

Decision Notice

Decision 104/2019: Ms B and Dumfries and Galloway Council

Employment dispute

Reference No: 201900140

Decision Date: 8 July 2019



Scottish Information
Commissioner

Summary

The Council was asked about its handling of an employment dispute with a named person. The Council maintained that no information was held.

The Commissioner investigated and was satisfied that, at the time it received the information request, the Council did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information 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 3 May 2018, Ms B made a request for information to Dumfries and Galloway Council (the Council). Ms B asked for the following information regarding the Council's employment dispute with a named constituent:
 - (i) Policy covering practice in schools within the Council area.
 - (ii) Disciplinary Procedure covering employees of the Council within schools within the Council area.
 - (iii) The budget and actual cost so far incurred by the Council by the named constituent's employment case.
 - (iv) The number of Council officers who have been involved in the case against the named constituent and how many of them have since left the Council or retired from the Council.
 - (v) The cost to the Council of external consultants and special appointees relevant to the named constituent's employment case.
 - (vi) The cost to the Council of legal representation relevant to the named constituent's employment case.
 - (vii) The role of elected councillors in employment dispute cases.
2. On 14 May 2018, the Council asked Ms B for clarification of part (i) of her request and she provided this on 25 May 2018.
3. The Council responded to the request on 19 June 2018. In this response, the Council provided Ms B with a policy which addressed parts (i) and (ii) of her information request and it provided an explanation with regard to part (vii) of her request. The Council withheld information falling within the scope of parts (iii) to (vi) of her request on the basis that it comprised personal data which was exempt from disclosure under section 38(1)(b) (Personal information) of FOISA.

4. On 16 July 2018, Ms B wrote to the Council stating that she did not accept that the information covered by parts (iii) to (vi) of her request was personal data. Ms B also made a further information request which does not form part of the Commissioner's investigation.
5. The Council provided Ms B with an amended response to her request, arguing that the information falling within the scope of parts (iii) to (vi) of her request was now being withheld under section 36(1) (Confidentiality) of FOISA, as it considered the information to be legally privileged.
6. On 15 September 2018, Ms B wrote to the Council requesting a review of its decision to withhold information from her under section 36(1) of FOISA. Ms B argued that the information she was seeking related to the cost to the public purse of the advice and documents rather than the legal advice itself. She asked the Council to provide her with the information she had requested.
7. The Council notified Ms B of the outcome of its review on 26 September 2018. The Council accepted, following the clarification provided by Ms B on 15 September 2018, that it was incorrect to apply section 36(1) and gave Ms B notice, under section 17(1) of FOISA, that it did not hold information falling under parts (iii) to (vi) of her information request.
8. On 22 January 2019, Ms B wrote to the Commissioner. Ms B applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms B stated she was dissatisfied with the outcome of the Council's review because she disagreed that the Council did not hold the information.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Ms 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.
10. On 7 February 2019, the Council was notified in writing that Ms B had made a valid application and the case was allocated to an investigating officer.
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 to answer specific questions. In particular, the Council was asked for details of the searches and enquiries it had carried out in order to identify and locate relevant information.

Commissioner's analysis and findings

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

Is relevant information held by the Council?

13. 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.

14. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. 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.
15. During the investigation, the Council provided Ms B with further information relating to parts (iii) to (vi) of her information request, namely:
 - (iii) The Council explained that the only external costs it holds are those related to the cost of legal advice (asked for in part (vi) of the request).
 - (iv) The Council explained that it does not hold information that would enable it to identify all of the officers who have worked on the employment dispute, but it provided Ms B with the information it did hold, which related to the number of principal officers involved.
 - (v) The Council reiterated that it does not hold any information falling under part (v) of the request (as no external consultants were recruited).
 - (vi) The Council provided Ms B with details of the legal costs it incurred, whilst noting that it did not hold this information at the time of her request.
16. Ms B was not satisfied with this disclosure and she asked the Commissioner to consider whether the Council did hold information at the time of her request (3 May 2018).
17. The Commissioner notes that Ms B was particularly concerned with part (vi) of her request, and whether such costs were held by the Council at the time of her request. However, as Ms B expressed dissatisfaction with the Council's responses to parts (iii) to (vi) of her information request in her application, the Commissioner will consider each of these requests below.

Part (iii) of the information request

18. As noted above, in part (iii) of Ms B's information request she asked for:
 - (iii) The budget and actual cost so far incurred by the Council by the named constituent's employment case.
19. The Council explained that it does not have a budget for any particular employment case. It does not time record internally for these cases and it has no way of ascertaining internal costs. The Council noted that the only financial records that are kept for such cases are for external representation and advice; and any court or tribunal outlays. It submitted that the only information it could provide was restricted solely to external legal advice, which is covered by part (vi) of Ms B's information request, and which was not held at the time of her request.
20. The Council explained that, once the case was raised at the Employment Tribunal, the vast majority of input has been external as it does not have internal lawyers who carry out Tribunal representation.
21. The Commissioner has considered the submissions put forward by the Council and he is satisfied that it cannot identify all of the costs incurred it has incurred by this case as it is unable to determine how much time each member of staff has spent working on the case. The Commissioner accepts that the Council does not ascribe a specific budget code or budget to individual employment cases. As a result, the Commissioner accepts that the Council cannot establish the total cost of its handling of the employment case. The

Commissioner is satisfied that the Council was correct to give Ms B notice, under section 17(1) of FOISA, that it did not hold the information requested in part (iii) of her information request.

