

Decision Notice 003/2021

Pay gap analysis by occupation

Applicant: The Applicant

Public authority: South Lanarkshire Council

Case Ref: 20200341



Scottish Information
Commissioner

Summary

The Council was asked for information on pay gap analysis, broken down by occupation, for the years 2014 to 2019.

The Council stated it did not hold the information requested and that responding would require the creation of new data.

The Commissioner investigated and found that the Council complied with FOISA in responding to the request. He accepted that 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) (Notice that information is not held); 73 (Interpretation) (definition of “information”)

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 12 December 2019, the Applicant made a request for information to South Lanarkshire Council (the Council). The information requested was:
In the report found at [link¹ to the Council's website provided] called “Mainstreaming equalities progress report 2017-2019”. On page 30 “pay gap analysis” table 2.1 lay[s] out the pay gap between grades but not by occupation like on page 34 Occupational Segregation. I would like to request under FOI the information contained in page 30 table 2.1 but by the occupations as laid out in page 34 for years 2014 to 2019.
2. The Council responded on 16 January 2020, apologising for the delay. It stated it had provided the Applicant with the information it held relating to pay gap information on 12 December 2019, which he had attached to his request (namely the report accessible via the link above). The Council gave notice, in terms of section 17(1) (Notice that information is not held) of FOISA, that it did not hold the information in the manner requested.
3. On 24 January 2020, the Applicant wrote to the Council, requesting a review of its decision as he believed the Council held the data, given that it was published in the report referred to in his request. In his view, the database just needed queried differently. He asked the Council to query the database to return the information requested.
4. The Council notified the Applicant of the outcome of its review on 21 February 2020, fully upholding its original decision. It refuted the Applicant's assertion that using different filters on existing data would produce the information requested. It explained that officers would require to physically analyse the data to identify the information requested and create a wholly new report.

1

https://www.southlanarkshire.gov.uk/downloads/file/12854/mainstreaming_equalities_progress_report_2017_-_2019

5. Noting that the request sought data for the years 2014 to 2019, the Council explained that it only held the data used for the mainstream report for 2018/19, and so only this could be the subject of such analysis. While the information for previous years could be sought from the Council's electronic HR system, this would not reflect the figures originally published due to personnel changes over time, and so the reports would potentially produce different results.
6. Acknowledging that FOISA extended to the provision of information which could be obtained by collating or combining existing information, the Council stated that responding to the request in this case would involve the creation of a wholly new report, requiring officers to interrogate and analyse information. It did not consider it was obliged to do this under FOISA, and so upheld its decision to apply section 17(1).
7. On 5 March 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he believed the Council held the information but was refusing to provide it.

Investigation

8. 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.
9. On 19 March 2020, the Council was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
10. 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. These focused on the Council's justification for stating that it did not hold the information requested.

Commissioner's analysis and findings

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

Whether the Council held the information requested

12. 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.
13. 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.

14. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in recorded form (for example, a person's intentions or opinions).
15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches and other checks carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
16. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and his application, in which he provides reasons as to why he considers the Council holds the information requested.

The Council's submissions

17. In its submissions to the Commissioner, the Council stated it had interpreted the request as seeking the data used to produce the published reports, which was held at the time they were prepared, and not the current information now held by the Council relevant to the specified periods.
18. The Council explained that, to prepare the mainstream reports for each year, it had to extract a "snapshot" of raw data from "People Connect" (its HR and pay system), and this was used, at the relevant times, to produce the data published in these reports. Once the mainstream report was published, there was no requirement to retain the original data extract, which was subsequently destroyed. The Council stated that, as the system was "live", the data extracted reflected the information held only at that point in time, and so it would be unable to recreate the original reports at a later date, to consider whether the equivalent information requested by the Applicant could be provided.
19. The Council submitted that a search of its local area network path had been completed, and confirmed it no longer held the data extracts used to produce the published information for the years 2014 to 2017/18. It explained that the reports were saved in one area of its network and worked on solely by one member of staff, who had confirmed the reports covering this timeframe were not saved locally. As the original reports were no longer held, no further breakdown of the information for this period could be provided.
20. The Council explained that "People Connect" was a live payroll system which held all personal and pay information, updated to reflect any changes. Any data extracted from this system would show the current information held at that point in time, meaning that the same data extracted two days apart could produce different results. As job titles, grades and other employee information would have changed over time, including movements in structures, this would affect any data now extracted for the relevant periods, which would not be the same as that previously used for the published mainstream reports. The Council confirmed it was therefore not possible to recreate data extracts identical to those used to produce the published reports.

