

Decision Notice



Decision 007/2012 Mrs Jean Ferguson and Glasgow City Council

Disciplinary hearing

Reference No: 201101699

Decision Date: 6 January 2012

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mrs Jean Ferguson requested from Glasgow City Council (the Council) all information relating to a disciplinary hearing which occurred on 22 October 1999. The Council advised Mrs Ferguson that it did not hold the requested information. Following a review, Mrs Ferguson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Council did not hold any information falling within the scope of Mrs Ferguson's request. He found that it had complied with Part 1 of FOISA by providing Mrs Ferguson with written notice to that effect, as required by section 17(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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.

Background

1. On 12 July 2011, Mrs Ferguson wrote to the Council requesting all the information relating to a disciplinary hearing held on 22 October 1999, with respect to employees within the Council's Housing Department.
2. The Council responded on 25 July 2011. The Council referred Mrs Ferguson to its response to a previous verbal request for the same information. In response to that request, the Council had explained that it did not hold the information she sought, and that information relating to human resources within the Housing Department had been transferred to the Glasgow Housing Association (GHA) (to which the Council transferred its housing stock) in 2003. The Council had suggested that GHA might be able to provide a response to her enquiry, and provided contact details for GHA.



3. On 30 July 2011, Mrs Ferguson wrote to the Council requesting a review of its decision. Mrs Ferguson informed the Council that, having made enquiries with the GHA, she had been advised that the information in question had not been transferred to GHA because it was not a live issue at the time and any relevant information would have remained with the Council. Mrs Ferguson suggested that the information could be held in Council or committee minutes, or files in the Housing, HR or legal services departments.
4. The Council notified Mrs Ferguson of the outcome of its review on 4 August 2011. It noted that Council and committee minutes are available for inspection at the Mitchell Library in Glasgow, and as such are exempt from disclosure under FOISA.
5. In respect to Housing Department and HR Department files, it again stated that it was most likely that all records relating to human resource issues were passed to GHA at the time of transfer of functions from the Council to GHA in 2003. In addition, the Council indicated that advice from its own corporate HR section had indicated that information relating to disciplinary matters is retained only for the duration of the disciplinary action and, once it has expired, the information is expunged from the individual's personnel record. Given the passage of time between the relevant disciplinary hearing (in 1999), and the transfer to GHA in 2003, the Council indicated that it was unlikely that GHA would have been in receipt of such information.
6. The Council indicated that Legal Services files had been searched, but no information pertinent to Mrs Ferguson's request had been located.
7. It thereby notified Mrs Ferguson, in line with section 17(1) of FOISA, that it did not hold the requested information relating to the disciplinary hearing.
8. On 8 September 2011, Mrs Ferguson wrote to the Commissioner, stating that she 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.
9. The application was validated by establishing that Mrs Ferguson 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. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested and to explain why it did not hold the information requested by Mrs Ferguson.



11. The Council responded on 14 October 2011, providing an explanation as to why it considered that it did not hold the requested information. The Council explained that Mrs Ferguson had not provided any details of the individuals who could have possibly been involved in or were the subject of the disciplinary hearing. The Council went on to explain that information about that hearing held previously would have long since been destroyed as disciplinary records are held for a maximum of twelve months and personnel files are held for five years after someone leaves the employment and the Council.
12. Both Mrs Ferguson and the Council provided background information on the circumstances leading to her request. The disciplinary hearing of interest to Mrs Ferguson took place on the same date (22 October 1999) as a court hearing in relation to a dispute between the Council and Mrs Ferguson. This had been mentioned by the Council by way of explanation of the absence of a member of its staff from that hearing. Mrs Ferguson believes that the disciplinary hearing related to matters connected with her dispute with the Council. She explained that the matter had been of serious concern to the Council resulting in a number of employees being dismissed.
13. After receiving the Council's initial submissions, the investigating officer requested and received additional information from Mrs Ferguson to assist the Council in identifying any information falling within scope of her request. In response, she provided a list of the individuals whom she considered would have known something about the disciplinary hearing.
14. The investigating officer subsequently requested and received further information regarding the Council's searches, disciplinary hearings and the associated appeal process from the Council. In particular, it was noted that minutes of appeal hearings were available online, and the Council was asked about its practices regarding the sharing, storage and retention of information relating to such appeal hearings, to establish whether such records could identify and provide information about the disciplinary hearing to which it relates. The Council provided further background information in response, and confirmed that having checked its archive it could still not find any information falling within scope of the request.
15. The arguments presented by both parties will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



