

Decision Notice



Decision 104/2010 Mr F and Fife Council

Location of documents removed from a pupil's file

Reference No: 200901875
Decision Date: 21 June 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr F asked Fife Council (the Council) for information about the storage of certain information which had been taken from his son's pupil record (PPR).

The Council initially failed to reply to Mr F's request, and in response to a request for review informed him that the information had been destroyed. Mr F queried this, and the Council issued a revised response which indicated that the information had been stored at the child's primary school. Mr F was not satisfied with this response and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Council did not hold any recorded information which was covered by the terms of Mr F's request. He found that the Council had failed to give Mr F written notice that no information was held. He commented critically on the failure to establish this fact during the review of Mr F's request. The Commissioner also found that the Council had failed to provide its responses to either the information request or the request for review within the relevant statutory timescales.

As the Council has recently undergone a Good Practice assessment by the Commissioner's staff, on this occasion the Commissioner has not required the Council to take any remedial action in response to Mr F's application.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority)

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

The 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)



Background

1. On 29 May 2009, in relation to ongoing correspondence with the Council, Mr F sent the Council an email asking:
Where has the information taken from my son's PPR been stored?
2. On 29 June 2009, and again on 2 July 2009, Mr F wrote to the Council to register his dissatisfaction that he had not received a reply to his information request, and to ask the Council to carry out a review in relation to this failure.
3. On 10 August 2009, the Council sent Mr F an email advising that it had investigated the matter and found that the information in question had been destroyed by the primary school attended by his son, prior to his son's file being sent to the local secondary school. The Council advised that this had been done in order to comply with the principles of the Data Protection Act 1998.
4. On 11 August 2009, Mr F sent an email to the Council disputing that the information had been destroyed, stating that this was contradicted by the information currently in his son's file.
5. On 23 October 2009, the Council wrote to Mr F to advise that its review response of 10 August 2009 had been incorrect, and that the information in question had been held at the child's former primary school at the time of his request. It had now been replaced in his son's PPR at the secondary school he now attended. The Council apologised for providing inaccurate information in its initial review response.
6. On 22 October 2009, Mr F wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He later provided reasons for his dissatisfaction with the Council's response to his request, in an email of 4 January 2010.
7. The application was validated by establishing that Mr F 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

8. On 29 January 2010, the Council was notified in writing that an application had been received from Mr F and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA).



9. The Council was advised that as it had not informed Mr F whether it held any recorded information relating to his request, the investigation would consider whether the Council held any recorded information which would answer his question, and whether the searches or enquiries carried out by the Council in relation to his question were adequate.
10. The Council was asked to provide any information which pre-dated Mr F's request for review and which related to the location of the documents missing from his son's file at the point when he made his request (9 May 2009).
11. The Council was also asked to provide copies of emails, phone notes, meeting notes or other communications relating to the investigation undertaken in response to Mr F's request for review, the outcome of which was reported in the Council's email of 10 August 2009.
12. Finally, the Council was asked to provide copies of emails, phone notes, meeting notes or other communications relating to Mr F's request, from the period 10 August 2009 to 23 October 2009 (the period between the first and second review responses).
13. The Council replied on 26 February 2010, providing a number of emails; however, some of the emails listed in the response were not provided. The Council was asked to remedy this, but had some difficulty in providing electronic copies; access to the email system was then arranged for the investigating officer during a visit to Council offices.
14. During the investigation, additional enquiries about the existence of recorded information relevant to Mr F's request were made in the course of interviews with staff from the primary and secondary schools concerned.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr F and the Council and is satisfied that no matter of relevance has been overlooked.

Information held or not held by the Council

16. FOISA provides a right to recorded information held by Scottish public authorities. In this case the Commissioner must consider whether the Council held any recorded information which would provide a complete or partial answer to the question raised in Mr F's initial request: "Where has the information taken from my son's PPR been stored?"
17. The review response issued on 10 August 2009 purported to relay the outcome of an investigation which had found that the information in question had been destroyed at the primary school in conjunction with the Council's Records Management Policy prior to the pupil's file being forwarded to the secondary school. However, Mr F was aware that this could not have taken place, as some of the information had since been restored to his son's PPR.



