

Decision Notice 048/2021

Monitoring Officer's investigation

The Applicant

Public authority: City of Edinburgh Council

Case Ref: 201901654



Scottish Information
Commissioner

Summary

The Council was asked whether or not a specified investigation was a Monitoring Officer's investigation.

The Council stated that it did not hold any information.

The Commissioner investigated and concluded that the Council was not entitled to claim that information was not held. He did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 11(1) and (2)(b) (Means of providing information); 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 5 June 2019, the Applicant made a number of information requests to the City of Edinburgh Council (the Council). The request which is the subject of this decision (request (a)) read as follows:
Please could you let me know whether or not Alex McGuigan's 2010/2011 investigation [the McGuigan Review] was a Monitoring Officer's investigation?
2. The Applicant made it clear that he did not expect to receive a copy of the records under FOISA, but that he did expect to be told whether the Council held the information.
3. The Council responded on 3 July 2019. It provided a response to all elements of the requests of 5 June 2019 with the exception of request (a).
4. On 12 July 2019, the Applicant wrote to the Council requesting a review of its decision on the basis that no response had been provided in respect of request (a).
5. The Council notified the Applicant of the outcome of its review on 26 July 2019. The Council told the Applicant that, as it had previously advised him, the McGuigan Review did not result in a report being produced by the Monitoring Officer under the Local Government and Housing Act 1989. The Council also stated that no formal Monitoring Officer Report was presented to the Council as a direct result of the McGuigan Review.
6. However, the Council went on to state that the answer to request (a) was more complex as it had been unable to establish what interest, if any, the Monitoring Officer had in the instruction or outcome of the McGuigan Review beyond what has already been disclosed to the Applicant. The Council referred to paragraph 1 of the McGuigan Review, which states that the review was instructed by a person other than the Monitoring Officer, but commented that this did not rule out any Monitoring Officer interest. It therefore notified the Applicant that it held no recorded information which would answer request (a) in line with section 17(1) of FOISA.

7. On 2 September 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Council's review because he believed that the Council did hold information.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 9 October 2019, the Council was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
10. 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 to answer specific questions. These related to whether any recorded information may be held that would indicate whether or not the McGuigan Review was a Monitoring Officer's investigation.
11. Submissions were received from both the Council and the Applicant.
12. The submissions from the Council included the explanation that:
The Council holds information that indicates the investigation was a Monitoring Officer's investigation and it also holds information that indicates that it was not a Monitoring Officer's investigation.
13. The submissions received from the Applicant also included an example of correspondence from the Council which had referred to the investigation as a Monitoring Officer's investigation.

Commissioner's analysis and findings

14. 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 the Council. He is satisfied that no matter of relevance has been overlooked.

Section 17(1) - Notice that information is not held

15. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
16. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must (unless it wishes neither to confirm nor deny whether the information is held under section 18 of FOISA), give the applicant notice in writing to that effect.
17. It is not within the Commissioner's remit to determine whether the McGuigan Review is – or is not – a Monitoring Officer's investigation. Instead, the Commissioner's role is to determine whether the Council holds information which indicates the status of the investigation in question – regardless of whether the Applicant or the Council considers the investigation to be a Monitoring Officer's investigation.

18. The Council submitted there is no standard and agreed definition, within legislation or elsewhere that it is aware of, which specifically outlines the scenarios which would absolutely describe a Monitoring Officer investigation or report. In its view, it is a semantic description rather than a definitive term.
19. The Council acknowledges that the McGuigan Review has been referred to in correspondence, and within another independent report, as a Monitoring Officer report, despite it not being commissioned by the Council's then Monitoring Officer.
20. The Council notes that the Applicant considers the Council's descriptions of the McGuigan Review to be unreasonable and that he has determined to seek clarification on the point. The Council argues that FOI legislation is not easily equipped to deal with this point as the recorded information does not provide the clarity sought.
21. The Council argued that the Applicant has requested a definitive answer and expects the Council to provide a simple yes or no response. He has not, argued the Council, asked whether it holds recorded information one way or the other.

