

Decision Notice



Decision 084/2011 Mr Tommy Kane and the Water Industry Commission for Scotland

Information relating to meetings

Reference No: 201002160
Decision Date: 12 May 2011

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Summary

Mr Tommy Kane (Mr Kane) submitted three requests to the Water Industry Commission for Scotland (WICS) requesting a range of information pertaining to meetings with named individuals and organisations. WICS disclosed some relevant information in response to one of the requests (request 3), but it notified him that it did not hold any information in relation to requests 1 and 2. After WICS's decisions were upheld upon review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, additional information falling within the scope of request 3 was identified and disclosed to Mr Kane. However, following his investigation, the Commissioner was satisfied that no further information falling within the scope of Mr Kane's requests was held by WICS.

He therefore found that WICS had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by notifying Mr Kane that it did not hold the information sought by requests 1 and 2.

The Commissioner found that WICS had partially failed to deal with request 3 in accordance with Part 1 of FOISA. Because it failed to identify and supply all relevant information to Mr Kane when it notified him of the outcome of its review, it failed to comply fully with section 1(1). However, this breach was rectified during the investigation and so the Commissioner did not require WICS to take any action in response to this decision.

However, the Commissioner expressed some concern about WICS' practice with respect to the creation and retention of records relating to its activities. He encouraged it to consider its records management practices in light of the FOISA Code of Practice on Records Management (the Section 61 Code) and to take any steps necessary to ensure that these are in line with that guidance therein.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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

Request 1

1. On 28 July 2010, Mr Kane emailed the Water Industry Commission for Scotland (WICS) requesting minutes from a liaison meeting in January 2007 and any minutes or notes taken at a further six meetings in 2006 and 2007 between the Chief Executive of WICS and named civil servants. Mr Kane provided the date on which each meeting took place.
2. WICS responded on 20 August 2010, advising Mr Kane that it held no information that fell within scope of his request.
3. On 6 September 2010, Mr Kane emailed WICS requesting a review of its decision.
4. WICS notified Mr Kane of the outcome of its review on 1 October 2010; it stated that it held no further information in relation to his request.

Request 2

5. On 28 July 2010, Mr Kane emailed WICS requesting the following:
 - a. A list of meetings with the Scottish Government concerning or involving a discussion on Project Checkers, which he indicated had been commissioned by WICS to consider options for potential models of ownership for water and wastewater services in Scotland.
 - b. Any presentations given to, and any minutes and/or notes taken, during any meeting the WICS had with the Scottish Government in relation to or discussing Project Checkers.
 - c. Any correspondence WICS had with any Scottish Government officials and/or Ministers in relation to Project Checkers.
6. WICS responded on 27 August 2010, advising Mr Kane that it did not hold the requested information.
7. On 30 August 2010, Mr Kane emailed WICS requesting a review of its decision. In particular, Mr Kane indicated that, given the significance and cost of Project Checkers, he was surprised to hear that WICS had no records of meetings and communications with the Scottish Government in relation to this.
8. WICS notified Mr Kane of the outcome of its review on 24 September 2010; it stated that it held no further information in relation to his request.



Request 3

9. On 28 July 2010, Mr Kane emailed WICS requesting the following:
 - a. A list of meetings WICS had with the Scottish Futures Trust (SFT) in the period between 10 September 2008 and 27 July 2010.
 - b. Any minutes and/or notes of any meetings which took place between any member and official of WICS and any official of SFT during the same period.
 - c. Any correspondence between any official member of WICS and any official of the SFT during the same period.
10. WICS responded on 27 August 2010. In response to part a. it advised Mr Kane that there was a reference to a relevant meeting in its minutes of December 2008, but no date was recorded. In response to parts b. and c. of his request, WICS notified Mr Kane that it held no relevant minutes or correspondence.
11. On 30 August 2010, Mr Kane emailed WICS requesting a review of its decision. He noted that the Chairman and Chief Executive of WICS had met with SFT several times and that SFT had commissioned and published an influential report in relation to the Scottish Water Industry. He commented that it would be a great surprise to many if SFT did not consult, meet, or communicate with the regulator, arguably the most influential stakeholder in the Scottish water industry.
12. WICS notified Mr Kane of the outcome of its review on 24 September 2010; it stated that it held no further information in relation to his request.
13. On 11 November 2010, Mr Kane wrote to the Commissioner, stating that he was dissatisfied with the outcome of WICS' reviews in relation to requests 1, 2 and 3, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
14. The application was validated by establishing that Mr Kane had made three requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to each of the requests. The case was then allocated to an investigating officer.

Investigation

15. On 14 December 2010, WICS was notified in writing that an application had been received from Mr Kane and was invited to comment on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions. In particular, WICS was asked to comment on the searches it had undertaken to establish whether the information requested by Mr Kane was held.