Part (iv) of the information request

22. As noted above, in part (iv) of Ms B's information request she asked for:

(iv) The number of Council officers who have been involved in the case against the named constituent and how many of them have since left the Council or retired from the Council.

23. The Council submitted that it does not hold any information that would enable it to determine the number of Council officers involved in the employment case. The Council submitted that it does not record every staff member's involvement in a case, nor can it identify those staff who may have been involved but have subsequently retired.

24. The Council explained that the officer who was principally involved in the investigation had retired before Ms B had made her information request and that emails of that officer had been deleted, as is normal practice. The Council reiterated that there is no time-recording by individuals in departments against any legal case that would be able to provide information on who else might have been involved.

25. The Council submitted that it does hold information on those officers who have principally been involved since these are included in records, and it noted that Ms B's constituent has a copy of these papers. The Council noted that it can also identify the number of officers who have retired from those that have been principally involved, but it does not hold any information on who has retired that might have been involved in any way.

26. The Commissioner has considered the submissions made by the Council and he is satisfied that Council officers do not record their involvement in any specific employment case and that there is no way for the Council to determine the total number of staff who may have been involved in the specified employment case.

27. The Commissioner notes that, during the investigation, the Council provided Ms B with the information it does hold, on the number of Council officers who were principally involved in the case (and of those, the number who have since retired).

28. In the circumstances, the Commissioner is satisfied that the Council was correct to give Ms B notice, under section 17(1) of FOISA, that it did not hold the information requested in part (iv) of her information request.

Part (v) of the information request

29. As noted above, in part (v) of Ms B's information request she asked for:

(v) The cost to the Council of external consultants and special appointees relevant to the named constituent's employment case.

30. The Council submitted that, from the records it holds, it has not found any mention of any external consultants or special appointments during its case against the named constituent, other than those covered by part (vi) of her request.

31. The Council maintained its view that it does not hold this information.

32. The Commissioner notes that the Council has stated that, when it initially applied section 36(1) to part (v) of Ms B's information request, it did so as it considered that confirming

whether or not any external consultants had been engaged would be prejudicial to its legal case. The Commissioner would stress that the exemption contained in section 36(1) of FOISA cannot be applied to information that is not held.

33. The Commissioner has considered the arguments put forward by the Council and he accepts that the Council does not hold any record of an external consultant or special appointment during its case against the named constituent.
34. The Commissioner finds that the Council was correct to give Ms B notice, under section 17(1) of FOISA, that it did not hold information falling within the scope of part (v) of her information request.

Part (vi) of the information request

35. As noted above, in part (vi) of Ms B's information request she asked for:
 - (vi) The cost to the Council of legal representation relevant to the named constituent's employment case.
36. The Council explained that, at the time it received Ms B's information request, the legal costs it had incurred were not fully known or held. The Council notes that, while the constituent may have considered the matter settled, at the time of Ms B's information request, the Council had already decided to pursue a formal procedural reconsideration of the case by the Tribunal Judge and if this was unsuccessful to proceed to ask for an appeal.
37. The Council submitted that, as the case was still ongoing at the time of Ms B's request and her requirement for review, the costs of external legal representation were not yet known or fully billed
38. During the investigation, the Council notified the Commissioner that it now held an accurate note of the costs up to 3 May 2018 and, given the passage of time, it was prepared to disclose this to Ms B. The Council subsequently provided Ms B with details of these costs on 23 May 2019.
39. The Commissioner has reviewed the chronology of the Council's employment case with Ms B's named constituent and he notes that, while the Employment Tribunal promulgated its decision on a particular date, the Council made an application for reconsideration of the judgment on a later specified date. The Council has also submitted that, if this application for a reconsideration of the judgement was unsuccessful, it was intending to seek an appeal. In the circumstances, the Commissioner is satisfied that, at the time it received Ms B's information request (3 May 2018), the Council's legal requirements were still ongoing and he accepts that the total costs of its legal fees were not then known.
40. Given the submissions received from the Council, the Commissioner is satisfied that the Council took adequate steps to establish what information was held and that it did not hold the information Ms B had requested, at the time of her information request or requirement for review. The Council was therefore correct to give Ms B notice, in terms of section 17(1) of FOISA, that it did not hold information falling within the scope of part (vi) of her information request.

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 Ms B.

Appeal

Should either Ms B or Dumfries and Galloway 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

8 July 2019

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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