21. The Council confirmed it still held, on its network, the data extract used for the mainstream report for 2018/19, as this had not been destroyed at the date of receipt of the Applicant's request. However, it took the view that analysing this data, in order to provide the information requested, would require such skill and judgement that it would effectively be creating a new record (which FOISA did not require it to do), as opposed to the simple collation of information.
22. In relation to the raw data extract still held for 2018/19, the Council explained that it had extracted data under the following headings from the live payroll system for all employees, including teachers. This had been saved as an Excel file containing over 15,000 lines of data under the following headings:

'Resource Name', 'Assignment No', 'First Name', 'Last Name', 'Normal Working Hours', 'Organisation*', 'Position*', 'Gender', 'Grade Name', 'FT Salary or Rate', 'Hire Date', 'Ethnic Origin', 'Age', 'Disabled Category', 'Spinal Point', 'Primary Flag', 'Annual Salary (FTE = 35hrs)'

** These comprise multiple fields, of which the Council provided a sample*
23. The Council described the skill and judgement it considered necessary to provide the information requested. It explained that, in order to provide the requested information, the positions captured in the occupational segregation information published in the mainstream report would require to be identified from those in the Excel file, and checked for accuracy. The Council submitted that, as knowledge of positions and these reporting requirements was crucial, this could only be carried out by its HR Business Manager, as the only staff member with sufficient knowledge and understanding of the systems.
24. The Council further explained that, once the positions were identified, a new interim report would require to be created for each occupational group, and these would then need to be broken down and new individual reports created for each grade, as per the request. Further analysis would be required by the HR Business Manager to complete and calculate the figures requested, as these would not be automatically generated. This process would need to be repeated for each occupational group and employee grade, to satisfy the request.
25. For these reasons, the Council confirmed it wished to rely on section 17(1) of FOISA.

The Commissioner's conclusions

26. In coming to a decision on this matter, the Commissioner has considered the Information Tribunal case *Michael Leo Johnson v the Information Commissioner and the Ministry of Justice (EA/2006/0085 13 July 2007)*², which involved a request relating to the number of cases dismissed in the High Court. (The Information Tribunal deals with appeals against decisions of the (UK) Information Commissioner made under the Freedom of Information Act 2000.)
27. In that case, a public authority had not collated the information at the time of the request. Although the Tribunal eventually concluded that the Ministry of Justice did hold the information, it commented that the degree of skill and judgement that must be applied may well have a bearing on whether the information is held or not. The Commissioner agrees with the approach taken by the Information Tribunal: a public authority will hold information if

² <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

it holds the building blocks to generate the information and no complex judgement is required to produce it.

28. This means that, in considering this application, the Commissioner will take into account whether the information requested by the Applicant can be collated without the need for any complex judgement on the part of the Council. If complex judgement is required, then the Commissioner will conclude that the information is not held by the Council. In contrast, if he is satisfied that no complex judgement is required, he will require the Council to identify and disclose the information to the Applicant (subject to any relevant provisions in Parts 1 and 2 of FOISA).
29. Having considered the submissions put forward by the Council, the Commissioner must conclude that it could not provide the Applicant with the information requested, corresponding to that published for the years 2014 to 2017/18. In the circumstances, and having considered the terms of the request and subsequent correspondence from the Applicant, he accepts the Council's interpretation of the request in this regard as reasonable. The Commissioner accepts that the Council no longer holds the original data extracts used to produce the data published in these mainstream reports. He is also satisfied that any data now extracted from "People Connect" (a live data system) would be current data, different to that used originally for those reports, and therefore the information is not held.
30. The Commissioner must also conclude that the Council could not provide the Applicant with the information requested, relating to that published for 2018/19, without undertaking tasks that require considerable skill and complex judgement. He is satisfied that the information is not readily retrievable. (The same would appear to follow for previous years, incidentally, even if the relevant base data were still held.)
31. The Commissioner has some sympathy with the Applicant's views that the Council holds the information, and so should be able to provide him with data on the analysis of pay gaps by occupation, given the Council has published data of this nature, albeit in a different format (i.e. by grade), in the mainstream report for 2018/19.
32. However, as noted above, while the Commissioner acknowledges that the basic "building blocks" of the information are held by the Council (i.e. the raw data used to produce the figures published in the mainstream report for 2018/19), he recognises that the Council would have to undertake complex tasks and analysis which would essentially result in the creation of new information, in order to be able to provide the information requested by the Applicant.
33. For these reasons, the Commissioner finds that the Council did not (and indeed does not) hold the information requested, and was entitled to respond in terms of section 17(1) of FOISA.

Decision

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

Appeal

Should either the Applicant 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

7 January 2021

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.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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