18. It is difficult to escape the conclusion that the “investigation” referred to in the letter of 10 August 2009 was inadequate. The Council has not provided the Commissioner with any evidence to show that an investigation actually took place, despite being asked to provide such information.
19. The revised review response issued on 23 October 2010 stated that the missing documents had been held at the primary school at the time of his request, and had since been filed back into the PPR held at the secondary school. The letter did not make it clear how the Council had established this, or whether this response was based on recorded information held by the Council. It should be noted that the interviews with staff at the primary and secondary schools concerned did not provide information which would support this version of events: none of the interviewees made any mention of information being transferred between the schools in the period following Mr F’s request of 29 May 2009. The Council was asked to provide the Commissioner with any information from the period 10 August 2008 to 23 October 2010 which would show how the Council reached its revised review decision. Again, the Council did not provide any such information.
20. The investigating officer interviewed staff at the primary and secondary schools to try to establish whether the Council held any recorded information relating to the storage and/or transfer of the information about Mr F’s son, which might give some indication where the documents taken from the PPR had been held.
21. As a result of these enquiries, the Commissioner is satisfied that there were no records in either the primary or the secondary school which showed exactly what information about Mr F’s son had been sent from the primary school, or what information had been received by the secondary school. The secondary school did not have any record of the contents of the PPR, or any record (or knowledge) of material being added to that file (apart from one letter discovered at the primary school in February 2009 and subsequently restored to the PPR at the secondary school).
22. The Commissioner has concluded that the Council holds (and held) no recorded information covered by the terms of Mr F’s request.
23. Section 17(1) of FOISA requires a Scottish public authority to give an applicant notice in writing if it does not hold the information to which their request relates. The Commissioner finds that the Council did not provide Mr F with such notice, and therefore failed to comply with section 17(1) of FOISA in dealing with his request.

Conduct of the review

24. FOISA is not prescriptive about the form of review that should be undertaken following a request for review. Under FOISA, the review may confirm the original decision, with or without modifications; substitute a different decision for it, or reach a decision where none has previously been taken.



25. The Section 60 Code provides guidance on the conduct of reviews, which includes:
 - authorities should have in place procedures for handling review, which should be fair and impartial and enable different decisions to be taken if appropriate
 - the procedures should be straightforward and capable of producing a decision promptly and in line with statutory timescales
 - a review should be handled by a person who was not involved in the original decision
26. The Commissioner is concerned to note that the Council issued two review responses, two months apart, neither of which provided a decision or conclusion supported by evidence from recorded information held by the Council, or which even considered whether the Council held any recorded information covered by the terms of Mr F's request.
27. The Council was asked to provide the Commissioner with any information which would help him understand how it reached the conclusions communicated in the two review responses sent to Mr F. The Council has not provided the Commissioner with any information on this point.
28. After initially failing to provide any response to Mr F, the Council appears to have responded to his request by telling him what its officials believed had happened, or what should have happened, rather than seeking to establish whether or not it held any recorded information relevant to Mr F's request. While this approach may have been intended to be helpful to Mr F, in providing him with an answer which could not be obtained from the recorded information available, ultimately it proved to be neither helpful nor compliant with FOISA.
29. The Commissioner also finds that the Council failed to comply with sections 10(1) or 21(1) of FOISA, which require responses to (respectively) a request for information and a request for review within 20 working days.
30. The Commissioner has recently carried out a Good Practice assessment in Fife Council's Education Department, and has made recommendations to the Council intended to improve practice in dealing with requests for review. Accordingly, the Commissioner does not require the Council to take remedial action in relation to the failings identified in this decision notice.



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 F. The Council failed to notify Mr F that it did not hold any information covered by the terms of his request, and so failed to comply with section 17(1) of FOISA. The Council also failed to respond to Mr F's request for information or his request for review within 20 working days, as required by, respectively, sections 10(1) and 21(1) of FOISA.

Appeal

Should either Mr F 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
21 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.

...

- (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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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.

...

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.

...