

Decision Notice

Decision 043/2017: Mr Campbell Martin and North Ayrshire Council

North Ayrshire Council Schools PPP Project

Reference No: 201602324

Decision Date: 22 March 2017



Scottish Information
Commissioner

Summary

North Ayrshire Council (the Council) was asked about its Schools PPP (“Public Private Partnership”) Project and/or bidding process, including correspondence to or from Strathclyde Police, the Crown Office and Procurator Fiscal Service (COPFS), and two named MSPs. The Council responded that it did not hold the information, but at review disclosed some information and confirmed that it had now supplied all the information falling within the request.

The Commissioner accepted that the Council had conducted adequate searches and did hold not any more information falling within the scope of the request.

Relevant statutory provisions

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

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 20 October 2016, Mr Martin made a request for information to the Council. The information requested was all correspondence (hard copy or digital) in relation to the Council’s Schools PPP Project and/or bidding process between the Council and:
 - Strathclyde Police
 - the Crown Office and Procurator Fiscal Service (COPFS)
 - Irene Oldfather MSP
 - Allan Wilson MSP.
2. The Council responded on 25 October 2016. In terms of section 17 of FOISA, it gave notice that it did not hold the information covered by Mr Martin’s request.
3. On 31 October 2016, Mr Martin wrote to the Council requesting a review of its decision. He believed it was:

...highly unlikely that Strathclyde Police carried out an investigation into the North Ayrshire Council Schools PPP Project but, at no time, conducted any correspondence – hard copy or digital – with council officials or elected members. This would mean Strathclyde Police carried out an investigation without writing or emailing council representatives to arrange interviews or seek clarification on any issues, including being provided with documentation to establish the council's position. Similarly, it would seem unlikely that a local authority could be investigated by a police force, at the request of the Crown Office, and yet no written contact – hard copy or digital – was made with the council to indicate an investigation had begun or had been concluded.

4. Mr Martin referred to an email sent by a named Council officer, which confirmed that the Council had sent a “statement” to Irene Oldfather MSP on 24 February 2006, in relation to the Police investigation into the Schools PPP project.
5. Mr Martin concluded his request for review by asking the Council to indicate why and when the Council had destroyed or otherwise disposed of the documents, if it had once held information covered by his request.
6. The Council asked Mr Martin if he could provide a copy of the email to Irene Oldfather MSP referred to in his request for review, so the Council could check if it held that information. Mr Martin provided a copy.
7. The Council notified Mr Martin of the outcome of its review on 21 November 2016. The Council acknowledged that it had not responded to Mr Martin’s request correctly and confirmed that it held information covered by his request. It provided information to Mr Martin, with personal data redacted in terms of section 38 of FOISA. The Council stated it had now supplied all the information it held that fell within his request. It also stated that it was impossible to know whether or not the Council held or did not hold any other documentation which had now been destroyed or otherwise disposed of.
8. On 22 December 2016, Mr Martin applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Martin was dissatisfied with the outcome of the Council’s review because he was concerned about the limited amount of information which had been located, expecting more information to be held.
9. Mr Martin did not challenge the Council’s decision to withhold personal data, and therefore the Commissioner will not consider whether the Council complied with Part 1 of FOISA in this respect.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr Martin made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her 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. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner’s analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr Martin and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 1(1) of FOISA – General entitlement

13. 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 in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.

14. 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. She will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in this case, more information) is not held.
15. Mr Martin explained that the documentation he requested related to legal matters and to a £138m contract of the Council. He was concerned at the Council's record-keeping and the limited number of documents the Council had supplied. He found it "very hard to believe" that the Council holds no correspondence with the former Strathclyde Police or COPFS in relation to a police investigation carried out into the Schools PPP project. He noted that in response to separate information requests, both Police Scotland and COPFS have confirmed the existence of such correspondence.
16. The Council submitted that it had disclosed all information it held in relation to Mr Martin's request.
17. The Council was asked to describe the searches it had undertaken and explain why these would have been likely to locate any information covered by the request.
18. The Council responded that many searches (of both electronic and paper-based information) were carried out in the Education Department and the Chief Executive's Department (the parts of the Council which would have been involved in the matter to which Mr Martin's request referred). The searches were carried out when the Council was reviewing its response to Mr Martin's request.
19. The Council explained that the Council officers who dealt with the PPP contracts at the time (some 12 to 14 years ago) were no longer employed by the Council. The Council asked two employees within its Education Department to check their records, as those employees were in the department at that time of the contract, but no information was found that fell within Mr Martin's request.
20. The Council searched its electronic and paper records and its "records store". Searches were carried out by the Council against the name of the previous [Education] Director, the Chief Executive's office and the previous Chief Executive and the Council's former Head of Legal Services. Although the Council holds many records relating to the PPP contract, none of the information required by Mr Martin was retrieved by these searches, and the Council found nothing to indicate that anything had been deleted.
21. The Council suggested that COPFS may not enter into correspondence about an investigation with those who may or may not subsequently be charged. It stated that the only reference it held to that investigation is a single letter received from the Procurator Fiscal confirming that no action would be taken. (This letter was disclosed to Mr Martin.)
22. The Council was asked whether its searches would have retrieved information relating to Ms Oldfather MSP and Mr Wilson MSP. It was asked to comment on Mr Martin's suggestion that the Council holds information that it supplied to Ms Oldfather ahead of a Scottish Parliamentary debate on 1 March 2006. The Council was asked to confirm whether its searches would have been likely to locate such information, if held.
23. The Council responded that the information released to Mr Martin at the review stage included copies of its correspondence with MSPs regarding the PPP process. These letters were stored in the Council's records store in a file entitled "MSP correspondence re PPP schools". The Council confirmed that the searches carried out electronically would have

