

Decision Notice 163/2019

Meeting minutes

Applicant: The Applicant

Public authority: Dumfries and Galloway Council

Case Ref: 201900798



Scottish Information
Commissioner

Summary

The Council was asked for information about social work minutes. The Council said it did not hold the information.

The Commissioner investigated and found that the Council was correct to state that it did not hold the information, but that it failed to comply with the procedural requirements of FOISA. The Commissioner 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); 17(1) and (2) (Notice that information is not held); 19(b) (Content of certain notices); 21(10) (Review by Scottish public authority)

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 4 March 2019, the Applicant made a request for information to Dumfries and Galloway Council (the Council). The information requested was:
 - “copies of all reports, memos, letters, emails etc. concerning the 3 boys who ran away from the home run by the Council on 21st/22nd January 1991, and were assaulted in [a specified location] Dumfries.” (Request one)
 - “copies of all social work minutes considered by councillors & any other committee, concerning these young boys.” (Request two)
 - “copies of all reports etc to & from [Neal McIntosh], Chief Executive concerning my letter concerning the above.” (Request three)
2. The Council responded on 26 March 2019. It stated that, given the nature of the request, it would not be possible to provide a detailed response as the information requested constituted personal data. The Council also informed the Applicant that, in line with its Retention Policy and Schedule, it no longer held information of the age sought. The Council went on to explain that Committee Meetings are published for public inspection under the Local Government (Scotland Act) 1973 and remain accessible for six years after publication. However, it confirmed that cases of this nature are not discussed in a public forum.
3. On 20 April 2019, the Applicant wrote to the Council requesting a review of its decision. The Applicant argued that the issues were discussed at a public meeting so they could be reported in the press; consequently, he was entitled to the information.
4. The Council notified the Applicant of the outcome of its review on 7 May 2019. It repeated that minutes only remained accessible for six years after publication and that his request, which dated back to 1991, could not be fulfilled. The Council said that “Details of an individual may still be held on that [individual’s] case file, however, consent from that individual would of course be required for any type of disclosure.”

5. On 14 May 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 was dissatisfied with the outcome of the Council's review because the Council had not informed him of his rights under FOISA. He also suggested that the Council's response was misleading as he was aware that all agendas and minutes are kept in the local library (request two).

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. The Council was invited to comment on this application and to answer specific questions. These related to how it had established what information it held that fell within the Applicant's request and the Applicant's dissatisfaction that the Council had not informed him of his rights under FOISA.
8. During the investigation, the Council was asked to clarify, in respect of request two, whether it was seeking to withhold information on the basis that it was personal data or whether it was claiming that the information was not held. The Council told the Commissioner that it did not hold the information.

Commissioner's analysis and findings

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

Section 17 – Notice that information is not held

10. In correspondence with the Commissioner (24 June 2019), the Applicant confirmed that the information he was expecting to be given were copies of council minutes and agendas.
11. 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.
12. The standard of proof to determine whether a Scottish public authority holds 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.
13. The Council was asked how it had satisfied itself that it held no relevant information. The Council referred to its Retention Policy and Schedule, which sets out how long, and under which legislation, the Council hold records. As the Applicant's request related to a date outwith the Council's retention period (1991), the Council said it no longer held the information requested. The Council supplied a copy of its Record Retention Schedule (RRS)

14. The Council's RRS suggests that, if there were a committee meeting of the sort referred to by the Applicant, there would be a record retained i.e. a master record in the Archive. However, the Council confirmed that it had checked this. It confirmed the then Archivist had been through the papers held for the Social Work Service in 1991 and could find no reference to any case that may fit the Applicant's description. There are no entries in this schedule concerning social work reports.
15. The Council confirmed that its Archivist had been through the papers held for the Social Work Service in 1991 and could find no reference to any case that may fit this description.
16. The Commissioner accepts, on the balance of probabilities, that the Council complied with Part 1 of FOISA in responding to request two by stating that it held no information. The Council has identified the only place that it is likely to hold such information - its Archive - and has had a suitably qualified member of staff check there with respect the Social Work Records. The Council has also provided reasonable argument why it would no longer hold such information. The Commissioner also notes that the age of the information sought by the Applicant (almost 30 years old) and accepts that, in general terms, the age must reduce the likelihood that the requested information is retained.

Technical breaches of FOISA – sections 19 and 21

17. The Applicant was dissatisfied the Council did not inform him of his right to request a review or apply to the Commissioner. The Council submitted that, due to the nature of the request, it handled the correspondence as "business- as-usual" rather than an information request. The Commissioner is satisfied that the Applicant's request complies fully with the requirements of section 8 and is therefore a valid information request in terms of FOISA.
18. As outlined above, section 17(1) of FOISA requires that an authority give notice to an applicant where it does not hold the information requested. Under section 17(2), any such notice is subject to section 19 of FOISA. Section 19 of FOISA states that a refusal notice (including a refusal notice section 17(1)) must contain particulars –
 - (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
 - (b) about the rights of application to the authority and the Commissioner conferred by sections 21(10) and 47(1).
19. Section 21(10) of FOISA states that a Scottish public authority's response to the applicant (under section 21(5)) following a review carried out under section 21 must contain particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively.
20. The Council's response to the Applicant's requirement for review did not contain particulars about his rights of application to the Commissioner and of appeal to the Court of Session, as required by section 21(10).
21. The Commissioner finds that by failing to inform the Applicant of his rights the Council failed to comply with Part 1 of FOISA.

Decision

The Commissioner finds that Dumfries and Galloway 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 the Applicant.

The Commissioner finds that the Council was correct to tell the Applicant that it did not hold the requested information but, in failing to advise him of his rights of review and appeal, the Council failed to comply with sections 19 and 21(10) of FOISA.

The Commissioner does not require the Council to take any action in relation to these failures in response to the Applicant's application.

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.

Margaret Keyse
Head of Enforcement

5 November 2019

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.

- (2) Subsection (1) is subject to section 19.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

...

- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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