

Decision Notice



Decision 148/2009 Mr James Elder and East Lothian Council

Contingency plan framework for the closure of Cockenzie House Nursing Home

Reference No: 200900655
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Summary

Mr James Elder requested from East Lothian Council (the Council) a copy of the contingency plan framework for the closure of Cockenzie House Nursing Home, as mentioned in Council minutes of 4 February 2008. The Council responded by withholding the information in terms of section 30(b)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review in which the Council disclosed to Mr Elder a business continuity plan dated November 2008, he remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Council also released an un-ratified continuity plan dated October 2007 to Mr Elder.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Elder's request for information in accordance with Part 1 of FOISA. The Council failed to advise Mr Elder that it did not hold the information he sought under section 17(1) of FOISA, failed to provide Mr Elder with advice and assistance under section 15(1) of FOISA and also failed to comply with the technical requirements of section 21(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 28 January 2009, Mr Elder emailed the Council requesting the following information:

A copy of the contingency plan framework set up at the end of 2007, as mentioned in point 2 of the Council's 4 February 2008 Cockenzie House Nursing Home Closure Planning meeting minutes.



2. The Council responded on 26 February 2009 and advised Mr Elder that it was withholding the requested information in terms of section 30(b)(i) of FOISA.
3. On 28 February 2009, Mr Elder emailed the Council requesting a review of its decision.
4. The Council notified Mr Elder of the outcome of its review on 6 April 2009. In its response, the Council provided Mr Elder with a copy of a document entitled "Adult Social Care Services Business Continuity Plan" which was dated November 2008. The Council also advised Mr Elder that this was the correct title of the document that was previously referred to as a contingency plan in Council minutes.
5. On 8 April 2009, Mr Elder wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review (he considered that the business continuity plan was not the contingency plan he had requested) and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Elder had made a request for information to a Scottish public authority and had 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 23 April 2009, the Council was notified in writing that an application had been received from Mr Elder, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to explain the apparent discrepancy between the information requested by Mr Elder (a contingency plan referred to in Council minutes of 4 February 2008) and that provided to him by the Council (business continuity plan dated November 2008).
8. The Council responded on 22 May 2009. In its response, the Council submitted that the business continuity plan provided to Mr Elder was an updated version of a business continuity plan that had been in place since 2007.
9. The Council went on to comment that, in its view, Mr Elder considered there was a separate contingency plan in 2007 that specifically dealt with the closure of Cockenzie House Nursing Home; he had previously requested a copy of this document in January 2008 and was advised at that time that individual contingency plans for residents were being prepared and that there was no overarching contingency plan for the closure of this nursing home. The Council had also undertaken additional searches to ascertain whether another contingency plan existed at the date of the February 2008 meeting and had located an un-ratified version of the "Care Home Transition from Independent to Local Authority Management".



10. The investigating officer subsequently asked the Council for evidence that supported its view that the November 2008 business continuity plan was the same document referred to in the 4 February 2008 Council minutes. The Council was also asked whether it had disclosed a copy of the un-ratified continuity plan to Mr Elder, and if not, whether it was now willing to do so.
11. In its response, the Council stated that although the business continuity plan had been in existence since 2005, it had never been referred to (within the Council) as a 'contingency plan framework'. The Council acknowledged that Mr Elder was not requesting this document and that he may have been seeking a copy of the un-ratified continuity plan that the Council had enclosed with its letter to the Commissioner dated 22 May 2009, which it was happy to disclose to Mr Elder. However, the Council asserted that it was the business continuity plan that most closely matched Mr Elder's request, and therefore it was the most appropriate document to release to him. The Council also noted that until May 2009, it was unaware that any of its officers had retained a copy of the un-ratified continuity plan.
12. In further correspondence, the Council submitted that the un-ratified continuity plan was created in October 2007 and was circulated internally as an action plan. However, the Council stated that the un-ratified continuity plan was never formally approved or adopted and it progressed no further than the draft.
13. A copy of the un-ratified continuity plan was provided to Mr Elder on 13 August 2009. Mr Elder disputed that this was the document he had requested as he had sought the specific contingency plan for Cockenzie House Nursing Home. In further discussions with the investigating officer, Mr Elder confirmed it was highly unlikely that a contingency plan framework for Cockenzie House Nursing Home had been created by the Council and that his request was in effect seeking confirmation from the Council that it had not created such a document.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions made to him by both Mr Elder and the Council and is satisfied that no matter of relevance has been overlooked.



