

Decision Notice



Decision 109/2013 Livingstone Terrace Residents Action Group and the
Scottish Public Service Ombudsman

Failure to carry out review

Reference No: 201300734
Decision Date: 14 June 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

This decision considers whether the Scottish Public Services Ombudsman (the SPSO) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to information request made by the Livingston Terrace Residents Action Group (LTRAG).

Background

1. On 2 February 2013, LTRAG wrote to the SPSO requesting certain specified information.
2. The SPSO responded on 4 February 2013. It appeared to process LTRAG's request as a continuation of correspondence relating an earlier Subject Access Request under the Data Protection Act 1998 (the DPA).
3. On 11 February 2013, LTRAG wrote to the SPSO, requesting a review in respect of its failure to respond to the information request of 2 February.
4. On 8 March 2013, the SPSO responded to LTRAG's correspondence of 11 February 2013. The SPSO informed LTRAG that it had been provided with all the personal data that could be released under the DPA.
5. On 19 March 2013, LTRAG wrote to the Commissioner's Office, stating that it was dissatisfied with the SPSO's failure to carry out a review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that LTRAG made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. On 17 May 2013, the SPSO was notified in writing that an application had been received from LTRAG and was invited to comment on the application.



8. The SPSO responded on 29 May 2013 and its submissions are considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. The SPSO informed the Commissioner that it considered the request made by a member of the LTRAG as a Subject Access Request in terms of the DPA. The SPSO explained that it had originally responded to this request on 29 January 2013, informing the member of LTRAG submitting the request that it considered it more appropriate to deal with the request under the DPA. This was because much of the information encompassed by the request (the SPSO file on LTRAG's complaint) constituted that individual's own personal data. With a view to protecting the individual's privacy, it considered disclosure under the DPA (which would not, unlike disclosure under FOISA, involve disclosure to the world at large) to be more beneficial to the individual concerned.
10. The SPSO submitted that it aimed to handle requests from complainants for information on their own complaint in as helpful a way as possible, and release information under the DPA unless there was a valid reason for withholding. It also confirmed that the requirement for review of 11 February 2013 was dealt with under the DPA (informally, there being no provision for a review under the DPA) rather than FOISA.
11. The Commissioner has considered the terms of the request in this case. The information requested consists of attachments to a public authority's submissions in relation to the complaint investigated by the SPSO. Although contained in the relevant complaint file, the Commissioner cannot accept that this information should be construed as the requester's personal data.
12. In reaching this conclusion, the Commissioner has taken account of guidance issued by the UK Information Commissioner on access to information contained in complaint files.¹ This guidance recognises that complaint files are complex and often consist of a mixture of information that is the complainant's personal data, third party personal data and information that is not personal data at all. The guidance provides examples of the kinds of information (such as an organisation's policies and procedures) which may not be the requester's personal data, despite being held in the complaint file.

1

http://www.ico.org.uk/~media/documents/library/Data_Protection/Practical_application/access_to_information_held_in_complaint_files.ashx

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13. It is the Commissioner's view that the information requested in this case is not the personal data of the individual referred to by the SPSO (who submitted the request on behalf of LTRAG). It may be information in which the individual (as a member of LTRAG and perhaps personally) has an interest, but the matters covered by the information could not be said to relate to that individual. The Commissioner therefore concludes that it was not appropriate for the SPSO to deal with the request under the DPA rather than FOISA.
14. Taking into account her own guidance on the validity of requests², the Commissioner is satisfied that the request of 2 February 2013 described the information LTRAG was seeking adequately, as required by section 8(1)(c) of FOISA. It also met the requirements of section 8 in being in writing and providing the applicant's name and an address for correspondence. Consequently, the Commissioner is satisfied that the request was a valid one for the purposes of section 1(1) of FOISA, to which the SPSO was therefore obliged to respond in terms of Part 1.
15. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with section 10(1) of FOISA. As the SPSO did not provide a response (in terms of FOISA) to LTRAG's request for information within 20 working days, the Commissioner finds that it failed to comply with section 10(1) of FOISA.
16. Having considered the terms of LTRAG's email to the SPSO dated 11 February 2013, the Commissioner finds that the SPSO should have dealt with it as a requirement for review made under section 20 of FOISA. She is satisfied that it meets the requirements of that section. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
17. Since the SPSO did not provide a response to LTRAG's requirement for review within 20 working days, the Commissioner finds that it failed to comply with section 21(1) of FOISA.
18. The remainder of section 21 sets out the requirements to be followed by a Scottish public authority in carrying out a review. As no review has been carried out in this case, the Commissioner finds that the SPSO failed to discharge these requirements. She now requires a review to be carried out in accordance with them.

² <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>

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DECISION

The Commissioner finds that the Scottish Public Services Ombudsman (the SPSO) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by the Livingstone Terrace Action Group (LTRAG), in particular by failing to deal with LTRAG's request for information in accordance with section 1(1) of FOISA. Consequently, she finds that the SPSO failed to respond to LTRAG's request and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA.

The Commissioner therefore requires the SPSO to undertake a review in respect of LTRAG's request for information, in line with the requirements of section 21 of FOISA, by 29 July 2013.

Appeal

Should either the Livingstone Terrace Residents Action Group or the Scottish Public Services Ombudsman wish to appeal against this decision, there is an 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.

Euan McCulloch
Deputy Head of Enforcement
14 June 2013



Appendix

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) states the name of the applicant and an address for correspondence; and
- (c) describes the information requested.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...



20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".
- (3) A requirement for review must-
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify-
 - (i) the request for information to which the requirement for review relates; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).
- (4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).
- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-
 - (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
 - (b) in a case where the authority purports under this Act-
 - (i) to comply with a request for information; or
 - (ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,

but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

...



- (9) In subsection (1), the reference to "actions" and "decisions" includes inaction and failure to reach a decision.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-

- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached.

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...