Section 17(1) – Information not held

17. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that it does not hold the information.
18. In order to determine whether the Council dealt with Mrs Ferguson's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mrs Ferguson's request, the Council held any information which would fall within the scope of that request.
19. The request under consideration sought details of a particular disciplinary hearing, on a specified date and involving staff from a particular department, more than 12 years ago. Mrs Ferguson is aware of this hearing because it was mentioned in court, during a hearing in which she was involved. A solicitor from the Council who was also present at that time has confirmed that his recollection matches that of Mrs Ferguson on these key facts.
20. The question to be considered in this decision is whether the Council still holds further information about this disciplinary hearing, for example confirming whose conduct was in question, for what reason, the outcome, the evidence on which this was based, and the identities of others present.
21. Mrs Ferguson has identified a number of parties who she believes would have been involved in or aware of the disciplinary process based on her beliefs about the reasons for the disciplinary process. She went on to explain that her action was still a live issue with the Council and as the disciplinary hearing was a serious matter of concern she expected the Council to still hold information.
22. In addition, Mrs Ferguson considered that these issues would have been discussed at Council meetings, and although the details of the hearing may not have been discussed openly and minuted for the general public perusal, she considered that it was almost certain that such issues would have been reported to Councillors possibly by way of a report attached to or issued with an agenda for consideration prior to these particular meetings.
23. The Council's position is that it no longer holds recorded information that would allow it to establish the facts surrounding the particular disciplinary hearing of interest to Mrs Ferguson. In particular, it has explained that information relating to disciplinary action would not be retained within personnel files
24. The Council explained that any disciplinary actions held on an employee's file would be expunged after twelve months at the latest, or if the employee was dismissed, their personnel file would be destroyed five years after they left the Council. The Council advised that the employee who had attended the disciplinary hearing on the day in question had left the Council between 2000 and 2003 and so their personnel file would also have been destroyed in line with the above practice. Consequently, the Council considered that it held no information in personnel files that fell within the scope of Mrs Ferguson's request.



25. In its submissions, the Council commented that searches had been conducted of its Legal Services department and no information had been identified. The Council explained that, following receipt of the additional information provided by Mrs Ferguson, it checked the files relating to the extant (but sisted) actions by Mrs Ferguson and another party. As Legal Services do not attend disciplinary hearings in other departments, the Council considered that there was no reason to search the Legal Services' department records initially until during the investigation when Mrs Ferguson had provided additional clarification.
26. During the investigation, the investigating officer explored the possibility that information about the disciplinary hearing of interest to Mrs Ferguson might be held in the agendas or minutes of Council meetings. The Council advised that agendas and minutes were available online on its website and an archive was held at the Mitchell Library in Glasgow. The investigating officer searched the agendas and minutes of the Housing and Finance Committees online for a period of three months following 22 October 1999, but did not identify any reference to the disciplinary hearing or associated concerns.
27. The Commissioner considers that, due to the sensitivities surrounding disciplinary hearings and the confidentiality that operates around such processes, it is unlikely that such matters would be raised and recorded in Council meetings. The Commissioner considers that such information would be likely to be held within the individual's personnel file and only accessible to the individual concerned, relevant staff within the Human Resources department and possibly the individual's manager.
28. However, the Commissioner is aware that if an employee wanted to appeal a dismissal by the Council they would have to do so via the Personnel and Administration Services (Appeals) Sub-committee. The minutes of this committee do provide limited information about the consideration of such appeals. The investigating officer searched this Committee's agendas and minutes online for the three month period following October 1999 and identified two disciplinary hearings of Housing Department staff. There was nothing in the published documents indicating the date of the disciplinary hearing that had prompted the appeal.
29. However, this finding was raised with the Council who were asked for background information on the appeal process, to establish whether records might be held in relation to appeals in the period following the date of the hearing of interest to Mrs Ferguson, and whether such records might enable information of interest to Mrs Ferguson to be located. The Council was asked whether it held further information relating to the two identified disciplinary hearings.
30. In response, the Council explained that an employee has 14 days from the date of the letter confirming their dismissal to lodge an appeal. The timescales for hearing appeals are reliant upon availability of elected members, although these could take place within four to eight weeks of Human Resources receiving the appeal. The Council went on to explain that the dismissing service and the appellant are given the opportunity to provide information to support their case for consideration during the appeal hearing. A copy of all of this information is provided to elected members, the appellant and the dismissing service in advance of the hearing.