included correspondence with Ms Oldfather. The Council held another file relating to the Police investigation, but stated that most of the documentation in it was letters from Mr Martin, press announcements and transcripts of debates in the Scottish Parliament and radio interviews. The only matter relating to Ms Oldfather was a letter from Mr Martin (which it provided to the Commissioner) and a transcript of a parliamentary debate. The Council offered to release this information if Mr Martin wished.

24. The letter from Mr Martin to the Council, referred to above, includes an extract of the statement which he understands the Council gave to Ms Oldfather. The Council commented that it “has no way of knowing whether that was her statement, although that will be a matter of public record, or whether that was the exact statement which [Mr Martin] alleges was given to her by the Council...”
25. As Mr Martin raised concerns about the Council’s records management in his application to the Commissioner, the Council was asked if it had any policy or procedure specifying recording practices for the type of information covered by his request, and specifying how long certain types of information should be retained.
26. The Council supplied a copy of its retention schedule, explaining that it was formulated in 2010 and was being reviewed at present. The Council explained that the records for the Schools PPP are held at the Council’s records store and the Education Service had originally instructed that they should be held for a period of 30 years.
27. Having considered all the relevant submissions, the Commissioner accepts that the Council has taken adequate and proportionate steps to establish whether it held any information that fell within the scope of Mr Martin’s request. The Council appears to have used reasonable search criteria and has focused its searches on the locations where relevant information was most likely to be held, i.e. the files containing information about the PPP contract and information within the Education and Chief Executive’s Departments of the Council. The searches carried out when the Council responded to Mr Martin’s request for review successfully located information which fell within his request, showing that the searches were capable of locating and retrieving relevant information.
28. The Commissioner has also taken into account the Council’s statement that no action was taken (by COPFS) in respect of any allegation relating to the PPP contract. This makes it less likely that the Council would have retained any of the correspondence requested by Mr Martin, if it existed.
29. Mr Martin raised concerns about the Council’s records management, because it was unable to say whether information relating to his request had been destroyed or deleted. The website of the National Registers of Scotland shows¹ that the Council has complied with the compulsory elements of the Model Records Management Plan. This includes having in place a records management policy and a retention schedule.
30. The Council explained that its records retention schedule was introduced several years after the events to which Mr Martin’s request relates. The retention schedule shows how long the Council now retains certain types of documents, but it is not obvious whether the information requested by Mr Martin would fall into any of the categories listed in the schedule. Therefore, although the Council has demonstrated it has the required records management

¹ <https://www.nrscotland.gov.uk/files/record-keeping/public-records-act/keepers-assessment-report-north-ayrshire.pdf>

procedures and policies in place, these do not assist in determining whether the information covered by Mr Martin's request was once held but has been destroyed.

31. Mr Martin has submitted that other public authorities may still hold relevant information. However, the question for the Commissioner is whether the Council holds the information covered by his request. While it may be apparent from information held elsewhere that the Council corresponded with the parties named in his request about the PPP contract, this does not prove that the Council now holds any relevant information.
32. The Commissioner is satisfied on the balance of probabilities that the Council has now disclosed to Mr Martin all the information it holds which falls within the scope of his request. She finds that while the Council was wrong to give Mr Martin notice that it did not hold information covered by his request, it rectified this when reviewing its response to his request and therefore complied with Part 1 of FOISA in responding to his request.
33. As stated in many previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA or the Environmental Information (Scotland) Regulations 2004 in responding to a request. The Commissioner cannot comment on whether a public authority should retain, record or hold more information about a particular event or process.

Decision

The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Martin.

Appeal

Should either Mr Martin 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

22 March 2017

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.

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