

Decision Notice

Decision 009/2018: Mr B and Aberdeenshire Council

Complaint information

Reference No: 201701892

Decision Date: 19 January 2018



Scottish Information
Commissioner

Summary

The Council was asked for information relating to a specific complaint and, if specific listed information was no longer held, the details of its removal. The Council provided some information under the Data Protection Act, stating that other information was not held.

Following investigation, the Commissioner found that the Council failed to respond to the request in terms of FOISA. He accepted, however, that the information under consideration was not held by the Council.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 17(1) and (2) (Notice that information is not held); 19 (Content of certain notices)

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 2 April 2017, Mr B made a request for information to the Council. The information requested was:
 - a) all information held by the Council in the circumstances of his “Have Your Say” reference 897897 and if any of the Council’s specifically listed file contents (copy list held by Legal Services) was no longer held
 - b) the exact date when each absent item was removed
 - c) where it was removed to, and
 - d) under whose direction.
2. On 4 May 2017, the Council responded to the above request as a Subject Access Request (SAR) under the Data Protection Act 1998 (the DPA). It provided Mr B with the information it held relative to part a) of his request, advising that third party personal data had been redacted.
3. The Council further explained that as his “Have Your Say” submission related to a previous decision issued by the Commissioner, *Decision 145/2012 Mr B and Aberdeenshire Council*¹, his request also included the information considered by the Commissioner in that decision. Noting that the previous decision had found the request to be vexatious, the Council confirmed that this information had been destroyed in line with its retention policy.
4. On 7 May 2017, Mr B wrote to the Council. He acknowledged the response in terms of the DPA and that the Council had provided a DPA reference number, and asked for a FOISA reference number for the FOISA element of his request. He noted that the Council had

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201101578.aspx>

stated some information had been destroyed, and so believed it should hold destruction records, falling within the scope of parts b) to d) of his request.

5. On 12 June 2017, Mr B wrote to the Council. He asked the Council to review its response to his request, on the grounds that partial or incomplete information had been provided and the Council had failed to respond promptly and provide details of review procedures.
6. On 13 June 2017, the Council responded to Mr B's email of 7 May 2017. It advised that it had dealt with his request of 2 April 2017 as a SAR, under the DPA only.
7. On 15 June 2017, Mr B wrote to the Council and stated that his request had not been a SAR, but a request under FOISA, with particular reference to parts b) to d) of the request.
8. The Council notified Mr B of the outcome of its review on 5 July 2017. It advised Mr B that it had conducted a review in terms of section 21 of FOISA, which upheld its original decision.
9. On 30 October 2017, Mr B wrote to the Commissioner. Mr B applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Council's review because, in his opinion, the Council failed to follow the legislation. He believed the information requested should still be held by the Council and, in particular, policy required the Council to maintain accurate records covering parts b) to d) of the request.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr B 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.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 7 December 2017, the Council was notified in writing that Mr B had made a valid application. It was invited to comment on this application and answer specific questions regarding its handling of Mr B's request.
12. The Council responded and advised the Commissioner that as Mr B's request was about a complaint he himself had submitted on the "Have Your Say" portal on its website that it had responded in terms of the DPA only. It accepted that it could have responded under FOISA, confirming that the information was not held.
13. The Council also provided explanation and submissions to the effect that it held no information falling within the scope of parts b) to d) of Mr B's request.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the relevant correspondence and submissions made to him by both Mr B and the Council. He is satisfied that no matter of relevance has been overlooked.
15. Mr B provided the Commissioner with copies of numerous documents and exchanges with the Council in relation to aspects of the case, which cannot be considered as relevant to the Council's compliance with FOISA in dealing with his request for information. The Commissioner can only comment on correspondence relating to the request under consideration (and specifically, parts b) to d)), which relate to the destruction of certain information.

16. Mr B's request for information and subsequent correspondence raise a number of technical issues surrounding the way in which the Council handled the request in terms of FOISA.
17. The Commissioner has considered Mr B's request of 2 April 2017 carefully. The Commissioner is not satisfied that there is any basis for characterising all of the information requested as Mr B's own personal data, even if parts of it may fit that description. Mr B's email of 2 April 2017 meets the requirements for a request for information under section 1(1) of FOISA. Even if that was not apparent to the Council at the outset (and the Commissioner considers it should have been), Mr B's emails of 12 and 15 June 2017, as outlined above, make it clear that he is seeking to pursue his rights under FOISA. It should have been readily apparent to the Council that it was required to respond on that basis, under FOISA. In failing to do so, it failed to comply with section 1(1) of FOISA
18. Before considering the technical issues raised by the application, the Commissioner will first of all consider the steps taken by the Council to establish what information it held to address parts b) to d) of Mr B's request.

Information held by the Council

19. 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.
20. 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, although the applicant's reasons may be relevant to the investigation of what is actually held. 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.
21. The Commissioner has taken account of the submissions provided by Mr B, in which he provides reasons why he considers the Council should hold information falling within the scope of parts b) to d) of his request.
22. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of Mr B's request. It concluded that while the information that had been held relative to Decision 145/2012 had since been disposed of, there was no recorded information held about its disposal. Given the nature of the destroyed information, there was no reason why this information should have been retained or why its disposal should have been recorded
23. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that – having acknowledged that the request was an information request under section 1(1) of FOISA – the Council interpreted that request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held. He also accepts that it was reasonable in all the circumstances for the Council to conclude that it did not hold any information falling within the scope of parts b) to d) of Mr B's request: in all the circumstances, there would appear to be no reasonable expectation that such information would be held.

Technical breaches of FOISA – sections 10, 17 19

24. As mentioned above, the Commissioner is satisfied that Mr B's request of 2 April 2017 was a valid request for the purposes of section 1(1) of FOISA, to which the Council had a duty to respond under FOISA.
25. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case. The Council, having received Mr B's request on 2 April 2017, did not respond to it in terms of FOISA and so failed to comply with section 10(1).
26. As outlined above, section 17(1) of FOISA requires that an authority must 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.
27. Section 19 of FOISA states that a refusal notice under sections 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of 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 20(1) and 47(1).
28. Taking account of all of the correspondence between the Council and Mr B, the Commissioner cannot conclude that the Council provided Mr B with proper notice that it did not hold any information falling within the scope of parts b) to d) of his request. As the Council failed to give such notice, the Commissioner finds that it failed to comply with the requirements of sections 17(1) and 19 of FOISA.
29. As the Commissioner accepts that the Council did not hold information falling within the scope of parts b) to d) of Mr B's request, he does not require the Council to take any action in this case.

Decision

The Commissioner finds that the Aberdeenshire 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 Mr B. By failing to identify the request as a request for information in terms of section 1(1) of FOISA, and by failing to provide a response which was compliant with section 10, 17 and 19 of FOISA, the Council failed to comply with Part 1.

Given that the Commissioner is satisfied that the information subject to the application is not held, the Commissioner does not require the Council to take any action regarding these failures, in response to Mr B's application.

Appeal

Should either Mr B or Aberdeenshire 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

19 January 2018

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.

...

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-

...

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-

- (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 20(1) and 47(1).

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info