

Decision Notice 115/2020

Resignation financial provision

Applicant: The Applicant

Public authority: Lothian Buses Ltd

Case Ref: 202000669



Scottish Information
Commissioner

Summary

Lothian Buses was asked for any financial or other benefit paid or given to Mr Richard Hall as part of his resignation from his role of managing director of Lothian Buses. Lothian Buses stated that it did not hold this information.

The Commissioner investigated and found that Lothian Buses was correct to state that, at the time of the request, it held no recorded information. However, it also found that it should have provided advice and assistance to explain why it did not hold this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15 (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.

Background

1. On 8 March 2020, the Applicant made a request for information to Lothian Buses Ltd (Lothian Buses). The Applicant requested details of any financial or other benefit paid or given to Mr Richard Hall as part of his resignation from his role of managing director of Lothian Buses. The Applicant asked that the request be taken to include information such as any early contract end settlement, or final bonus or final salary payment, or any other benefit including gifts.
2. Lothian Buses responded on 1 April 2020. Lothian Buses gave notice, under section 17 of FOISA, that it did not hold information falling within the scope of the request. Lothian Buses stated that FOISA “entitles citizens with a right to **recorded** information” (Lothian Buses’ emphasis).
3. The next day, the Applicant wrote to Lothian Buses requesting a review of its decision. The Applicant stated:

“I would expect Mr Hall has received a final salary payment at the very least which my request covers.”
4. Lothian Buses notified the Applicant of the outcome of its review on 1 June 2020. Lothian Buses was satisfied that, as at the date of the request (8 March 2020), it did not hold any information concerning details of any financial or other benefit that had been paid or given to Mr Hall. Accordingly, Lothian Buses confirmed its original decision under section 21(4)(a) of FOISA.
5. On 26 June 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of Lothian Buses’ review because he did not agree it did not hold the information. The Applicant highlighted information in the public domain that he considered fell within the terms of his request. He believed Lothian Buses had withheld the information from him because he was a journalist.

Investigation

6. 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.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Lothian Buses was invited to comment on this application and to answer specific questions. These related to its response to the request and review, and how it had established that it held no information falling within the request.

Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Applicant and Lothian Buses. He is satisfied that no matter of relevance has been overlooked.

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

9. 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. This is subject to qualifications, but these are not applicable here. If no information is held by the authority, section 17(1) of FOISA requires the authority to give an applicant notice in writing to that effect.
10. Lothian Buses notified the Applicant in terms of section 17 that it did not hold the information requested. The question for the Commissioner is whether Lothian Buses complied with FOISA in responding in this way, or whether Lothian Buses held any recorded information that fell within the request.
11. The Applicant said that Lothian Buses' response was incorrect. He referred the Commissioner to page 113 of the City of Edinburgh Council's (the Council's) unaudited annual accounts¹, which shows that Lothian Buses paid Mr Hall £174,618 in salary and £147,950 in a payment called "compensation for loss of office". The note on the accounts adds: "Compensation for loss of office includes contractually-due payment in lieu of six-month notice period agreed at the end of March 2020."
12. The Applicant commented that he knew Lothian Buses had agreed a final payment with their former managing director, and that the annual accounts submitted to the Council showed this was the case. In his view, in relying on section 17(1), Lothian Buses were saying that Mr Hall received no final payment, including no final salary payment. The Applicant said:

"This was fundamentally and categorically false..."
13. Lothian Buses was asked to explain how it had come to the view that it did not hold any information. It was also invited to comment on the Applicant's points about why he believed it did hold recorded information falling within the request.

