

Decision Notice



Decision 080/2010 Mr T and Fife Council

Chief Officers' report in response to HMle inspection

Reference No: 201000077

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www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr T requested from Fife Council (the Council) a copy of an action plan given to internal stakeholders and a report provided to Her Majesty's Inspector of Education (HMIE) in response to a joint services inspection. The Council provided a link to a webpage in response, but the Chief Officers' report could not be accessed there. Following a review, following which the Council directed Mr T to the same webpage, Mr T remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council disclosed the Chief Officers' report to Mr T. At the end of the investigation, the Commissioner found that the Council had failed to deal with Mr T's request for information in accordance with Part 1 of FOISA. By failing to provide Mr T with the Chief Officers' report to HMIE, the Council breached the requirements of section 1(1) of FOISA. The Council also failed to provide Mr T with reasonable advice and assistance as required by section 15(1) of FOISA and also failed to comply with the timescales required by section 21(1) of FOISA.

The Commissioner notes that a review of Fife Council Education Services' practice with respect to compliance with FOISA was recently conducted, and the report and recommendations of the assessors will be published in due course. In the circumstances, he does not require the Council to take any action with regard to the failures identified in this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 15 (Duty to provide advice and assistance) and 21(1) (Review by Scottish public authority)

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code): paragraph 66

The full text of each of the provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 7 October 2009, Mr T emailed the Council requesting information generated in response to a Joint Services inspection undertaken by Her Majesty's Inspector of Education (HMIe) in April 2009. He provided a link to HMIe's report¹ on this inspection, which stated on page 19:

“The Chief Officers have been asked to prepare an action plan indicating how they will address the main recommendations of this report, and to share that plan with stakeholders. Within four months Chief Officers should submit to HM Inspectors a report on the extent to which they have made progress in implementing the action plan.”
2. Mr T asked the Council to supply a copy of the Chief Officers' report, along with the action plan that was supplied to stakeholders.
3. The Council responded to this request on 29 October 2009. It provided a link to a page on its website, where it stated that the information requested could be found. This link directed Mr T to a page providing information relating to meetings of the Council's Social Work and Health Committee.
4. Mr T emailed the Council following receipt of this response to note that this link did not allow him to locate the information he was seeking. Mr T was then advised by telephone of the date of the meeting at which the inspection report was discussed, and the relevant item number on the agenda.
5. On 16 November 2009, Mr T emailed the Council requesting a review of its decision. Mr T noted that while the link supplied provided access to the action plan, it did not include a copy of the report submitted to HMIe.
6. The Council notified Mr T of the outcome of its review on 22 December 2009. The Council apologised for its delayed response and acknowledged that the link supplied to Mr T had directed him to the front page of the Social Work and Health Committee information pages, and not to the particular papers he had requested. The Council provided further details on how to access the papers for the meeting at which it stated the report was presented to the Committee.
7. Following the instructions provided in this letter, Mr T was able to identify the summary action plan and a report regarding the inspection that was presented to the Social Work and Health Committee (as he had been able following the advice previously given by telephone). However, the Chief Officers' report to HMIe was still not among the papers to which Mr T was directed.

¹ <http://www.hmie.gov.uk/documents/inspection/FifeSFCU..pdf>



8. On 11 January 2010, Mr T wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T was particularly dissatisfied that the Council's instructions still did not provide him with the Chief Officers' report to HMle. Mr T also expressed concerns regarding the Council's review process. He noted that the response had been provided outwith the required 20 working day period, and he queried whether the review had been impartial, given that he was aware that an individual involved in handling his original request was also involved in the review.
9. The application was validated by establishing that Mr T had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

10. On 29 January 2010, the Council was notified in writing that an application had been received from Mr T and was invited to comment on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions. In particular, the Council was asked to provide direct links to the requested documents on the internet, and to provide any covering letters that would demonstrate that these were sent to stakeholders (in the case of the action plan) and HMle (in the case of the report). The Council was also asked to provide comments on its review process, and whether it considered that it had complied with its duty to provide advice and assistance to Mr T in this case.
11. The Council responded to the investigating officer's letter, confirming that the link to the webpage provided to Mr T was incorrect. It provided a link to a different webpage in which meeting minutes of the Chief Officers' Public Safety Group were held. Within the minutes it was noted that the report had been sent to HMle. The Council also provided separately a copy of the Chief Officers' report (which was presented in the form of an action plan) to HMle, and the associated covering letter. The Council explained that no information was being withheld in this case, as it considered the information to be publicly available.
12. Subsequently, the investigating officer enquired whether the report and covering letter could be disclosed to Mr T. On 8 March 2010, the Council sent Mr T a copy of the report and on 9 March 2010 it also sent a copy of the covering letter to HMle.
13. Mr T confirmed he had received the information from the Council, and that this was the information he sought. He also provided comments on the Council's handling of his request.



Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr T and the Council and is satisfied that no matter of relevance has been overlooked.
15. The focus of the investigation in this case was on the Council's failure to supply to Mr T the Chief Officers' report to HMIE, or to direct him to a published version. Since Mr T's request for review accepted that he had received the action plan shared with stakeholders, this part of the request has not been considered further in this decision.
16. The Chief Officers' report was provided to Mr T (along with the covering letter to HMIE, which fell outside the scope of his information request) during the investigation. It is clear that this information was held by the Council at the time of Mr T's request.
17. The Council's submissions in this case explained that it had not intentionally withheld any information from Mr T as it genuinely believed that the information he sought was publicly available on its website.
18. As noted above, the Council's correspondence with Mr T directed him to a webpage where information could be accessed relating to meetings of the Council's Social Work and Health Committee. Although the initial response did not indicate where relevant information could be located via this page, later communications, and the Council's response to Mr T's request for review, directed him to papers relating to a particular meeting. These instructions allowed identification of the action plan shared with the stakeholders. However, the Chief Officers' report to HMIE could not be accessed on this webpage.
19. During the investigation, the Council directed the Commissioner to a further webpage containing minutes of a meeting of the Chief Officers' Public Safety Group (dated 31 August 2009) in which reference was made to the report being sent to HMIE. However, the copy of the report was not included within these minutes.
20. While the Council may have believed the Chief Officers' report to HMIE was publicly available, its correspondence directed both Mr T and the Commissioner to webpages that did not actually contain this information.
21. Given that Mr T's request for review made clear that he had been unable to find the Chief Officers' report to HMIE on the webpage to which he was directed, the Commissioner was surprised to see that the Council incorrectly directed him to the same location again, simply reiterating guidance that had been provided prior to Mr T's request for review.
22. The Commissioner can only conclude that the Council did not actually check the content of relevant web pages to establish whether the report to HMIE could be found there. This should have been a simple task, which could have allowed a simple resolution to a case where the Council had no objection to disclosure.



Breach of section 1(1) of FOISA

23. Although the Council had indicated that it believed the Chief Officers' report to HMIE was publicly available, it has not been able to direct either Mr T or the Commissioner to this information on its website.
24. Had the report been available, the Council would have been able to apply the exemption in section 25(1) of FOISA (which applies where an applicant can reasonably obtain the information otherwise than by making an information request) to it. However, where an authority applies this exemption, the Commissioner expects it to be able to give the applicant reasonable directions on how to access that information. In this case the Council proved unable to do so and so it could not rely upon this exemption.
25. Since the Council has not claimed that the report to HMIE was exempt in terms of section 25(1) or any other exemption, the Commissioner concludes that, by failing to provide this in response to Mr T's request, the Council failed to comply with section 1(1) of FOISA.

Section 15 of FOISA – duty to provide advice and assistance

26. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonably expected to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 Code") in providing advice and assistance in any particular case, it is taken to have complied with this duty for the purposes of that case.
27. Where a public authority believes that information which has been requested is already publicly accessible, and does not intend to provide the information directly to the applicant, the Commissioner expects that authority to provide sufficient information to the applicant to enable them to locate that information from the publicly accessible sources.
28. In this case, the Commissioner has reached the view that the Council's communications with Mr T in this case were extremely unhelpful and factually incorrect. Although Mr T's request for review provided the opportunity to rectify this, the Council simply reiterated its previous guidance.
29. In the circumstances, the Commissioner has concluded that the Council failed to comply with its duty under section 15(1) in this case.

Failure to comply with timescales in FOISA

30. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review, except in very limited circumstances which do not apply here.
31. Mr T submitted a requirement for review on 16 November 2009. The Council responded to Mr T's request on 22 December 2009. In its response, the Council acknowledged that it had failed to respond within the timescales laid down in FOISA.



32. The Commissioner finds that the Council failed to respond to Mr T's request for review within the 20 working days allowed under section 21(1) of FOISA.

Review procedure followed by the Council

33. Mr T expressed dissatisfaction with the impartiality of the review undertaken by the Council.
34. Paragraph 66 of the Section 60 Code states that any review of an authority's original decision in regard to a request for information should generally be handled by staff who were not involved in the original decision. The Commissioner regards this to be good practice which ensures that the review process is carried out impartially and fairly by an independent person within the public authority.
35. The Commissioner has noted, and the Council confirmed in its correspondence with the investigating officer, that its responses to Mr T 's initial request and request for review were carried out by the same team.
36. In its submissions, the Council commented although the review was undertaken by the same team, it was not the same individual in both cases and the person who would normally undertake such a review was away from the office.
37. In this case (and particularly given that the review process does not appear to have involved the checks that might have been expected), the Commissioner can understand why it has appeared to Mr T that the review process did not involve a fresh or independent review of this case.
38. The Commissioner accepts that different individuals provided the initial and review response. Nonetheless, it is important that a review process is conducted and can be seen to have taken place, such that there is a record of the matter of complaint having been considered afresh. The Commissioner therefore recommends that the Council considers how this can best be done allowing for the limitations of staff availability.

Overall comment

39. The Commissioner is concerned by his findings regarding the Council's handling of Mr T's information request. This was simple and clearly expressed, but the Council has provided him with perfunctory responses apparently issued without the benefit of simple checks to determine whether and where the information he requested was available. The Commissioner considers that the practice illustrated in this case falls far short of good practice.
40. However, the Commissioner would note that the practice of the Council and its Education Service has recently been the subject of a practice assessment by his office. This assessment and the report that will be issued in due course will more widely consider and make recommendations with respect the practice of the Council.



DECISION

The Commissioner finds that Fife Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr T.

The Commissioner finds that by failing to provide Mr T with the Chief Officers' report to HMIE, the Council failed to comply with the requirements of section 1(1) of FOISA. The Council also failed to provide Mr T with adequate advice and assistance in line with section 15(1) of FOISA.

The Commissioner also finds that the Council failed to comply with the timescales laid down in section 21(1) of FOISA in responding to Mr T's requirement for review.

Given that the report was disclosed to Mr T during the investigation (and given the comments set out in paragraph 40 above), the Commissioner does not require the Council to take any action in relation to these breaches in response to this decision.

Appeal

Should either Mr T or Fife Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
1 June 2010



Appendix

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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

Scottish Ministers' code of practice on the discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002

66. Where the requirement for review concerns a request for information under the general right of access, the review should generally be handled by staff who were not involved in the original decision. While this may not always be possible, it is important that the review procedure enables the matter to be considered afresh.