The Commissioner's findings

22. The Applicant asked the Council whether or not the McGuigan Review was a monitoring officer's investigation. However, the request for information does not end there. In this case, the Applicant specifically stated in the request for information:

I don't expect to receive a copy of the records under FOISA, but I believe that the law requires confirmation of whether or not the information is held.

23. In FOISA terms, when the request for information is considered as a whole, the Commissioner therefore disagrees with the view taken by the Council that the Applicant has not asked whether it holds recorded information one way or the other.
24. Section 11(2)(b) of FOISA makes it clear that a requester has the right to ask for a digest or summary of information – a yes/no response or a statement of position can be viewed as a suitable digest or summary in some circumstances. The framing of the Applicant's request and his explicit statement that he did not expect to receive records in response to this request suggests that a summary or digest was sufficient and, indeed, expected.
25. Requests which expect a yes/no answer under FOISA are not always straightforward for authorities to deal with, particularly when the situation may be more nuanced than a yes/no answer would suggest. In this case, matters are even more complicated given that the Applicant did not actually frame his request as requiring a simple yes/no answer. The Applicant specifically framed this request using the phrase "whether or not", thereby expanding the possible response beyond that of a definitive yes/no answer. (The Commissioner notes that the Applicant framed other information requests in his email of 5 June 2019 differently using, for example, the following wording:

Does the council hold any record showing that Alex McGuigan's investigation report was passed to any Monitoring Officer following its completion in 2012?

These requests, given the statement from the Applicant that he does not expect to receive documents in response to the requests, clearly require [and are capable of] a yes/no answer.)

26. In this case, the use of the phrase "whether or not" in the request for information essentially creates two yes/no questions – does the Council hold recorded information that Alex

McGuigan's report was a monitoring officer's investigation, and does the Council hold recorded information that Alex McGuigan's report was not a monitoring officer's investigation?

27. The Council has acknowledged that it holds information referring to the McGuigan Review as a Monitoring Officer investigation and that it also holds information suggesting that it is not a Monitoring Officer investigation. The Council alluded to this position in its review response to the Applicant – that is, a Monitoring Officer's interest in the investigation could not be ruled out.
28. The Council finds itself in the difficult position where it cannot be certain of the status of the investigation. Nevertheless, it has advised the Commissioner that it does hold information as to whether or not the investigation was a monitoring officer's investigation. The information actually held may be contradictory – but the Council does hold information falling within the scope of the request.
29. Having considered the submissions made, in particular the fact that the Council holds information that states that the investigation was a Monitoring Officer's investigation, and also holds information to the effect that the report was not a Monitoring Officer's investigation, the Commissioner finds that the Council was not entitled to notify the Applicant, in line with section 17(1) of FOISA, that it does not hold information falling within the scope of his request.
30. As stated above, the Commissioner cannot comment on whether the investigation was – or was not – a Monitoring Officer's investigation. He is simply required to determine whether or not the Council complied with Part 1 of FOISA in responding to the Applicant's request. The Commissioner is satisfied that the Council incorrectly relied on section 17 in this case and therefore failed to comply with Part 1 of FOISA in responding to the Applicant's request.
31. However, as the Council has explained during the course of the investigation that it holds information in relation to both of the yes/no questions contained in the request for information, and as the Applicant expressly stated that he did not expect to receive a copy of the records, the Commissioner does not require the Council to take any further action in relation to this breach.

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 in responding to the information request made by the Applicant, by incorrectly stating that no information was held. It therefore failed to comply with section 1(1).

The Commissioner does not require the Council to take any action in relation to this breach.

Appeal

Should either the Applicant or the 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.

Daren Fitzhenry
Scottish Information Commissioner

6 April 2021

Appendix 1: 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

...

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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