

Decision Notice

Decision 086/2017: Mr Angus Files and Argyll and Bute Council

Costs of a complaint

Reference No: 201602291

Decision Date: 30 May 2017



Scottish Information
Commissioner

Summary

The Council was asked about the costs of a complaint made to the Commissioner for Ethical Standards in Public Life in Scotland. The Council stated that it did not hold any information about the costs of the complaint.

The Commissioner investigated and found that the Council did not hold any information. She also found that it had failed to provide adequate advice and assistance, but did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(3) and (4) (General entitlement); 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 Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 20 October 2016, Mr Files made the following request for information to the Council:
“Could you please supply all of your costs in taking the failed action against the Councillor Michael Breslin.”
2. The information requested was in connection with a complaint made to the Commissioner for Ethical Standards in Public Life in Scotland (the Commissioner for Ethical Standards), resulting in report reference number LA/AB/1758¹ (the complaint report).
3. The Council sought clarification from Mr Files (on 2 November 2017) as to the scope of his request. He responded, on the same day, that he was looking for information relating to staffing costs and legal fees both, out sourced and in-house.
4. The Council responded on 16 November 2016, stating that it did not hold the information. The Council advised Mr Files that it had incurred no costs in relation to the complaint.
5. On 17 November 2016, Mr Files wrote to the Council, requesting a review of its decision. He queried the Council’s interpretation of his request, given that, in his view, there would have been extensive Council involvement in the complaint.

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http://www.publicstandardscommissioner.org.uk/site/uploads/decisions/pdf/upload_57e0f09c84310/web%20report%20la-ab-1758%20%E2%80%93%20final%2019-09-16_redacted.pdf

6. The Council notified Mr Files of the outcome of its review on 15 December 2016 and upheld the application of section 17(1) of FOISA. This review was conducted by the Council's Head of Governance and Law, who was also mentioned in the complaint report itself.
7. On 15 December 2016, Mr Files wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Files stated he was dissatisfied with the outcome of the Council's review because he did not believe that the Council held no information. He also felt that it was inappropriate for the review to have been conducted by a person with involvement in the actual complaint process.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Files made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 24 January 2017, the Council was notified in writing that Mr Files had made a valid application. The case was then passed 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 provide submissions in support of its position that it did not hold the information. The Council was also asked to comment on how it had handled the review.
11. Both the Council and Mr Files provide submissions to the investigating officer during the investigation.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Files and the Council. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner notes that the complaint in question is one that was made by four Council officers to the Commissioner for Ethical Standards about Councillor Breslin.

Section 17 - information not held

14. In terms of 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, subject to qualifications which are not applicable in this case. Under section 17(1), where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.
15. In this case, the Council gave notice to Mr Files that it did not hold the information he requested.

Submissions from the Council

16. The Council was asked to explain the searches that would locate any information falling within the scope of Mr Files' request. The Council did so, confirming that it identified no relevant information.
17. The Council submitted that the complaint had been made by the four Council officers individually and not by the Council as a corporate entity. In that case, the Council submitted,

it followed that there would be no costs to the Council in progressing or pursuing the complaint. It was required to co-operate with the Commissioner for Ethical Standards' investigation, and entitled to keep itself aware of that investigation's progress, but that was another matter and did not fall within the scope of Mr Files' request. It was to maintain awareness, and for their own professional development purposes, that a legal officer of the Council attended the hearing.

Submissions from Mr Files

18. Mr Files stated that he had believed the complaint had been made by the Council and was aware of no suggestion to the contrary by the Council. He provided extensive submissions on why he could not accept the Council could have avoided incurring considerable costs in taking action in relation to the complaint.