31. The Council went on to explain that its Human Resources department will retain copies of all issued papers for a period of six years after the hearing date in line with Council procedures, but no information relating to the appeal will be held in the employee's personnel file, and the employee's personnel file will also be destroyed six years after them leaving the Council's employment.
32. In relation to the two identified disciplinary hearings, the Council advised it was unlikely to hold the information as it would be destroyed in line with Council procedures, which state that records will be destroyed six years after the meeting. The Council also provided a copy of its retention schedules that applied on 22 October 1999, which confirm that if such information was held then it would have been destroyed six years after the date of the meeting, which would have been around 22 October 2005.
33. The Council's archivist undertook extensive searches of its papers, but could not find any information falling within the scope of Mrs Ferguson's information request. The only information available on the two disciplinary hearings was that available online. The Commissioner has viewed this information online, but considers that the information is not that what Mrs Ferguson sought, since it is not possible to establish whether the appeals to which the minutes refer relate to the disciplinary hearing of interest to her.
34. In its final submissions, the Council explained that, following the additional explanation provided by Mrs Ferguson, the Human Resources department had undertaken additional searches for the information as they now believed they knew who the disciplinary hearing on 22 October 1999 related to, but could not be certain. The Council noted that an employee in the Housing Department had been dismissed on the day, and it seemed likely that the employee who could not attend court on that day would have attended the hearing.

Commissioner's conclusions

35. The Commissioner has considered all of the comments from both Mrs Ferguson and the Council (including those which are not summarised above). He recognises that this case is unusual, since it relates to events which happened more than a decade ago, but both parties have been able to provide accounts, which agree in many respects, which allow informed speculation about the nature and outcome of a disciplinary process.
36. However, these accounts depend almost entirely on the recollections of Mrs Ferguson and a Council employee. The question the Commissioner must address is whether the Council holds recorded information about the disciplinary hearing in question.
37. Having considered all of the submissions, the Commissioner has concluded, on balance of probabilities, that it does not. The Council's records management practices (which are as would be expected for information of this type) would have led to the routine destruction of information within the personnel files of staff involved some years before Mrs Ferguson made her information request.



38. While the outcome of the disciplinary process may have been appealed, and so considered by a Council committee, the Commissioner accepts that it is not possible from the minutes and agendas of that committee's meetings to establish whether any of the appeals considered within the period following 22 October 1999 relates to that hearing. The Council's records management practice means that records created and considered in the course of that appeal (which might have provided information about the hearing itself) would no longer be expected be held by the Council. The Council's searches for records concerning appeals around the relevant time have proved fruitless.
39. The Commissioner has carefully considered the Council's comments that its HR department, following further searches and cross checks during the investigation, believes that it may know who the disciplinary hearing related to. He considered whether this discovery meant that there was some (limited) recorded information still held relating to that hearing.
40. He has found that it does not, since he accepts that this conclusion could only be reached via informed speculation, based on the correlations between dates of an employee's dismissal and the hearing of interest to Mrs Ferguson. The Commissioner accepts that, in the absence of records which establish beyond doubt that the dismissal was indeed connected with the hearing on 22 October 1999, the Council does not hold recorded information which identifies that hearing with any particular employee or a particular outcome.
41. Having considered Mrs Ferguson's request and the submissions provided by the Council, and in particular the time that has passed since 22 October 1999, together with the Council's retention policies, the Commissioner accepts, on the balance of probabilities, that the Council does not (and did not at the date of Mrs Ferguson's request) hold any information regarding the disciplinary hearing. The Commissioner is satisfied that the Council has undertaken reasonable and sufficient searches to establish whether such information is held, and he accepts that it is not.
42. The Commissioner therefore finds that the Council acted in accordance with Part 1 of FOISA by giving Mrs Ferguson notice in terms of section 17 of FOISA that it did not hold this information.

DECISION

The Commissioner finds that Glasgow City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs Jean Ferguson.

Decision 007/2012
Mrs Jean Ferguson
and Glasgow City Council



Appeal

Should either Mrs Jean Ferguson or Glasgow City 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
6 January 2012



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.

...

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.

...