

Decision Notice

Decision 209/2017: Dr Niall MacKinnon and Education Scotland

Review of complaint

Reference No: 201701513

Decision Date: 15 December 2017



Scottish Information
Commissioner

Summary

Education Scotland was asked for a “review document” relating to a review of its response to a complaint. Education Scotland gave notice that it did not hold the information. It explained why no review document had been created.

The Commissioner investigated and was satisfied that Education Scotland held no recorded information that was a review document, and that it had complied with Part 1 of FOISA in its response to the requester.

Relevant statutory provisions

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

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 29 May 2017, Dr MacKinnon made a request for information to Education Scotland. Dr MacKinnon referred to a letter he had received from Education Scotland and asked for “the review document referred to in paragraph 2”. Dr MacKinnon also asked for other information, specifically the identity of the person who had reviewed his complaint.
2. Education Scotland responded on 14 June 2017. It explained the process it had followed in addressing Dr MacKinnon’s complaint and which staff had been involved, and stated that there was no “review document” in this process. Education Scotland specified the documentation given to the reviewer in order to review Dr MacKinnon’s complaint.
3. On 19 July 2017, Dr MacKinnon wrote to Education Scotland requesting a review of its decision on the basis that Education Scotland had not sent him the information he had requested “yet there is indication that it may exist in that the reply informs me that some of it has been reported verbally and formally within Education Scotland”. Dr MacKinnon believed that Education Scotland was legally required to hold the information in relation to complaints handling procedures.
4. Education Scotland notified Dr MacKinnon of the outcome of its review on 9 August 2017. It concluded that its original decision of 14 June 2017 should be confirmed as no “review document” was involved in the review of the complaint.
5. On 24 August 2017, Dr MacKinnon applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Dr MacKinnon was dissatisfied with the outcome of Education Scotland’s review because he believed it held information falling within his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Dr MacKinnon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.

7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Education Scotland was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The Commissioner's investigation examined whether Education Scotland complied with FOISA in responding to Dr MacKinnon's request for any review documentation in respect of his complaint.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both Dr MacKinnon and Education Scotland. He is satisfied that no matter of relevance has been overlooked.

Section 17 - Notice that information is not held

10. 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. If no such information is held by the authority, section 17(1) of FOISA requires the public authority to give the applicant notice in writing to that effect.
11. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
12. In his request, Dr MacKinnon asked for "the review document" to which reference had been made in a letter from Education Scotland dated 19 May 2017. The letter simply states that a review was carried out. Both Education Scotland and the Commissioner have accepted that Dr MacKinnon's request would cover any document which records the process or outcome of the review, even though the letter of 19 May 2017 makes no reference to a "review document".
13. Education Scotland was asked to explain how it had established that it did not hold any recorded information that would be regarded as a review document covered by Dr MacKinnon's request.
14. Education Scotland explained that Dr MacKinnon's complaint was analysed by the Head of Communications, who verbally advised the Strategic Director and the official responsible for replying to Dr MacKinnon that the letter did not contain any new issues. No "review" document" was prepared or necessary in the consideration of Dr MacKinnon's complaint.
15. Education Scotland explained that the complaint was looked at "to assess it with the intention of instituting change - assessing whether previous complaint responses had been fully considered and responded to or whether there was a requirement to reassess the complaint if there was new information/evidence being presented to support such a consideration".
16. Education Scotland was satisfied that no new complaints had been raised and that it had already provided Dr MacKinnon with considered responses to his previous complaints on the same subject matter. Within Education Scotland, this conclusion was verbally communicated

for the purposes of the response to Dr MacKinnon's complaint, and there was no requirement to produce any notes or a review document.