The Commissioner's conclusions

19. The Commissioner has considered all the submissions she has received carefully. In particular, she has considered the scope of Mr Files' request. She notes that he has taken issue with the Council's use of certain terminology in responding to his request, which he believes restricts its interpretation of the request unduly. On the other hand, the request does refer to costs "in taking the above failed action", which does suggest (as do Mr Files' remaining submissions) that he is concerned with costs arising in some way out of the active pursuit of a complaint by the Council. The Commissioner agrees with the Council that it would not be reasonable to include within the scope of the request costs (if there were any) incurred in simply keeping itself aware of the progress of a complaint made by someone else.
20. Although it refers to them by their job titles as well as their names, the complaint report does refer to a complaint made by four individual officers of the Council. It does not refer to a complaint made by the Council. She considers it likely the report would have referred to a complaint made by, or at least on behalf of, the Council if the Commissioner for Ethical Standards had understood the officers to be pursuing the complaint in the course of their employment. On the other hand, the Commissioner can understand, from the terms of the complaint, how a member of the public might understand the complaint to have been made by or on behalf of the Council.
21. The Commissioner has also taken the Council's own submissions into consideration. It is clear that the Council approached the complaint throughout as a complaint made by the officers as individuals. Mr Files is not in a position to provide any evidence to the contrary. In all the circumstances, therefore, the Commissioner is satisfied that the complaint was made (and therefore pursued) by those individuals and not by the Council as a corporate entity. Inevitably, therefore, there would be no information held by the Council which fell within the scope of Mr Files' request.
22. The Commissioner therefore finds that the Council was correct to give notice (in terms of section 17(1) of FOISA) that it did not hold any information falling within the scope of Mr Files' request.

Section 15 of FOISA - duty to provide advice and assistance

23. Section 15(1) of FOISA requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty if it conforms with the guidance contained in the

Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code of Practice)².

24. The current version of the Section 60 Code of Practice, which had come in to force by the time the Council carried out its review, contains recommended good practice (at Part 2, section 5) in relation to the provision of advice and assistance.
25. Although the Section 60 Code is of limited assistance on this point, the Commissioner takes the view that there will be cases where the need to provide advice and assistance will extend to explaining the context underlying an authority's claim that it does not hold particular information, particularly where that will help the applicant understand why the authority should not be expected to hold that information.
26. In the Commissioner's view, this is such a case. The Council would not have expected to hold any information on taking the action referred to in Mr Files' complaint, because it took no such action. That underlying reason was not, however, explained to Mr Files in the Council's responses to him, allowing a request (and application to the Commissioner) to be taken forward based on a false premise. The Council should have recognised at an early stage that it did not share the premise which drove Mr Files' request, and explained its own position clearly. In not doing this, the Commissioner finds that the Council failed to comply with the duty to provide advice and assistance in section 15(1) of FOISA.
27. As the explanation is clear from this decision, the Commissioner does not require the Council to take any action in relation to this breach, in response to Mr Files' application. She would, however, urge the Council to reflect on the breach, with a view to preventing its recurrence in similar future cases.

The handling of the review

28. As noted above, Mr Files also expressed his concern that the Council's review had been carried out by its Head of Governance and Law, who had attended the complaint hearing and given evidence. Mr Files questioned the officer's impartiality.
29. At paragraph 10.3.3 in Part 2, the Section 60 Code underlines the need for impartiality in review procedures.
30. The Council stated that the officer who conducted Mr Files' review (Mr Reppke) was involved in the complaint only in the capacity of a witness. The request did not relate to the evidence given by that officer and the Council did not believe he could be considered to have any particular interest in the outcome of the request. The request was about costs incurred by the Council in progressing/pursuing the complaint and it did not believe the Head of Governance and Law had any locus or interest in such matters.
31. The Commissioner agrees with the Council's position on this point. She must consider any argument of this kind in the context of the particular information request made by the applicant. Even if the Council had incurred costs falling within the scope of Mr Files' request, it is not clear how the Head of Governance and Law's involvement in matters covered by the complaint could reasonably be expected to influence his handling of a review on a straightforward factual question. Given that, by the nature of the Council's involvement in the

² <http://www.gov.scot/Resource/0051/00510851.pdf>

matter, no such costs could have been incurred, the risk of any conflict appears even more remote.

Decision

The Commissioner finds that Argyll and Bute 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 Files.

The Commissioner finds that the Council was correct to give notice (in terms of section 17(1) of FOISA) that it did not hold any information falling within the scope of Mr Files' request. However, by failing to provide Mr Files with reasonable advice and assistance in relation to his request, the Council failed to comply with section 15(1) of FOISA.

The Commissioner does not require the Council to take any action in respect of this failure, in response to Mr Files' application.

Appeal

Should either Mr Files 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.

Margaret Keyse
Acting Scottish Information Commissioner

30 May 2017

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.

...

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 that case, to be taken to comply with the duty imposed by subsection (1).

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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