¹ <https://democracy.edinburgh.gov.uk/documents/s24622/Item%208.1%20-%20Unaudited%20Annual%20Accounts%202019-20.pdf>

14. Lothian Buses told the Commissioner that, as at the date of the request (8 March 2020), no financial or other benefit had been given to Mr Hall as part of his resignation. Mr Hall's settlement was agreed after the request was received (it was agreed in principle on 25 March and signed 26 March 2020). Mr Hall's employment ended on 31 March 2020 and the settlement sum was later paid. For this reason, at the date of receipt of the request, no information was held as no decision had been made on what payment would be given.
15. Lothian Buses explained that no searches had been undertaken, but that those involved (its Chair and Head of People) had been asked verbally. They confirmed (at response stage) why no information was held.
16. Lothian Buses confirmed it now held the information, and that the information was published in the Council's accounts. However, Lothian Buses stressed that this information was dated 30 June 2020 – which was after the request, and after the requirement for review. Lothian Buses said that it had always intended to publish the information and that, had the Applicant's request been made after the agreement, it would have relied on section 27 (Information intended for future publication) of FOISA.
17. The standard of proof to determine whether a Scottish public authority holds information (or held information) is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
18. Both Lothian Buses and the Applicant are correct to highlight that the information is disclosed in the Council's unaudited accounts. Here it is noted (note 2 at page 127) that compensation for loss of office includes contractually-due payment in lieu of six-month notice period agreed at the end of March 2020. This agrees with the point made by Lothian Buses that the agreement was not until the end of March 2020, which was after the Applicant's request was received.
19. The Applicant commented that Lothian Buses was "well aware of this agreement ahead of the time it was 'officially' agreed". The Applicant said that Mr Hall stepped down in early March, and "discussions about his position were ongoing for months". If full confirmation had not been reached, the Applicant believed that "a verbal agreement or otherwise would have been made prior to the end of March 2020."
20. FOISA is clear (section 1(4)) that the information to be given by the authority is that held by it at the time the request is received. Section 73 (Interpretation) of FOISA provides that "information" means information recorded in any form – this does not extend to verbal discussions, unless recorded. Having considered all the relevant submissions, the Commissioner accepts that Lothian Buses did not hold recorded information falling within the terms of the Applicant's request at the date of the request.
21. The Commissioner therefore finds that Lothian Buses complied with Part 1 of FOISA in responding to the Applicant's request by giving notice, as required by section 17 of FOISA, that it did not hold the requested information.

Section 15 - Advice and Assistance

22. Section 15(1) of FOISA provides that 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.

23. If the authority complies with the 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)², it will be taken to comply with section 15(1).
24. Paragraph 9.3.1 of the Section 60 Code states:
- The legislation only applies to recorded information which is held by the authority at the time when the request is received... Where an authority issues a response informing the applicant that it does not hold the requested information, it is good practice for an authority to explain to the applicant why it does not hold the information. A request for review is less likely to be made if authorities inform applicants why they do not hold the information they have requested.*
25. In this instance, it would have been good practice for Lothian Buses to explain to the Applicant why it did not hold the requested information – i.e. because, at the time of the request, it did not hold recorded information falling within the request. The emphasised word (“**recorded** information”) in Lothian Buses’ initial response, assuming the emphasis was intentional, does not give such an explanation. The Commissioner also notes that the review response was issued 1 June 2020, after the agreement was finalised and the sums paid. A second opportunity was lost to explain to the Applicant, as suggested, by the Section 60 Code, why the information was not held.
26. On balance, the Commissioner finds that Lothian Buses failed to comply fully with its duty to provide reasonable advice and assistance to the Applicant under section 15(1) of FOISA. Given that the Applicant is now aware, as a result of the Commissioner’s investigation, why the information was not held at the time of his request, and given that he now has the information which was the subject of his request, the Commissioner does not require Lothian Buses to take any action in respect of this breach.

Decision

The Commissioner finds that Lothian Buses Ltd (Lothian Buses) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the Applicant’s request. While it was entitled to advise the Applicant, in line with section 17 of FOISA, that it held no recorded information, it failed to comply with its duty provide reasonable advice and assistance under section 15(1) of FOISA.

For the reasons set out above, the Commissioner does not require Lothian Buses to take action in respect of this failure in response to the Applicant’s application.

² <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Appeal

Should either the Applicant or Lothian Buses 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

1 October 2020

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.
...

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info