlement); 11(1), (2)(b) and (3) (Means of providing information); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)

Background

1. On 31 July 2013, Mr Mackenzie wrote to the Council requesting information relating to the activities of the Council's Safer Communities Team (the SCT). Although Mr Mackenzie made five separate requests for information, only the following request is the subject of this decision notice:

"What was the nature and type of each of the anti-social behaviour investigations that were carried out by the SCT between 1 July 2012 and 1 July 2013".



2. The Council responded in a letter dated 17 July 2013 (although this date was clearly a typographical error). The Council informed Mr Mackenzie that it was not possible to detail the nature and type of investigations as to do so would mean producing a list to cover every record. The Council explained that each level of investigation would differ, depending on the circumstances.
3. On 14 August 2013, Mr Mackenzie wrote to the Council requesting a review of its decision. Mr Mackenzie considered that the Council should be able to detail the nature and type of each investigation from its computer records.
4. The Council responded on 26 August 2013. The Council confirmed that the information was not recorded in the format which Mr Mackenzie had expected, and informed Mr Mackenzie that, in order to comply with his request, it would have to assess each incident and the subsequent investigation. The Council stated that this would require the creation of new information which it was not obliged to do under FOISA. The Council notified Mr Mackenzie that, in terms of section 17(1) of FOISA, it did not hold the specific information that he had requested.
5. On 15 September 2013, Mr Mackenzie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Mackenzie made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The investigating officer asked the Council to explain why it considered that new information would have to be created in order to comply with the request. The investigating officer also asked the Council if a synopsis of the types of investigations undertaken could be provided to Mr Mackenzie.
8. On 21 November 2013, the Council wrote to Mr Mackenzie again stating that it did not hold the information that he had requested. However, it disclosed to him a breakdown of the types of complaints received by the SCT during the period covered by his request.
9. During subsequent discussions with the investigating officer, Mr Mackenzie explained that he remained dissatisfied with the information that had been disclosed to him and the Council's handling of his information request.



10. The investigating officer then contacted the Council again asking it to explain the differentiation that it had made between “complaints” and “investigations”. The Council was also asked to provide a sample of the SCT’s investigation files. Additionally, the Council was asked for its view on whether it considered it ought to have provided Mr Mackenzie with advice and assistance in terms of section 15 of FOISA.
11. The Council responded on 17 January 2014. It provided an explanation of how it differentiated between “complaints” and “investigations”, supplied a sample of investigation files and provided its views on the application of section 15 of FOISA.

Commissioner’s analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Mackenzie and the Council. She is satisfied that no matter of relevance has been overlooked.

Does the Council hold the information in the format requested?

13. As noted above, Mr Mackenzie asked the Council to provide him with the nature and type of each of the investigations carried out by the SCT during a specified time period. The Council informed him that, in order to do so, it would have to create new information. In its response to his requirement for review, the Council gave notice (in terms of section 17(1) of FOISA) that it did not hold the information that he had requested.
14. In its submissions to the Commissioner, the Council stated that it had interpreted Mr Mackenzie’s request as one seeking information about the methods used by the SCT in conducting investigations.
15. The Council explained that the SCT used combinations of different techniques depending on the nature and circumstances of the complaint. For example, the SCT may simply speak to the complainant by telephone, may visit an individual or an area, may visit neighbours, may undertake sound monitoring in person or using equipment, or may involve other organisations. The Council also stated that some cases may end up in court. The Council explained that cases may simply take a few hours to investigate or could take several hundred hours extending over many months.
16. The Council provided a sample of the SCT’s case files to the investigating officer. These provided examples of the various types of investigations undertaken by the SCT and the various methods employed during its investigations.
17. The Commissioner has considered the Council’s submissions, the sample of investigation files provided by the Council and the Council’s explanation of why it considers it would be required to create new information in order to comply with Mr Mackenzie’s request.