16. WICS provided a response on 17 January 2011. This explained the searches that were undertaken to identify relevant information following receipt of Mr Kane's three information requests, and provided copies of internal emails evidencing these searches. WICS confirmed that these searches had located no information falling within the scope of Mr Kane's requests, other than the reference to the meeting provided in response to his request 3.
17. WICS indicated that further searches had been undertaken prior to making its submissions to the Commissioner and that these had identified notes of the meeting referred to in WICS's response to request 3 and emails which would also fall within the scope of parts b. and c. of that request respectively. This information was subsequently disclosed to Mr Kane.
18. Other than this information, WICS maintained that it held no further information falling within the scope of Mr Kane's information requests.
19. On 22 February 2011, the investigating officer met with representatives of WICS to discuss in more detail a number of matters relevant to the Commissioner's consideration of this case. This included the searches undertaken to locate information relevant to Mr Kane's requests, its practice with respect to recording and managing information about meetings, and its general record management practices and systems.
20. Following this meeting, Mr Kane was provided with a summary of the meeting with WICS and advised that, in the investigating officer's opinion, no further information falling within the scope of his requests was held by WICS. In response Mr Kane requested that the Commissioner still come to a decision as he considered that WICS should hold further information on the matters specified in his requests, and especially in relation to Project Checkers.
21. The submissions received from both Mr Kane and WICS, insofar as relevant, will be considered full in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

22. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Kane and WICS and is satisfied that no matter of relevance has been overlooked.
23. In his application and subsequent correspondence, Mr Kane has indicated that, given the important nature of the meetings to which his requests referred, he believes WICS should hold information falling within the scope of his three requests beyond that disclosed in response to his request 3. By the end of the investigation, the only information identified was that falling within scope of request 3, and WICS maintained that it held no information falling within the scope of requests 1 and 2, and that all relevant information had been identified and supplied in response to request 3.



24. The key matter to be investigated in this case was therefore whether WICS had, at the point where it notified Mr Kane of the outcome of his review, identified and supplied to Mr Kane all information falling within the scope of his requests.

Request 3 – section 1(1) of FOISA

25. Section 1(1) of FOISA creates a general entitlement to access information held by a Scottish public authority (subject to the application of any exemptions in Part 2 of FOISA, and any other relevant provisions within Part 1).
26. In order to comply with section 1(1), an authority must therefore take steps to identify all information falling within the scope of a request, and provide it to the applicant, unless it is exempt from disclosure under Part 2 of FOISA or otherwise subject to one or more of the provisions set out in Part 1 of FOISA.
27. In relation to request 3 of Mr Kane's request, WICS advised him that a reference to a meeting taking place had been referred to in its December 2008 meeting minutes (information falling within the terms of part a. of that request). During the investigation, WICS identified and disclosed to Mr Kane a note of the meeting and email correspondence (falling within the terms of parts b. and c. of request 3). Other than this information, WICS maintained that it did not hold any further information falling within the scope of request 3.
28. By failing to identify and supply all information falling within the scope of request 3 at the point when it notified Mr Kane of the outcome of its review, WICS failed to comply with section 1(1). Given Mr Kane's concerns, however, the Commissioner must go on to consider whether the additional disclosure of information during the investigation rectified this breach by supplying all relevant information that had been overlooked, or whether further information should have been identified.

Requests 1 and 2 – section 17(1) of FOISA

29. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, then it must give the applicant notice in writing to that effect. WICS gave such notice when responding to requests 1 and 2, and it maintained during the investigation that no further information was held.
30. In order to determine whether WICS dealt with Mr Kane's requests 1 and 2 correctly by providing notice in terms of section 17(1), the Commissioner must determine whether, at the time it received Mr Kane's request, WICS held any information which would fall within the scope of those request.



Commissioner's findings

31. The Commissioner's findings on these related matters have been informed by the submissions made by WICS, and the outcome of the meeting between the investigating officer and representatives of WICS. WICS has explained that all of the information it generates is stored on a central network drive, which is categorised based on internal department or business function. Anyone in WICS can access the network drive providing they have the appropriate permissions.
32. WICS has explained the steps undertaken to search for the information requested by Mr Kane in relation to each of his requests. Whilst at WICS' office, the investigating officer was permitted to conduct searches on both the network drive and individual email accounts for the requested information. Additional searches were undertaken by WICS staff following on from the visit and the results provided to the investigating officer. These searches revealed no additional information beyond that disclosed to Mr Kane.
33. Having considered all of the submissions received, the Commissioner is satisfied that appropriate searches were undertaken by WICS on receipt of each request. He accepts that no further information, beyond that located and provided to Mr Kane in response to request 3, is held by WICS.
34. The Commissioner shares Mr Kane's surprise on finding that WICS held no records falling within the scope of requests 1 and 2, and that only very limited documentation was found falling within the scope of his request 3. He found some explanation of the lack of documentation within the following key points regarding WICS practice that were recorded following the meeting between the investigating officer and WICS representatives:
 - WICS' Directors do not record information as a result of meetings or conversations and take a mental note. If actions are required, the Directors will advise the appropriate staff verbally.
 - WICS' culture is one in which action points from a meeting may be noted (on paper), but little else. Once these action points are passed on to the appropriate member of staff, then any recorded information is destroyed.
 - If the meeting is held with an external organisation, the chair of the meeting is responsible for the minute.
 - The majority of meetings are arranged by telephone and the arrangements for the meeting are recorded in the individual's electronic calendar. These calendar entries are deleted once the expenses for the time period concerned are received.
 - In 2010, new server hardware was installed which resulted in a radical overhaul of the information held by WICS' staff, with information being destroyed that no longer had use and tight restrictions being placed on the amount of information individuals can hold on in their emails; so information is routinely deleted.



