

Decision Notice

Decision 155/2019: The Applicant and the City of Edinburgh Council

Investigations into specific allegations

Reference No: 201900482

Decision Date: 28 October 2019



Scottish Information
Commissioner

Summary

The Council was asked for information it held regarding five specific allegations made against a named person. The Council advised that the information it held was exempt from disclosure. The Commissioner investigated and found that the Council did not in fact hold any of the information that had been requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 2 to this decision. Both Appendices form part of this decision.

Background

1. On 15 November 2017, the Applicant made a request for information to the City of Edinburgh Council (the Council). The email containing the information requested is set out in full in Appendix 1 to this decision.
2. The Council responded on 14 December 2017. The Council refused to comply with the request, arguing that it was vexatious in terms of section 14(1) of FOISA.
3. On 20 December 2017, the Applicant wrote to the Council requesting a review of its decision as he did not accept that his request was vexatious.
4. The Council notified the Applicant of the outcome of its review on 23 January 2018, upholding its previous position that the request was vexatious. The Applicant subsequently asked the Commissioner to investigate whether the Council was correct to deem the request vexatious. After an investigation¹, the Commissioner concluded that the request was not vexatious and he required the Council to provide the Applicant with a new review outcome.
5. The Council did this on 22 February 2019. In this review outcome, the Council identified information that it considered as falling within the scope of the Applicant's information request, but which it was withholding it under sections 30(c) and 38(1)(a) and (b) of FOISA. The Council also provided the Applicant with a response under the Data Protection Act 2018 (the DPA 2018) where it stated, for each specific allegation, that no investigation was instructed and that specific or separate report exists.
6. On 18 March 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he disagreed with the Council's interpretation of his information request and its subsequent application of exemptions. The Applicant also argued that, if the Council did not hold information falling within the scope of his request, it should have given him notice under section 17(1) of FOISA, rather than responding under the DPA 2018.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201801044.aspx>

Investigation

7. 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.
8. On 2 May 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
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 to answer specific questions. These related to its interpretation of the request, its application of exemptions and its identification of information falling within the scope of the request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and 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.

The Council's interpretation of the request

11. The information request made by the Applicant in his email of 15 November 2017 is set out in full in Appendix 1 to this decision notice. However, the Council claimed that the Applicant had also requested the following information in his email:

".. the evidence upon which the Council based a statement made to the SPSO in relation to a case they were examining."

12. The Commissioner reviewed the text of the Applicant's information request thoroughly but was unable to find the exact wording referred to by the Council. In light of this, the Council was asked to refer the Commissioner to the specific part of the Applicant's email of 15 November 2017 that contained the information request highlighted by the Council in paragraph 11.
13. The Council explained that the Applicant's information request made reference to the contents of a letter it had sent to the Scottish Public Services Ombudsman (SPSO) on 11 October 2017. Specifically, the Applicant referred to the assertions made by the Council to the SPSO that his complaints had been comprehensively scrutinised. The Council noted that the Applicant did not agree with the Council's assertions and he indicated that he would expect reports of such "comprehensive scrutiny" to exist. The Council explained that the next line in the Applicant's information request began "*I therefore make the following requests for information...*"
14. The Council explained that it has interpreted this, together with the Applicant's reference to his expectation that certain records exist, as setting the context for the specific information requests which followed. The Applicant then went on to list the format of evidence which he would expect to exist to support the Council's assertion that it had comprehensively scrutinised his complaints.

15. The Council submitted that the interpretation of the request pivots upon a fundamental difference of opinion between itself and the Applicant. The Council explained that its submission to the SPSO (which was referred to by the Applicant) argued that its handling of the Applicant's complaints, which included the actions of individual council officers, had already been examined in great detail. However, the Applicant does not accept that the Council has fully examined the actions of the individual council officers involved.
16. In responding to the Applicant's request, the Council recognised that he was asking for the evidence which formed the basis of the Council's letter to the SPSO, and this was how it identified information falling within the scope of the request. The Council noted that the Applicant's request went on to reference specific information which he assumed would be held to meet his interpretation of the Council's statement to the SPSO. However, because he had misinterpreted the Council's position, there was no correlation, in the way the Applicant asserted there would be, between the reports/evidence the Council held within the scope of his request and the description of the reports he specified in his request.
17. The Council submitted that it is the SPSO's investigation which formed the background to the information request made by the Applicant on 15 November 2017, and it is in the context of the SPSO's investigation that it interpreted his request and understood what he was asking for.
18. The Council also submitted that the timing of the Applicant's request, and the reference to the ongoing SPSO investigation, made it clear that his request related to the evidence it submitted in support of its arguments to the SPSO. The Council noted that there is a fundamental difference of approach/interpretation between the Applicant and the Council in respect of "comprehensive scrutiny" at the time the request was made.
19. The Council explained that it responded to the Applicant's request in the context of the complex, ongoing complaint situation and the information which is held by the Council in relation to that. It noted that its approach is to first consider what information is in the scope of the request, and thereafter whether it is appropriate to release that information. The Council submitted that the Applicant appears to want it to take a very narrow assessment of the information falling within the scope of his request. It noted that the Applicant's position appears to be that, because no individual and specific investigation took place in relation to each narrow allegation made, the only response available to the Council is in the form of section 17(1) of FOISA. The Council submitted that it does not agree that this is an appropriate response, taking into account its responsibilities under FOISA.

