

Decision Notice 127/2022

Investigation of allegations - repeated requests?

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202000428



Scottish Information
Commissioner

Summary

The Council refused to comply with a three-part request, arguing that the requests were repeated requests. The Commissioner concluded that only one of the requests could be regarded as being repeated. He required the Council to respond again to the other two requests.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14 (Vexatious or repeated requests)

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 14 February 2020, the Applicant made requests for information to the City of Edinburgh Council (the Council). The Applicant requested any information held by the Council demonstrating that:
 - the Council decided to investigate allegations referred to in a comment made by the Council, i.e. allegations listed in Appendix 1 of [Decision 155/2019](#)¹ (“the allegations”) – request 1
 - the Council decided not to investigate the allegations – request 2
 - a Council decision to investigate the allegations was pursued by the Applicant through the Scottish Public Services Ombudsman (the SPSO) – request 3
2. The Council responded on 13 March 2020. It notified the Applicant that it was not obliged to comply with the requests as they were substantially similar (section 14(2) of FOISA) to the requests made by the Applicant on November 2017, which was later subject to Decision 155/2019. The Council considered that the information the Applicant received in response to those requests adequately answered the questions posed. As the subject matter of both requests related to decisions most recently taken in 2017 and the Council’s actions prior to that, the Council advised the Applicant that the information held by the Council pertinent to this matter had not changed since his previous requests.
3. The Council commented that the Applicant appeared to have chosen to submit requests in pursuit of ongoing correspondence about the Council’s response to another of the Applicant’s information requests to the Council. The Council said it understood that the Applicant felt it necessary for the Council to clarify a sentence which the Applicant

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900482.aspx>

considered to be misleading, but noted that it had responded to the Applicant's concern by email on 27 January 2020.

4. On 15 March 2020, the Applicant wrote to the Council requesting a review of its decision. He did not agree that section 14(2) of FOISA applied: he believed his requests of 14 February 2020 were neither identical nor substantially similar to his requests of 16 November 2017. He said that, although asking for information about the same allegations, the current information requested was specifically about information held about the making of a decision to investigate by the Council, while the previous requests were for information held about investigation reports or outcomes.
5. He commented that, between 16 November 2017 and 14 February 2020, there had been activity which may have produced new information which did not exist when the earlier requests were made. The Applicant commented that, given that this activity involved two applications to the Commissioner, an investigation by the SPSO, and actions taken by councillors and an MSP, the activity is likely to have produced reports, submissions to regulators, and internal and external correspondence. Therefore, in his view, the Council's claim that the information had not changed was incorrect.
6. The Council notified the Applicant of the outcome of its review on 9 April 2020. The review upheld the Council's use of section 14(2) of FOISA to refuse the requests on the ground "that the information ... asked for in this request is substantially similar to EDIR:16921 and that the response you were provided with then adequately answers the questions you have posed on this occasion".
7. On 10 April 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. In his view, it did not address any of the grounds for dissatisfaction set out in his request for review. He wished the Commissioner to consider those grounds for dissatisfaction.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
9. 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 related to why the Council had refused the requests.
10. The Council provided submissions to the Commissioner on why it had refused the Applicant's requests in terms of section 14(2) of FOISA.

Commissioner's analysis and findings

11. 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 Council. He is satisfied that no matter of relevance has been overlooked.

Section 14(2): repeated requests

12. Under section 14(2) of FOISA, where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.
13. The Commissioner must therefore consider the following points:
 - were the Applicant's previous requests ("the 2017 requests") identical or substantially similar to the requests under consideration here ("the 2020 requests")?
 - did the Council comply with the 2017 previous requests? and, if so,
 - was there was a reasonable period of time between the submission of the 2017 requests and the submission of the 2020 requests? In deciding whether a reasonable period of time has elapsed, it is helpful to consider whether the information or the circumstances have change since the 2017 requests were made.