Recent Court of Session Opinion

15. The Commissioner notes that the information request by Mr Elder was for a copy of a document. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
16. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Elder and the Council that the Council questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the Council has subsequently had with the Commissioner that the Council was unclear as to what the information requested sought.
17. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

Information not held

18. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing that it does not hold the information.
19. In his correspondence with the Commissioner, Mr Elder has expressed dissatisfaction that the Council had not formally advised him that it did not hold the contingency plan framework for Cockenzie House Nursing Home that he had requested.
20. As noted above, the Council provided alternative documents in response to Mr Elder's request, but did not advise Mr Elder that it did not hold the actual document he sought.
21. In correspondence with the Commissioner, the Council has commented that it understands Mr Elder believes there was a separate contingency plan in 2007 that specifically dealt with the closure of Cockenzie House Nursing Home. When he previously requested the information contained within this document in January 2008, the Council advised him that individual contingency plans for residents were being prepared and that there was no overarching contingency plan for the closure of this nursing home. As noted above, during the course of the investigation, Mr Elder accepted that it was highly unlikely that the Council held the contingency plan framework that he sought.



22. The Commissioner is unclear as to why the Council's response to Mr Elder's previous request in January 2008 (to the effect that there was no overarching contingency plan for the closure of the nursing home) was not re-iterated to him in the Council's letters of 26 February 2009 and 6 April 2009.
23. Having considered all the submissions made by the Council, the Commissioner is satisfied that the Council carried out adequate searches to ascertain what information was held which may satisfy Mr Elder's request and, taking account of the information provided in response to the investigating officer's additional questions, is satisfied that the Council does not hold the specific information requested by Mr Elder.
24. However, by failing to advise Mr Elder that it did not hold a copy of the contingency plan framework, the Commissioner had concluded that the Council failed to comply with the technical requirements of section 17(1) of FOISA and consequently failed to comply with Part 1 of FOISA.

Section 15 of FOISA – duty to provide advice and assistance

25. In his application to the Commissioner, Mr Elder has expressed dissatisfaction with the way in which the Council responded to his information request, in both the time taken to respond and provision of the information sought. He was particularly dissatisfied that he had made a very specific request for the contingency plan framework for Cockenzie House Nursing Home and the Council had continually "dragged its heels" in providing what it considered to be the information he sought. Mr Elder considered at no point in the process of responding to his request had the Council advised him formally that a contingency plan framework for Cockenzie House Nursing Home did not exist.
26. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 Code") in providing advice and assistance in any particular case, it is taken to have complied with this duty for the purposes of that case.
27. As noted above the Council eventually provided Mr Elder with a copy of the business continuity plan on 6 April 2009. When the Council was advised that this was not the information Mr Elder sought, it undertook a search for a relevant continuity plan and located an un-ratified continuity plan.
28. The Council commented on the problems it had encountered in identifying the document sought by Mr Elder. It stated that the business continuity plan provided to Mr Elder was an updated version of the business continuity plan that was in place in 2007 is, in effect, the same document that was in existence in 2007.



29. As noted above, the Council advised the Commissioner that it did not hold the document requested by Mr Elder and had advised him of this previously in its response to a request submitted in January 2008. The Commissioner considers that if this had been restated by the Council in its response to Mr Elder's request of 28 January 2009, much of the confusion which ensued may have been avoided.
30. It is the Commissioner's view that, in responding to Mr Elder's request, request for review and in subsequent correspondence, the Council failed to effectively communicate its position to Mr Elder. In particular, the Council did not make it clear that it did not hold the specific document that he had requested and made assumptions about the information he was seeking. The Commissioner considers that it should have been clear to the Council what Mr Elder was looking for and reasonably straightforward for it to explain why it did not hold the requested document and what other relevant information it did hold which may be of assistance to him. As such, the Commissioner concludes that the Council did not provide Mr Elder with such advice and assistance as it would have been reasonable to expect in the circumstances of this particular case. Consequently, it failed to comply with section 15 of FOISA.

Failure to comply with timescales in FOISA

31. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review subject to exceptions which are not applicable in this case.
32. Mr Elder submitted a requirement for review on 28 February 2009. The Council did not notify Mr Elder of the outcome of its review until 6 April 2009. In its response, the Council acknowledged that it had failed to respond within the timescales laid down in FOISA.
33. The Commissioner finds that the Council failed to respond to Mr Elder's requirement for review within the 20 working days allowed under section 21(1) of FOISA. In failing to comply with this timescale, the Council failed to comply with Part 1 of FOISA. Given that the Council did provide a response to Mr Elder's requirement for review, the Commissioner does not require the Council to take any further action in relation to this particular breach in response to this decision.



DECISION

The Commissioner finds that East Lothian 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 Elder.

The Commissioner finds that the Council failed to comply with the requirements of section 17(1) of FOISA by failing to inform Mr Elder that it did not hold the information requested by him.

The Commissioner finds that by failing to provide Mr Elder with adequate advice and assistance, the Council failed to comply with the requirements of section 15 of FOISA.

The Commissioner also finds that the Council failed to comply with the timescales laid down in section 21(1) of FOISA in responding to Mr Elder's requirement for review.

The Commissioner does not, however, require the Council to take any action in relation to these breaches in response to this decision.

Appeal

Should either Mr Elder or the Council 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 notice.

Kevin Dunion
Scottish Information Commissioner
21 December 2009



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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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.

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.