

Decision Notice

Decision 010/2016: Mr Murray Sinclair and Orkney Islands Council

Missing email

Reference No: 201501389

Decision Date: 25 January 2016



Scottish Information
Commissioner

Summary

On 25 October 2015, Mr Sinclair asked Orkney Islands Council (the Council) for a copy of an email from a named planning officer to a developer.

The Council provided Mr Sinclair with a copy of an email. Mr Sinclair did not accept that the email provided to him was the information he had requested. After a review, he remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had properly responded to Mr Sinclair's request for information in accordance with Part 1 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement)

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 25 October 2014, Mr Sinclair made a request for information to the Council. The information requested was for a copy of an email relating to Planning Application 14/275/TPP which was sent from a named planning officer to a named developer on 21 October 2014.
2. The Council responded on 24 November 2014. In its response, the Council provided Mr Sinclair with an email which it claimed fulfilled the terms of his request.
3. On 29 November 2014, Mr Sinclair wrote to the Council requesting a review of its decision on the basis that the email provided to him was not the email he had requested. Mr Sinclair explained that the email the Council had provided was an email between the named planning officer and another council employee, whereas he had asked for an email from the named planning officer to a named developer.
4. The Council did not respond to Mr Sinclair's request for review and, on 24 February 2015, Mr Sinclair contacted the Council again, reiterating his requirement for a review.
5. The Council notified Mr Sinclair of the outcome of its review on 6 March 2015. It stated that no emails had been sent from the named planning officer to the named developer "on 20 October 2014". (During the investigation, the Council told the Commissioner that it mistakenly referred to 20 October 2015 instead of 21 October 2015.)
6. On 23 July 2015, Mr Sinclair applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Sinclair stated he was not satisfied with the Council's handling of his information request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Sinclair made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 26 August 2015, the Council was notified in writing that Mr Sinclair had made a valid application. The case was then allocated to an investigating officer.
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 answer specific questions.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Sinclair and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 1(1) of FOISA – General entitlement

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. (This is subject to qualifications, but these are not applicable in this case.) This is not necessarily to be equated with information an applicant believes the authority does or 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.

Requested information

12. The requested information is an email sent on 21 October 2014 from a named planning officer to a named developer relating to planning application 14/275/TPP.
13. In his application to the Commissioner, Mr Sinclair explained that, on 21 October 2014, one of his neighbours viewed an email on the Council's planning website about application 14/275/TPP. This email was from a named planning officer to the developer involved in the planning application and Mr Sinclair's neighbour had drawn it to his attention as he considered the content of the email to be inappropriate. His neighbour told him that the email concluded with the planning officer stating "This should allow us to get it through".
14. Mr Sinclair explained that his neighbour had viewed the email via his mobile phone and was unable to print a copy at that point but agreed to print a copy for Mr Sinclair the following morning. When his neighbour went to print the email the following day, it was no longer on the website.
15. Mr Sinclair explained that he had phoned the Council's Planning Department to ask for a copy and was told by a clerical assistant that the Council was not prepared to give him a copy. This verbal refusal led to Mr Sinclair putting in a formal information request under FOISA.
16. In its submissions, the Council stated that it could not locate any email sent by the named planning officer to the named developer on 21 October 2014. As noted above, the Council confirmed that its review outcome had mistakenly referred to 20 October 2014 when advising Mr Sinclair that it held no emails generated on that day.