The 2020 requests

14. The 2020 requests referred to other recorded information. As noted in paragraph 1, the requests asked for any information held by the Council demonstrating that:
 - the Council decided to investigate specific allegations – request 1
 - the Council decided not to investigate those allegations – request 2
 - a Council decision to investigate those allegations was pursued by the Applicant through the SPSO – request 3
15. The allegations, set out in the Applicant's email of 15 November 2017, are set out in Appendix 1 of Decision 155/2019. These were that:
 - [named person] had told us that he had investigated [an identified person] when he had not investigated the most serious concerns.
 - [named person] interfered with the investigation process by twice advising the Head Teacher (who he line-managed) not to respond to the Council Complaints Manager [name provided].
 - [named person] had not been truthful, open and honest
 - on 6 June 2011, as the investigation was being taken out of his control, [named person] sent an email to his line-managers making serious false allegations against us, saying that he had hopefully persuaded me not to go to the police, and stating that he had become involved in the case in September 2010 "principally to try to protect [an identified person] and regrettably I have not succeeded."
 - [named person] at no point showed any concern for the welfare of the child in his care, nor for the possible damaging effects on the child of having no resolution to the incidents in which that child was mistreated.

Submissions from the Council

16. The Council considered the 2020 requests to be substantially similar to the 2017 requests, in which the Applicant requested the following information in relation to each of the allegations in paragraph 15:
- Let me know if a report into the investigation of that allegation exists
 - Let me know if a record of a decision on the allegation (e.g. upheld/not upheld) exists
 - Provide a copy of the report into the investigation
 - Provide a copy of the record of the decision (e.g. upheld/not upheld)
 - Provide a copy of any information about my family held within the report into the investigation
 - Provide a copy of any record of learning or action taken as a result of the investigation into the allegation.
17. The Council had initially refused to comply with the 2017 requests on the basis that they were vexatious (section 14(1) of FOISA). However, the Commissioner determined ([Decision 001/2019](#)²) that the requests were not vexatious and ordered the Council to provide an alternative response.
18. The Council did this on 22 February 2019. The Applicant was dissatisfied with the alternative response and subsequently made an application to the Commissioner, resulting in Decision 155/2019.
19. The 2020 requests refer to the 2017 requests and to Decision 155/2019 and asks for confirmation of Council decision-making around the allegations made. The Council believes the 2020 requests are substantially the same as the 2017 requests: both the 2020 requests and the 2017 requests capture the same information and, the Council believes, its previous response adequately answered the questions posed in the present requests.
20. The Council considered that the Applicant's review (and application) raised the following issues:
- He disagreed with the Council's view that his requests were repeated
 - He disagreed that the information captured by his requests would not have changed
 - He was unhappy with the Council's assertion around his motivation for the requests, and the applicability of FOISA in the circumstances
 - He was unhappy about the Council's reference to its complaints procedure referencing previous correspondence to which, he asserted, he had not received a response
21. Although the first two points clearly relate to whether the Council has fulfilled its obligations under FOISA, in the Council's view, the final two points relate to a more general level of dissatisfaction around the Council's correspondence, rather than the 2017 information requests specifically. The Commissioner agrees.

² [Decision 001/2019 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

22. The Council said that, although the Applicant wished to distinguish between a decision to take action and the nature of information held in relation to the complaint allegations, the 2017 and 2020 requests were “so similar in nature that they capture the same information”. The Council remained of the view that the information provided to the Applicant in response to the 2017 requests answered the questions in his 2020 requests.
23. The Council also commented that, as the requests related to historic decisions and actions taken by the Council in relation to complaints made by the Applicant, the information would not have changed since the Council responded to the 2017 requests.

Submissions from the Applicant

24. The Applicant recognised that his 2017 and 2020 requests asked for information about the same allegations, but argued that he had not made repeated requests for the following reasons:
 - Request 1 – his 2020 requests were specifically about information held about the making of a decision to investigate by the Council, while the 2017 requests were for information held about investigation reports or outcomes.
 - [Request] 2 – his 2020 requests are specifically about information held about the making of a decision by the Council not to investigate the allegations. This did not form any part of the 2017 requests.
 - [Request] 3 – his 2020 requests are specifically about information demonstrating that a Council decision to investigate the allegations was pursued by him through the SPSO. This did not form any part of the 2017 requests.
25. As noted above, the Applicant also believed that, between the making of the 2017 and 2020 requests, there had been activity which may well have produced new information which did not exist when the 2020 requests were made. Consequently, the Applicant believed it was unlikely that the Council’s statement that the information held had not changed was correct.