18. In the Commissioner's view, Mr Mackenzie had asked essentially for a summary of the information held regarding each investigation undertaken by the SCT.
19. The Commissioner agrees that, in order to comply with the request, the Council would be required to undertake work in order to summarise the nature and type of each investigation. The Commissioner accepts that the Council would have to consider the contents of every investigation file and create a summary of the information contained therein in order to provide the summary information requested by Mr Mackenzie.
20. The Commissioner does not agree with the Council's position that it does not hold the information in terms of section 17(1) of FOISA. In the Commissioner's view, the information that Mr Mackenzie is seeking is available within the SCT's investigation files, but not in the format requested by Mr Mackenzie. Therefore, the Commissioner concludes that the Council was not entitled to give notice in terms of section 17(1) of FOISA that it did not hold the requested information.
21. Section 11(1) of FOISA provides that where an applicant expresses a preference for receiving information by one or more of the means mentioned in section 11(2), the authority must, so far as is reasonably practicable, give effect to that preference. Section 11(2)(b) provides that one of the means is "provision to the applicant of a digest or summary of the information".
22. In the Commissioner's view, for the reasons outlined above, it was not reasonably practicable for the Council to have given effect to Mr Mackenzie's preference and to have provided the information in summary format. The Commissioner considers that the Council did attempt to explain this to Mr Mackenzie (albeit in a way which could have been clearer) in its response to his requirement for review.
23. The Commissioner concludes that, in order to provide the information by way of the means sought by Mr Mackenzie, the Council would have been required to create a digest or summary of the information. In the Commissioner's view, given the number of records involved, it was not reasonably practicable for the Council to do so.

Section 15 – Duty to provide advice and assistance

24. Section 15 of FOISA provides that Scottish public authorities should provide advice and assistance to requesters so far as it would be reasonable to expect them to do so.
25. In its submissions to the Commissioner, the Council stated that it believed Mr Mackenzie had articulated his request clearly and unambiguously. It consider his request was clearly seeking information about investigations undertaken by the SCT rather than the types of complaints received.



26. The Commissioner has considered the guidance on the types of advice and assistance suggested in the Section 60 Code¹. Paragraph 1.10 of the Section 60 Code provides that “*the duty to provide advice and assistance does not extend to providing additional information which falls outside the scope of the information request, or locating information held by other public authorities. However, in some situations it may be helpful to provide some form of clarification or context to their response to avoid the information disclosed being misunderstood or misinterpreted*”.
27. In this case, the Commissioner considers it would have been helpful if the Council had provided a clearer explanation to Mr Mackenzie of the format in which it held information regarding investigations undertaken by the SCT. Additionally, it could have provided a clearer explanation of why it was not reasonably practicable for it to provide the information in the format that he had requested. Furthermore, the Commissioner considers that the Council could have offered to provide Mr Mackenzie with the information that it disclosed regarding the type of complaints received by the SCT at an earlier stage; this may have gone some way to satisfying Mr Mackenzie’s interest in the matter.
28. By failing to do so, the Commissioner has concluded that the Council failed to comply fully with the duty in section 15(1) of FOISA to provide reasonable advice and assistance to Mr Mackenzie in relation to his request. In view of the background information provided within this decision which explains how the information is held by the Council, and the information disclosed to Mr Mackenzie during the investigation, the Commissioner does not require the Council to take any further action in relation to this failure.

DECISION

The Commissioner finds that Perth and Kinross Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mackenzie.

The Commissioner finds that the Council was not obliged to provide the requested information in the format sought by Mr Mackenzie in terms of section 11 of FOISA.

The Commissioner finds that the Council incorrectly gave notice in terms of section 17(1) of FOISA that it did not hold the requested information. The Commissioner also finds that the Council failed to provide adequate advice and assistance to Mr Mackenzie in terms of section 15 of FOISA. The Commissioner finds that the Council failed to comply with Part 1 of FOISA in these respects.

The Commissioner does not require the Council to take any action in response to these failures in response to this decision.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

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Appeal

Should either Mr Mackenzie or Perth and Kinross Council 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
13 February 2014



Appendix

Relevant statutory provisions

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.
- ...

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.
- (2) The means are-
- ...
- (b) such provision to the applicant of a digest or summary of the information; and
- ...
- (3) In determining, for the purposes of subsection (1), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.
- ...



15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects

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.

...