- WICS' staff are located in one large room; consequently it is not difficult to check on a face-to-face basis whether anyone holds relevant information.
35. Notwithstanding his surprise at the practice followed by WICS, having considered all the above, the Commissioner is satisfied that, by the end of the investigation, WICS had conducted thorough searches and does not hold any further information in relation to request 3. However, as noted above, since WICS identified and disclosed a meeting note and email correspondence falling within the scope of request 3 after it had issued its review response to Mr Kane, the Commissioner has concluded that WICS failed to comply fully with section 1(1) of FOISA. Since this breach was rectified during the investigation, the Commissioner requires no further action to be taken in response to this decision.
36. The Commissioner is also satisfied that, by the end of the investigation, WICS had conducted thorough searches for the information sought by each request. On the balance of probabilities, the Commissioner has concluded that WICS do not hold any information that falls within the scope of Mr Kane's requests 1 and 2. Consequently the Commissioner is satisfied that WICS was correct to give Mr Kane notice in terms of section 17(1) of FOISA in response to his requests 1 and 2.

Records management responsibilities

37. As noted above, the Commissioner has been surprised in this case to learn that WICS does not routinely record and retain information about its meetings, and the decisions and actions agreed at these. It appears that a significant proportion of its work is undertaken on a verbal basis. The Commissioner considers this to be highly unusual practice, which appears to have the consequence that it would be very difficult for it to evidence and document its work or decision making, for either internal purposes or external scrutiny.
38. As stated in *Decision 073/2006 Mr Connolly and the University of Glasgow*, although FOISA gives a person the right to receive information if it is held by the authority, the Commissioner does not have the power to require an authority to reorder its system of records management in a way that ensures information is held.
39. However, in this case, the Commissioner considers it appropriate to note the terms of the FOISA Code of Practice on Records Management (the Section 61 Code)¹, issued by the Scottish Ministers. This contains the following guidance under the heading, **Active records management:**

"Record Creation

8.1 Each business area of the authority should have in place adequate arrangements for documenting its activities. These arrangements should take into account the legislative and regulatory environments in which the authority operates.

8.2 Records of a business activity should be complete and accurate enough to allow current employees and their successors to fulfil their responsibilities to:

¹ <http://www.scotland.gov.uk/Resource/Doc/1066/0003775.pdf>



- facilitate an audit or examination of the business by anyone so authorised;
- protect the legal and other rights of the authority, its clients and any other person affected by its actions;
- provide proof of the authenticity of the records so that the evidence derived from them is shown to be credible and authoritative; and
- provide a true and accurate record of the principal policies and activities of the authority for ongoing public accountability and interest, as well as for the historical interest of future generations, including historians.”

8.3 Records created by the authority should be arranged in a record keeping structure (or structures) that will enable it to obtain the maximum benefit from the quick and easy retrieval of information.”

40. The findings in this case have caused the Commissioner to be concerned about WICS’s compliance with the Section 61 Code, and in particular the provisions regarding record creation. He would highlight that this document states on page 7 that public authorities should note that, “If an authority fails to have regard to the Code, they may be failing in their duty under [FOISA]”.
41. The Commissioner would encourage WICS to consider its general records management practices in light of the Section 61 Code and to take any steps necessary to ensure that its procedures and practices are in line with the guidance therein.

DECISION

The Commissioner finds that the Water Industry Commission for Scotland (WICS) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to information requests 1 and 2 (set out in paragraphs 1 and 5 respectively) made by Mr Tommy Kane. The Commissioner finds that WICS complied with Part 1 of FOISA by advising Mr Kane in terms of section 17(1) of FOISA that it did not hold the requested information.

However, the Commissioner finds that WICS failed to comply fully with Part 1 of FOISA when responding to request 3 made by Mr Kane. WICS failed to identify and supply to Mr Kane all relevant information when it notified him of the outcome of his review, and in so doing it failed to comply with Part 1 and section 1(1) of FOISA. However, he found no evidence that any further information was held.

Given that WICS disclosed the additional information during the investigation, and the Commissioner was satisfied that no further information was held by WICS, he does not require WICS to take any further action in relation to this particular breach in response to this decision.



Appeal

Should either Mr Tommy Kane or the Water Industry Commissioner for Scotland 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
12 May 2011



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.

...

- (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.

...