17. Given that only one person was involved in the consideration of the "new" complaint, Education Scotland was content that this person would know if there had been any review document prepared, and confirmed again that no written document was created.
18. Dr MacKinnon was of the view that Education Scotland was required to hold the information he had requested "under current legislative requirements of procedures of complaint handling of Scottish public bodies." Dr MacKinnon supplied a link to a complaint adjudication procedure followed by another Scottish public authority to illustrate what he expected a review procedure to involve in terms of documentation. He also suggested that not to have had such recorded information for a complaint response would, in his view, constitute maladministration. In the context of the handling of his complaint, Dr MacKinnon expressed concerns relating to compliance with the Nolan Principles of Standards in Public Life.
19. Dr MacKinnon believed that Education Scotland had provided the wrong document for the internal independent reviewer to examine and indicated that this was why he had requested the information from Education Scotland. He accepted that a recorded review note might not exist, but he was of the opinion that this was done deliberately.
20. Finally, Dr MacKinnon referred to the response to his request (14 June 2017) which noted that a member of Education Scotland's staff had advised that legal advice should be sought to determine if all procedures for carrying out a review of Dr MacKinnon's complaint had been followed. Dr MacKinnon asked: "Was that observation furnished and received with no documentary trace?" Dr MacKinnon surmised "that there is some recorded minute, almost certainly relating to the reviewer's advice concerning the recommendation to seek legal advice but also likely more".
21. Education Scotland was invited to comment on this point and was asked if it held any document from the complaint reviewer (i.e. the Head of Communications) which records that legal advice should be sought about the review, or whether the suggestion about legal advice was recorded by any other staff in Education Scotland as a note. If it held such a document in respect of legal advice, Education Scotland was invited to explain whether it regarded this information as falling within the terms of Dr MacKinnon's request.
22. Education Scotland confirmed that it held no document which recorded that legal advice should be sought: this view had been expressed verbally. As there was no relevant recorded information, there was no need to consider whether such information fell within the terms of Dr MacKinnon's request.
23. Dr MacKinnon asked the Commissioner to consider Education Scotland's request for legal advice, and any advice received, in relation to his request.
24. After reviewing the correspondence between Education Scotland and its legal adviser, the Commissioner does not accept this information is covered by Dr MacKinnon's request for "the review document". The Commissioner must be careful not to disclose the content of this correspondence in the reasoning of his decision, and this imposes restrictions on the extent to which an explanation can be given of why the request for legal advice and the legal advice received does not fall within the terms of Dr MacKinnon's request.
25. In its response to his request, Education Scotland told Dr MacKinnon that the person responsible for reviewing the response to his complaint had recommended that legal advice should be sought "to determine if all our procedures for carrying out a review of your

complaint had been followed". The Commissioner can appreciate why Dr MacKinnon may have thought that such advice would fall within his request, but having viewed the correspondence constituting the advice and request for advice, he is satisfied that the information does not, on a reasonable interpretation, fall within the request.

26. Having considered all the relevant submissions, the Commissioner accepts that Education Scotland took adequate and proportionate steps to establish whether it held any information that fell within Dr MacKinnon's request, and accepts that it did not. In reaching this conclusion, the Commissioner has taken account of Education Scotland's explanation of why no information was recorded. The Commissioner is of the view that it would be simple for Education Scotland to establish whether it held a recent complaint review by a specified member of senior staff. He sees no reason to doubt Education Scotland's position that it does not hold any recorded information that would comprise a review document.
27. The letter from Education Scotland to Dr MacKinnon stated "After review... we judge it [Dr MacKinnon's complaint letter] to contain no new issue." Nothing in this letter indicates that recorded information relating to the review is held by Education Scotland, only that there had been a "review": i.e. an administrative action undertaken by Education Scotland.
28. The Commissioner is therefore satisfied that Education Scotland was correct to give Dr MacKinnon notice, in terms of section 17(1) of FOISA, that it did not hold any information falling within the scope of his request.
29. The Commissioner's remit extends only to the consideration of whether Education Scotland actually held the relevant information requested and whether it complied with Part 1 of FOISA in responding to Dr MacKinnon's request. The Commissioner cannot comment on whether a Scottish public authority should have recorded any, or more, information about a particular event or process, nor can he comment on whether that authority complied with its own procedures or any rules of good practice unless that relates to compliance with Part 1 of FOISA. The Commissioner cannot comment on whether Education Scotland dealt with Dr MacKinnon's complaint as it should. Dr MacKinnon has acknowledged his full awareness of this.

Decision

The Commissioner finds that Education Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dr MacKinnon.

Appeal

Should either Dr MacKinnon or Education Scotland 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
15 December 2017

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.

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