The Commissioner’s findings

26. The matters to be considered by the Commissioner are those set out in paragraphs 12 and 13 above.
27. This application is complicated because it refers to past requests and the Council’s corresponding responses and reviews, and to the Commissioner’s decisions relating to these requests.
28. The Council considers the 2020 requests to be substantially similar to the 2017 requests, and that the response which was provided to that 2017 requests adequately answered the questions posed in the new requests. The Council stated that, while the Applicant appeared to wish to make a distinction between a decision to act and the nature of information held in relation to the complaint allegations, the requests are so similar in nature that they capture the same information.
29. Having regard to those responses, and their application to the 2020 requests, it is useful to consider each of the 2020 requests separately.

Request 1: decision to investigate the allegations

30. In response to request 1 (any information the Council holds which demonstrates that it decided to investigate the allegations listed in Appendix 1 of Decision 155/2019) the Council

told the Applicant, in line with its response to the 2017 requests, that no such investigation was instructed – i.e. information would not be held in response to the current request.

31. The Commissioner is satisfied that section 14(2) of FOISA does not oblige the Council to comply with request 1. He is satisfied that the wording of the request is substantially similar to the 2017 request and that the Council complied with the 2017 request. He is not satisfied that a reasonable period of time has passed between the making of the 2017 request and the 2020 request.

32. In particular, he agrees with the Council's submissions that:

“As the request related to historic decisions and actions taken by the Council in relation to complaints made by [the Applicant], the information would not have changed since the Council's response to EDIR:16921. This position was explicitly stated in the section 1 response, which the Council's review response upheld.”

Request 2: decision not to investigate the allegations

33. In relation to request 2 (any information the Council holds which demonstrates that the Council decided not to investigate the allegations referred to in Appendix 1 of Decision 155/2019), the Commissioner is not satisfied that the 2020 request is substantially similar to the 2017 request. The 2017 response did not answer the 2020 request. The fact that no investigation was instructed does not make it clear whether recorded information may be held by the Council which clarifies whether or not a decision was made “not to investigate” the allegations. Such a decision may or may not have been made, but the previous request – and response – does not make the position clear.

34. Consequently, the Commissioner is satisfied that the Council was obliged to comply with [request] 2 of the 2020 request.

Request 3: decision to investigate the allegations was pursued by the Applicant

35. Request 3 (any information the Council holds which demonstrates that a Council decision to investigate the allegations referred to Appendix 1 of Decision 155/2019 was pursued by the Applicant through the SPSO) is the most complex of the three.

36. It is useful to consider the words around the current request. In his information request (14 February 2020), the Applicant introduced his request as follows:

“I am referring to your comment:

‘I also consider that your more general concerns around the Council's decision to investigate the complaint allegations you had made can, and have been, pursued through the SPSO.’

It is my view that the comment implies that the [Council] made a decision to investigate the allegations referred to, and that decisions by the SPSO and the [Commissioner] show this not to be the case.

The FOISA request below could be withdrawn if reasonable clarification of your comment is received. For example you could state that the [Council] did not make a decision to investigate the allegations referred to, or that the [Council] made a decision not to investigate the allegations referred to.

I make the following request in order to establish if your comment is based on any information held by the [Council] ... “

37. Having regard to the context in which request 3 was made, the Commissioner does not consider that the 2017 requests deal with this limb of the 2020 requests. While it does show that no specific decision to investigate was made, it does not deal with the SPSO dimension, and cannot therefore found a clear response to request 3.
38. The Commissioner therefore finds that the Council was not entitled to refuse to comply with request 3 on the grounds that section 14(2) applied.

Decision

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

While the Commissioner finds the Council was not obliged to comply with request 1, he finds that, because request 2 and 3 were not substantially similar to a previous request, the Council was obliged to comply with those requests.

The Commissioner therefore requires the Council to review its response to requests 2 and 3 of the request in terms of section 21(4) of FOISA and to respond other than in terms of section 14(2), by **5 January 2023**.

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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

17 November 2022

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

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