

Decision Notice 146/2019

Further Education College provision for profoundly disabled

Applicant

Public authority: The Scottish Ministers

Case Ref: 201901214



Scottish Information
Commissioner

Summary

The Ministers were asked about the arrangements for accessing Further Education college provision for the profoundly disabled in England or in Scotland. The Ministers said they did not hold the information.

The Commissioner investigated and found that the Ministers were correct to state that they did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17 (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 13 May 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant requested details of accessing Further Education (FE) college provision for profoundly disabled in England or in Scotland, alongside related documentation, including policies, procedures, guidelines, criteria relating to this, and how to access funding.
2. The Ministers responded on 16 May 2019. They explained that Scotland does not have any specialist college targeted solely at learners with additional support needs, and it is possible for students residing in Scotland to be funded to study at specialist residential colleges based in England. The Ministers suggested that any Scottish student wishing to study in England should contact their local authority to discuss funding, as funding is at the discretion of individual local authorities.
3. The Ministers went on to explain about the Independent Living Fund (ILF) Transition Fund, Self-directed Support and provide details for Lead Scotland which produces a guide to the charitable trusts, some of which can be used for educational purposes. The Ministers also provided more information about the Scottish Funding and Higher Education Funding Council's (SFC) Access and Inclusion fund.
4. On 6 July 2019, the Applicant wrote to the Ministers requesting a review of their decision on the basis that he had requested all documentation on accessing FE colleges in England (the review made no reference to Scotland), but that he had received no information.
5. The Ministers notified the Applicant of the outcome of their review on 16 July 2019. They apologised that they had not treated the Applicant's email of 13 May as a request for information under FOISA. Providing their review response, the Ministers explained that they did not hold the information requested and suggested the Applicant contact the SFC in respect for documentation relating to FE provision in Scotland and/or make a request to the Department for Education (a ministerial department of the UK Government), under the Freedom of Information Act 2000 (FOIA). The Ministers explained why they did not hold the information. They also explained that local authorities may have provision for funding for

Scottish students who wish to study at a specialist further education institution in England, but acknowledged that the Applicant had already requested this from his local Council.

6. On 17 July 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The applicant stated he was dissatisfied with the outcome of the Ministers' review because he believed information was held.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions. These related to how the Ministers had established that they held no information that fell within the Applicant's request.

Commissioner's analysis and findings

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

Section 17 – Notice that information is not held

10. 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 here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
11. The Ministers explained that initially they had provided the Applicant with advice about FE student support in Scotland, including that available to disabled students. To provide the Applicant with as much assistance as possible, they also asked the SFC for advice on potential alternative sources of support, specifically for those with profound and complex needs, and included these suggestions in their initial response to the Applicant.
12. The Ministers explained that searches were conducted of the Scottish Government's electronic management system (eRDM), using different keyword combinations, to identify any information held within the scope of the request. These searches returned numerous documents, but the Ministers submitted that none of these related to documents, policies, procedures, guidelines, criteria on how to access funding for FE college provision for the profoundly disabled in England or anywhere else in Scotland. The information was therefore not within scope of the Applicant's request. The Ministers provided the Commissioner with a record of the searches carried out, including screenshots of the results.
13. For completeness, a staff member within the College Policy Team with responsibility for FE Student Support was asked to search their inbox for any information relating to this request. No information was identified.

14. In their submissions, the Ministers explained that FE courses in Scotland are funded by the SFC and that, under the Further and Higher Education (Scotland) Act 2005, the SFC may only fund institutions listed in that Act. The SFC is responsible for providing funding to the college sector in Scotland to support access and inclusion to help colleges achieve a parity of outcomes for their students. The SFC is responsible for the development of these strategies or any policies, procedures, guidelines and criteria relating to this.
15. The Ministers also commented that they are not directly responsible for funding for FE college provision for profoundly disabled students in England. The Department for Education, as a ministerial department of the UK Government, is responsible for such provision.
16. In his application, the Applicant specifically questioned whether the Ministers held documentation relating to the discretionary power of local authorities to fund access to FE in England for disabled students.
17. The Ministers explained that local authorities in Scotland may offer funding for FE provision for the profoundly disabled, but this would derive from discretionary local authority powers, and would therefore be entirely at the individual local authority's discretion, not the Scottish Government's. The Ministers confirmed that they did not hold information on the funding local authorities may offer where there is no statutory power or administrative agreement to report on any such funding.
18. The Ministers also explained that, while the Ministers have a College Policy Unit, neither that unit, nor any other unit within the Scottish Government, has the specific responsibility of funding FE college provision for profoundly disabled students.
19. Consequently, the Ministers were not responsible for any policies, procedures, guidelines, or eligibility criteria in relation to this, and therefore did not hold any information falling within scope of this request. Again, the Ministers highlighted that the SFC is responsible for providing funding to the college sector in Scotland to support access and inclusion. The Ministers said that they were confident that, through an extensive search of their corporate record, they do not hold any information falling within scope of the request.

The Commissioner's view

20. 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. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
21. Having considered all the relevant submissions, the Commissioner accepts that the Ministers have taken adequate and proportionate steps to establish if they held information that fell within the Applicant's request. In reaching this conclusion, the Commissioner has taken into account the following factors.
22. The Ministers conducted searches to establish if they held any information. These searches are reasonable and proportionate – they use search terms that would reasonably be expected to locate (in the eRDM) any information relevant to the request – and likely to identify relevant information. The Ministers evidenced these searches to the Commissioner.
23. The Ministers checked with staff with experience and knowledge of the subject, reducing the likelihood of searches being faulty or relevant information being overlooked.

24. The Ministers identified other bodies that may hold the requested information, and explained why these others were more likely (due to statutory responsibilities) to hold the requested information: namely, the SFC, local authorities, and the (UK Government) Department for Education.
25. The Commissioner can appreciate the Applicant's frustration in trying to obtain information on an important subject, but the Commissioner accepts that the Ministers were correct to inform the Applicant that they held no information.

Decision

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

The Ministers were correct to notify the Applicant that they did not hold the requested information.

Appeal

Should either the Applicant or the Ministers 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

1 October 2019

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.

...

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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