

Decision Notice

Decision 031/2015: Mr Roy Mackay and City of Edinburgh Council

Investigation relating to a specified authority's statutory obligations

Reference No: 201402880

Decision Date: 10 March 2015



Scottish Information
Commissioner

Summary

On 19 October 2014, Mr Mackay asked City of Edinburgh Council (the Council) for information relating to an investigation it undertook, commissioned by Scottish Borders Council (SBC).

The Council did not respond to Mr Mackay's request and Mr Mackay submitted a requirement for review. The Council then informed Mr Mackay that it did not hold the information, as it was held on behalf of SBC. Mr Mackay remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council accepted that it did hold the information in its own right and provided Mr Mackay with a revised response. The Commissioner found that the Council had failed to respond to Mr Mackay's request for information in accordance with Part 1 of FOISA but did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (4) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that Information is not held)

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

1. On 19 October 2014, Mr Mackay made an information request to the Council, seeking information relating to an investigation commissioned by SBC in 2014. He described the investigation as having been carried out by the Council's Corporate Governance Department (CECCGD) and relating to SBC's performance of its statutory obligations in respect of the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (and SBC's handling of related matters, including complaints and requests for information). The information requested was all records relating to:
 - (i) any enquiries from SBC concerning the proposed investigation and CECCGD's indication it was able and prepared to undertake the task, and on what basis;
 - (ii) the investigation including, but not limited to, SBC's requirements (including in relation to the investigating personnel); the investigation's specification, objectives, scope, limitations, exclusions, terms of reference, tendering, commissioning, conduct, monitoring, revising, editing, versioning, recording, checking, approval, authorisation, evidence, documentation and reporting, and
 - (iii) claims for and/or payment of any and all fees and/or expenses and/or disbursements in relation to any/all the above.
2. The Council sought clarification from Mr Mackay on 28 October 2014, explaining that it needed further details to identify the information requested. It asked Mr Mackay to provide details of where he saw the proposed investigation.

3. On 28 October 2014, Mr Mackay provided the Council with a copy of a letter sent to him by Ms Tracey Logan, SBC Chief Executive, in which she confirmed that she had commissioned CECCGD to investigate the matters he had described, and was in receipt of the investigating officer's report. The letter summarised the main findings and recommendations.
4. On 26 November 2014, Mr Mackay wrote to the Council, requiring a review on the basis that the Council had not provided a response to his request within 20 working days.
5. The Council notified Mr Mackay of the outcome of its review on 26 November 2014. It gave Mr Mackay notice in terms of section 17(1) of FOISA, informing him that it did not hold the information he had asked for. It considered this information to be held on behalf of SBC. It explained that under section 3(2)(a)(i) of FOISA, where information is held on behalf of another person, it is not held by the authority receiving the request for the purposes of FOISA and that authority is not required to provide the information.
6. On 19 December 2014, Mr Mackay wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Mackay stated he was dissatisfied with the outcome of the Council's review because the Council had applied section 17(1) of FOISA as a "blanket" provision to his entire request, and had not considered each point separately. He also believed that at least some (if not all) of the information must be held by the Council for its own purposes.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Mackay made a request for information to a Scottish public authority and asked the authority to carry out a review following its failure to respond to that request before applying to her for a decision.
8. The case was allocated to an investigating officer. On 5 February 2015, the Council was notified in writing that Mr Mackay had made a valid application.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions.
10. The Council was asked to justify why it had applied section 17(1) of FOISA to the entire request, and why it had not considered each point separately. It was also asked to explain, and to provide evidence of, the searches carried out to identify and locate any information falling within the scope of Mr Mackay's request.
11. The Council was also asked to explain why it considered the information to be held on behalf of SBC, in terms of section 3(2)(a)(i) of FOISA.
12. On 17 February 2015, the Council informed the Commissioner that it accepted it had been incorrect in applying section 17(1) to Mr Mackay's request in its entirety. It also provided the Commissioner with a copy of a further response sent to Mr Mackay on 19 February 2015, in which it confirmed that it had incorrectly applied section 3(2)(a)(i) to his request, with the result that the initial response in terms of section 17(1) was incorrect. The further response was otherwise than in terms of section 17(1) and considered each part of Mr Mackay's request separately.

Commissioner's analysis and findings

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

Information held by the Council

14. 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.
15. The information to be given is that held by the authority at the time the request is received, subject to any amendment or deletion which would have been made, regardless of the receipt of the request, between the time the request is received and the time the information is given (section 1(4)). 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.
16. Section 3(2)(a)(i) of FOISA makes it clear that if a Scottish public authority holds the information on behalf of another person, then the information is not held by that authority for the purposes of FOISA. Consequently, if the information requested in any given case is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.
17. In this case, the Council provided Mr Mackay with a notice in terms of section 17(1), on the basis that section 3(2)(a)(i) applied. The Council was asked to justify its reliance on these provisions.
18. During the investigation, the Council accepted it had been incorrect in applying section 17(1) to Mr Mackay's request in its entirety. The Council provided Mr Mackay with a further response, otherwise than in terms of section 17(1), in which it confirmed that it held the information requested and responded to each part of Mr Mackay's request separately.
19. Having considered the terms of the request, the Council's acceptance that it was incorrect to apply section 17(1) and the further response provided to Mr Mackay during the investigation, the Commissioner is now satisfied that the Council has responded to Mr Mackay's request correctly, in concluding that it held the information for the purposes of FOISA.
20. In the circumstances, the Commissioner does not require any further action to be taken in respect of this case, in response to Mr Mackay's application. If dissatisfied with the terms of the Council's further response, Mr Mackay may apply to the Commissioner again (within the six months allowed by section 47(4) of FOISA).

Decision

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mackay, by incorrectly applying section 17(1) to Mr Mackay's request and informing him that it did not hold the information requested.

Given that the Council has provided Mr Mackay with a further response, otherwise than in terms of section 17(1) of FOISA, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr Mackay's application.

Appeal

Should either Mr Mackay or City of Edinburgh 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

10 March 2015

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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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.

...

3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
 - (i) on behalf of another person; or

...

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.

...

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