The Applicant's interpretation of the request

20. In his application to the Commissioner, the Applicant referred to the request that the Council claimed he had made, "...the evidence upon which the Council based a statement made to the SPSO in relation to a case they were examining" and he argued that he did not request this information.
21. The Applicant alleged that the Council included in its review outcome information which is outside the scope of his request in order for it to preface the admission that no investigations of the specified allegations against the named person were carried out, with a misleading narrative giving the impression that the allegations were "covered" by other investigations, when this is not the case. The Applicant submitted that other investigations did not "cover the same ground" as the specified allegations.

22. The Applicant argued that the Council should be clear, open and transparent and confirm that no information is held relating to the investigation of the specified allegations. The Applicant contended that the Council has used the inclusion of this “out of scope” information to claim that exemptions are required when they are not.

The Commissioner’s view on the interpretation of the request

23. In interpreting information requests, the Commissioner believes that the words used in the request should generally be given their plain, ordinary meaning. Similarly, the Commissioner expects requests to be interpreted in an objective manner, rather than with reference to what a public authority considers a requester may have intended. If there is any doubt over the information that an applicant wishes to obtain when making a request, the public authority should seek clarification from the applicant without delay.
24. The Commissioner has considered the terms of the Applicant’s request carefully. He considers that, on a plain English reading, the Applicant has not made the information request claimed by the Council. The Council has submitted extensive arguments as to why its interpretation of the request is correct, but it has been unable to refer the Commissioner to the specific text in the Applicant’s email which contains the request outlined above, in paragraph 11.
25. The Commissioner understands that the Council’s interpretation of the request was very much influenced by its knowledge of the Applicant’s views on how the Council has handled previous complaints he has made. However, the interpretation of a request must be based on the text with which it is expressed.
26. In the circumstances, the Commissioner does not accept that the Applicant asked for “... *the evidence upon which the Council based a statement made to the SPSO in relation to a case they were examining*” and he finds that the Council were wrong to interpret the request in this way.

Information held by the Council

27. 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 such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
28. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
29. In this case the Council has identified five documents that it claims fall within the scope of the Applicant’s information request. In its review outcome, the Council notified the Applicant that this information was being withheld under sections 30(c) and 38(1)(a) and (b) of FOISA. During the investigation, the Council advised the Commissioner that it was also withholding some of the information under section 25(1) of FOISA.
30. Before he can consider the exemptions being relied on by the Council, the Commissioner must first establish whether this information falls within the scope of the Applicant’s information request, outlined in paragraph 1 of this decision.

Submissions from the Applicant

31. In his application to the Commissioner, the Applicant argued that the Council “knew” that the information he had requested was not held, but it failed to give him notice of this, under section 17(1) of FOISA. The Applicant referred to a letter that the Council had sent the Commissioner in which it referred to his information request and stated:

“The Council suggests that the request is worded to elicit an “information not held” response in order to re-open investigations.”
32. The Applicant argued that, unless the Council can demonstrate that it holds information in relation to each part of his request, it is not entitled to apply any exemptions to that part of the request and it must notify him that the information is not held.
33. The Applicant referred to the response the Council gave him under the DPA 2018, and argued that this also gives weight to the argument that no investigation of the specific allegations took place. (The Applicant stated that the Council’s response to the Applicant under the DPA 2018 states that, in relation to each allegation, no specific investigation took place and that no specific or separate report exists.)
34. The Applicant argued that it seems very likely from the information provided under the DPA 2018 that none of the information he has requested is held.
35. The Applicant argued that the Council’s response under the DPA is not sufficient and the Council needs to respond to his requests under FOISA. He argued that the response provided under the DPA is ambiguous as, while it states that no specific investigation into each allegation was carried out, it goes on to suggest that the allegations were addressed by other means, as part of other investigations that were carried out by the Council and the SPSO; the Applicant argues that this is not the case.
36. The Applicant provided detailed submissions explaining why he considered that the previous investigations carried out by the Council did not cover the same ground as the specific allegations made in his request.

Submissions from the Council

37. The Council argued that it *does* hold information falling within the scope of the request and, simply because the information is not held in the format that the applicant wishes it to be, or is information which the Applicant may want the Council to discount from its assessments, this does not mean it is not information held within scope of the request.
38. The Council submitted that it must act lawfully when responding to information requests and it is of the view that it has done so appropriately. The Council argued that, if it were to state that the information was not held, this would not be compliant with its obligations. The Council provided the Commissioner with a table that highlighted where (in each of the five withheld documents) information relating to each of the specific allegations is held, despite no individual and specific investigation having been undertaken in the manner the applicant request it to have been undertaken.
39. The Council noted that its approach has been to address matters in the round, and the Applicant’s desire in this instance is that they are each tackled individually. However, the Council argued that there is a significant point of difference between not conducting an individual investigation into specific allegations, and not looking at the matters at all (and therefore not holding any information about them).