Evidence of searches

17. In order to establish whether or not the Council held the email at the time it received Mr Sinclair's request, the Council was required to provide details of the searches it had conducted on its website and to detail all documents that were uploaded and/or deleted from the planning website on 21 October 2014. The Council was also asked to search for all emails sent from the named planning officer's account on 21 October 2014. A search of the e-planning technician's computer hard drive and email system was also required to check for any emails received or sent to the named planning officer on 21 October 2014.
18. The Council was asked to describe the usual process for uploading documents to the planning website, and whether the named planning officer would have uploaded the document(s) or whether that responsibility lay with another person (e.g. the e-planning technician).
19. The Council explained that normally all documents for uploading to the planning website are emailed to the e-planning technician by the planning officers for each planning application they are dealing with. The Council submitted that the named planning officer would not normally have uploaded a document themselves (the implication being that while this was not normal, it was a possibility). The Council confirmed that once a document was uploaded, the e-planning technician would email the relevant planning officer to advise them that the document was on the website.
20. The Council noted that it had conducted a search of all documents deleted from the planning website between 20 October 2014 and 23 October 2014 and attached a log of the search results. The Council explained that an email would be classified as a "correspondence" type document, and the log indicated that no such document type was deleted in this timeframe.
21. The Council confirmed that it had undertaken searches of all emails between the named planning officer and the named developer as well as all emails sent and received by the named planning officer between 20 October 2014 and 21 October 2014.
22. The Council also provided details of all emails exchanged between the named planning officer and the e-planning technician in the month of October 2014.
23. The results of the search logs provided by the Council were reviewed thoroughly and there was no evidence of the email sought by Mr Sinclair. However, it was noted that the named council officer had received an email from the named developer at 23:47 on 20 October 2014 and this email had included an attachment. The search logs indicate that there was no acknowledgement or response from the named planning officer to this email, although every previous email sent by the named developer to the named planning officer had been acknowledged or responded to.
24. The Council was questioned on this point and was asked whether it was usual practice for planning officers not to acknowledge receipt of attachments from planning applicants. The Council submitted that it was difficult to speculate. It stated that the named planning officer was usually very good at acknowledging receipt of information, but that the email response from the named developer was at the end of a chain of emails between the two parties where the planning officer was looking for additional supporting information for the planning application under consideration to inform his presentation to the Planning Committee on 24 October 2014. The Council also noted that the named planning officer was in the final few weeks of employment with the Council, having taken up a new position with another local

authority and, with many other matters to conclude, they may have forgotten to acknowledge this particular email.

25. The Council was asked to run additional searches for emails from or to the named developer from the named planning officer from 21 October 2014 to 16 November 2014, but no further emails were located.
26. The Council provided a statement from the e-planning technician which noted that while they had received other emails from the named planning officer on 21 October 2014, they had not received any emails regarding the specific planning application 14/275/TPP.
27. The Council was asked whether it had conducted the searches detailed in the search log at the time that Mr Sinclair had put in his written request, on 25 October 2014. The Council submitted that original request to the Council's IT section to audit the planning officer's emails was made by the Head of Planning & Regulatory Service on 16 December 2014. This request was made after the Council had received notification from Mr Sinclair on 29 November 2014, indicating that the email it had provided to him did not contain the information he was seeking.

Commissioner's conclusions

28. Mr Sinclair has provided a detailed description of how he was informed that the email was published on the Council's website, and the Commissioner has no reason to doubt his submissions.
29. In response to her enquiries, the Council has provided detailed searches of the email accounts of the named planning officer and the e-planning technician and it has also provided a log of all documents deleted from the planning website in the relevant timeframe. The Commissioner has reviewed all of these search logs thoroughly and has found no evidence of the email sought by Mr Sinclair.
30. The Commissioner notes that the searches detailed in the search logs provided by the Council were carried out sometime on or after 16 December 2014, some six weeks after Mr Sinclair had submitted his request for information. The Commissioner considers that it is possible that information may have been deleted from the Council's IT systems in that six week gap (between Mr Sinclair's request for information and the Council's decision to conduct searches), but she has no evidence to confirm that this is the case.
31. The Commissioner is required to come to a decision as to whether, on the balance of probabilities, the Council held the email when it received Mr Sinclair's request. Coming to such a decision can be difficult, especially when, as is the case here, there are differing accounts as to the existence of the email. The Commissioner has found no evidence that the email was briefly available on the Council website, but is not in a position to state definitely that it was never there. However, the Commissioner cannot ignore the results of the very detailed searches carried out by the Council. She has therefore concluded, on balance, that the Council did not hold the email at the time of the request. It was therefore correct, at the time of the review, to notify Mr Sinclair that it did not hold the email he had requested.

Decision

The Commissioner finds that, in respect of the matters specified in the application, Orkney Islands Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Sinclair.

Appeal

Should either Mr Sinclair or Orkney Islands 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

25 January 2016

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.

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