

Decision Notice

Decision 162/2017: Kenneth Docherty and Scottish Enterprise

Contract information

Reference No: 201701258

Decision Date: 3 October 2017



Scottish Information
Commissioner

Summary

Scottish Enterprise was asked about the cancellation of a contract under the Digital Scotland Superfast Broadband programme. Scottish Enterprise said it did not hold the requested information.

Following an investigation, the Commissioner accepted that Scottish Enterprise did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information 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 19 May 2017, Mr Docherty wrote to Scottish Enterprise and commented that the procurement department at the Scottish Government had advised that, in order to cancel a specific contract for services under the Digital Scotland Superfast Broadband (DSSB) programme, the agreement of (amongst others) the programme director must be obtained. The programme director, he noted, was an employee of Scottish Enterprise. Mr Docherty requested information, as follows:
 - a) On what date did the programme director become aware of [specified personal circumstances of a named individual]?
 - b) When was the agreement to cancel the contract with [named company] sought?
 - c) From whom and on what date did the programme director receive the request for agreement to cancel the contract with [named company]?
 - d) If consent was given, on what date did the programme director give consent to the cancellation of the contract with [named company]?
2. Scottish Enterprise responded on 1 June 2017. It advised Mr Docherty that the programme director was on full time secondment to the Scottish Government and, in the context of the DSSB, acted for the Scottish Government. It confirmed, in accordance with section 17(1) of FOISA, that it did not hold the information requested. It advised Mr Docherty that he might wish to redirect his request to the Scottish Government and provided a web link.
3. On 22 June 2017, Mr Docherty wrote to Scottish Enterprise, requesting a review of its decision on the basis that – in his view – the secondment of an employee did not allow a Scottish public authority to abdicate its responsibilities under FOISA.

4. Scottish Enterprise notified Mr Docherty of the outcome of its review on 14 July 2017. It upheld the original response, with further explanation that it did not hold information relating to DSSB, a Scottish Government programme, or the more specific matters raised in his request.
5. On 18 July 2017, Mr Docherty wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Docherty stated he was dissatisfied with the outcome of Scottish Enterprise's review, again stating that the fact an employee is on secondment did not allow Scottish Enterprise to abdicate or delegate its responsibilities under FOISA.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Docherty 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.
7. On 24 August 2017, Scottish Enterprise was notified in writing that Mr Docherty had made a valid application. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 7 September 2017, Scottish Enterprise was invited to comment on this application and to answer specific questions, in particular to explain the steps it had taken to identify and locate the information requested.
9. Scottish Enterprise responded, providing submissions in support of its position that it did not hold information falling within the scope of the request under investigation.

Commissioner's analysis and findings

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

Information held by Scottish Enterprise

11. 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. The qualifications contained in section 1(6) are not applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. 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.
13. The Commissioner acknowledges the submission by Mr Docherty that an employee being on secondment does not allow an authority to abdicate its responsibilities under FOISA. However, the Commissioner must still consider whether, in the circumstances of this particular case, Scottish Enterprise can be considered to have held information falling within the scope of Mr Docherty's request.

14. In its submissions to the Commissioner, Scottish Enterprise confirmed its position that it did not hold any information that would answer the questions contained in Mr Docherty's request.
15. Scottish Enterprise explained that the programme director was on full time secondment to the Scottish Government for the purposes of delivering the DSSB programme and that Scottish Enterprise had no involvement in the programme. It provided background information on the programme and the secondment, which confirmed this. It also confirmed that it had searched its own systems and identified no information which would answer Mr Docherty's request: it provided evidence of the enquiries made.
16. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that Scottish Enterprise interpreted Mr Docherty's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held. She accepts that the request relates to matters which were the responsibility of the Scottish Ministers rather than Scottish Enterprise, the programme director being responsible to the Ministers rather than Scottish Enterprise for these matters. Given the explanations provided, she is satisfied that Scottish Enterprise did not, on receipt of the information request, hold any of the information requested by Mr Docherty.
17. In any event, if any such information had been held on Scottish Enterprise's systems, it is likely in the circumstances that it would have been held on behalf of the Scottish Ministers, for the purposes of the DSSB programme, and therefore would not have been held by Scottish Enterprise for the purposes of FOISA. In that context, Scottish Enterprise's advice that a request should be directed to the Scottish Ministers was appropriate.
18. The Commissioner is therefore satisfied that Scottish Enterprise was correct to give Mr Docherty notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope his request.

Decision

The Commissioner finds that Scottish Enterprise complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Docherty.

Appeal

Should either Mr Docherty or Scottish Enterprise 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

3 October 2017

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.

...

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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