40. The Council submitted that it has been transparent in its response to the Applicant, and correct in terms of how it has provided transparency within the relevant information access regimes. The Council noted that it has endeavoured to explain to the Applicant the information which is held within the scope of the request. The Council contended that it appears that the Applicant wishes to disregard this explanation.

Commissioner's view on the information that is held

41. In this case, the Council has argued that it holds information falling within the scope of the Applicant's information request and the Applicant has challenged this.
42. The Commissioner has carefully reviewed the five documents provided to him by the Council, and which the Council claims to fall within the scope of the Applicant's request. The Commissioner has also reviewed the table provided to him by the Council, and which aims to "map" each specific allegation to one or more of the five documents it is withholding from the Applicant. He has thoroughly examined the information that the Council has "mapped" to each allegation.
43. The Commissioner cannot say whether or not the Council (or any other body) has investigated the specific allegations made by the Applicant; all he can do is determine whether the information that the Council is withholding falls under the scope of the Applicant's information request.
44. Having considered all of the information laid before him, the Commissioner must conclude that the documents that the Council are withholding do not contain any information that falls under the scope of the Applicant's information request. The specific allegations contained in the Applicant's information request are very distinct.
45. The Commissioner notes that the allegations contained in the Applicant's information request refer to a named individual and that the five documents make reference to this individual and some allegations at various points. However, none of the documents contain information which falls within the specific scope of the information request. Given this, the Commissioner cannot see how these documents comprise or include information that falls under the scope of the Applicant's information request.
46. The Commissioner understands that the Applicant and the Council have been involved in ongoing communications for some time and that much of the dispute between the parties lies in a disagreement as to whether the Council has thoroughly investigated the complaints raised by the Applicant.
47. The Council's position may be that it has investigated matters "in the round", and it has not focused on the specific allegations raised by the Applicant. However, the Commissioner's role is not to assess whether or not the Council's investigations have been thorough or proportionate – his only role is to determine whether or not the Council has correctly identified the five documents as falling within the scope of the Applicant's request. For the reasons given above, he is not satisfied that this is the case.
48. The Commissioner finds that the Council wrongfully identified the five withheld documents as falling within the scope of the Applicant's information request, and that it failed to give him notice, as required by section 17(1) of FOISA, that it did not hold the information he had requested.
49. In its review outcome, the Council provided the Applicant with a response under the DPA 2018, advising him that it "*did not instruct an investigation in respect of that specific*

allegation. Therefore, no specific or separate report about the investigation of that specific allegation exists.” The Commissioner would note that a response issued under the DPA 2018 is not a substitute for a response issued under FOISA, and the Council’s DPA response in the review outcome, cannot be considered a replacement for notification under section 17(1) of FOISA.

50. As the Commissioner has concluded that none of the five documents identified by the Council contain information that falls within the scope of the Applicant’s information request, he will not consider the exemptions that the Council has applied to these documents.

Decision

The Commissioner finds that the 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 the Applicant as it failed to notify him, under section 17(1) of FOISA, that it did not hold information falling within the scope of his request.

In the circumstances, the Commissioner does not require the Council to take any action in response to this failure.

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

28 October 2019

Appendix 1: Email of 15 November 2017

I refer to your letter of 11th October 2017 to [name provided] at the SPSO.

In that letter, you set out a case that the Monitoring Officer's signed agreement to conduct an investigation of the actions and inactions of former [named person] was void because the matters had already been comprehensively scrutinised.

I expect that you are aware that I disagree with this claim. However, if as you state, the matters that the Monitoring Officer promised to investigate have already been the subject of comprehensive scrutiny, then I hope you can see that I would expect reports of the comprehensive scrutiny to exist.

Below, as examples, I list a selection of the allegations that we made against [named person] in the complaint that the Monitoring Officer promised to investigate.

For each of these allegations, please could you:

- Let me know if a report into the investigation of that allegation exists
- Let me know if a record of a decision on the allegation (e.g. upheld/not upheld) exists
- Provide a copy of the report into the investigation
- Provide a copy of the record of the decision (e.g. upheld/not upheld)
- Provide a copy of any information about my family held within the report into the investigation
- Provide a copy of any record of learning or action taken as a result of the investigation into the allegation.

List of allegations:

- That [named person] had told us that he had investigated [an identified person] when he had not investigated the most serious concerns.
- That [named person] interfered with the investigation process by twice advising the Head Teacher (who he line-managed) not to respond to the Council Complaints Manager [name provided].
- That [named person] had not been truthful, open and honest
- That on June 6th 2011, as the investigation was being taken out of his control, [named person] sent an email to his line-managers making serious false allegations against us, saying that he had hopefully persuaded me not to go to the police, and stating that he had become involved in the case in September 2010 *"principally to try to protect [an identified person] and regrettably I have not succeeded."*
- That [named person] at no point showed any concern for the welfare of the child in his care, nor for the possible damaging effects on the child of having no resolution to the incidents in which that child was mistreated.

Many thanks.

Appendix 2: 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.

...

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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