

# Decision Notice

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**Decision 097/2019: Ms Samantha Kerr and West Lothian Council**

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## **Social work guidance**

Reference No: 201900397

Decision Date: 25 June 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked for information about guidance and procedures relating to social workers' interactions with courts. The Council said that it held no information.

Following an investigation, the Commissioner agreed no information was held, but found that the Council's review response was issued outwith the required 20 working days.

## Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

## Background

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1. On 16 December 2018, Ms Kerr made a request for information to West Lothian Council (the Council). Ms Kerr's request (comprising five parts) is set out in full in Appendix 2.
2. The following day, Ms Kerr clarified that she sought the information contained in any guidance regarding the issues mentioned in her request. She acknowledged that some information would be held by the Scottish Courts and Tribunal Service (SCTS) guidance and notes to the judiciary.
3. On 21 January 2019, Ms Kerr wrote to the Council requesting a review on the basis that the Council had failed to respond to her request.
4. The Council notified Ms Kerr of the outcome of its review on 25 February 2019. The Council told her it did not hold the information she had requested and directed her to organisations that were more likely hold the information that she sought. On 28 February 2019, the Council apologised that it had not complied with the timescale for responding to her initial request.
5. On 5 March 2019, Ms Kerr wrote to the Commissioner. Ms Kerr applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Kerr was dissatisfied with the outcome of the Council's review as she believed that the Council had not interpreted her request correctly and that the information was held by the Council. Ms Kerr was also dissatisfied with the time taken to respond to her request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Ms Kerr 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. The Council was invited to comment on this application and answer specific questions related to the Council's reliance on section 17 of FOISA.
8. Ms Kerr also provided information and comments to support her application.

## Commissioner's analysis and findings

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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 Ms Kerr and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Section 17(1) - 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 here. If no such information is held by the authority, section 17(1) of FOISA requires the 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. The Council confirmed that it wished to rely on section 17 of FOISA for the whole request (i.e. all five parts) as it did not hold any of the information requested. The Commissioner will look at each part of request separately.

#### Part one

13. The Council explained that it interpreted this part of Ms Kerr's request as seeking information on what constitutes a criminal offence in Scotland. The Council considered that it was for the Crown Office and Procurator Fiscal Service (COPFS) to determine what constitutes an offence and whether there should be a prosecution. On that basis, it did not consider it necessary to conduct searches for information on what constitutes an offence. As a consequence the Council submitted that it does not hold guidance on this subject.
14. There will be instances where a Scottish public authority will hold recorded information that relates to the functions (the powers or rights or duties) of another Scottish public authority. The interaction of Scottish public authorities through the various regulatory regimes and legislation, which is a fact of public life, means that this will happen. However, authorities will hold more information related to their own functions, rather than to the functions of other authorities.
15. The Council is correct to state that it is for COPFS to decide whether to prosecute a person for an offence, and for COPFS to assess whether facts constitute – though it would be for a court to decide – an offence. This would not be a decision for the Council. There would seem therefore to be no requirement that the Council hold such information.
16. The Commissioner considers the interpretation of this request reasonable in the circumstances and accepts that the Council has taken adequate and proportionate steps to establish whether it held information which fell within this part of Ms Kerr's request.

#### Part two

17. The Council interpreted this request as relating to the duties of the sheriff court. The Council explained that it is not responsible for the operation of the sheriff court or for the training of Sheriffs and therefore does not hold information on the operation of the court or the duties of

Sheriffs. The Council submitted that it did not consider searches necessary as it is not responsible for policy, procedure or law in these areas and would never have any cause to obtain documents of this kind, should they exist.

18. The Commissioner accepts that the interpretation of this request is reasonable in the circumstances and that the Council has taken adequate and proportionate steps to establish whether it held information which fell within this part of Ms Kerr's request. As with request part 1 (above), the Council is correct that this request asks for the responsibilities of a judge when presented with an instance. The Commissioner accepts the Council's submissions that it does not hold this information, and sees no reason why the Council would be expected to hold this information.

#### Parts three and four

19. The Council submitted that it considered these parts of the request to be seeking information on the repercussions of deliberately misleading a court. Again, the Council explained that guidance on assessing criminal offences is likely to be held by COPFS, as the body responsible in Scotland for prosecuting crime. The Council said this was a matter for the SCTS, COPFS and the Scottish Government, rather than the Council.
20. The Council is correct that this request asks for information which relates to another public authority: firstly, what a judge may decide and secondly for guidance issued by the Scottish Government. The Commissioner is satisfied that the interpretation of these parts of the request was reasonable and that the Council has taken adequate and proportionate steps to establish whether it held information which fell within these parts of Ms Kerr's request.

#### Part five

21. The Council, in its submissions, acknowledged that this part of Ms Kerr's request lacked clarity. The Council submitted that, other than an interdict, it could not identify any other order which would prevent Social Work from exercising their own professional judgment on whether or not a case would be closed. The Council said it does not hold any guidance from the Scottish Government on closing cases.
22. Having considered all the relevant submissions, the Commissioner accepts – for the same reasons as he has given above - that the Council has taken adequate and proportionate steps to establish whether it held information which fell within this part of Ms Kerr's request. Although lacking clarity, the Commissioner is satisfied that the interpretation taken by the Council, in relation to this part of the request, is reasonable in the circumstances. However, the Commissioner notes that due to the procedural handling of this request, the Council missed an opportunity to seek clarification of this part of the request with Ms Kerr.

#### *The Commissioner's view*

23. The Commissioner is satisfied that the Council took a reasonable interpretation of all parts of this request and on the balance of probabilities that it does not hold any information falling within the scope of Ms Kerr's request. The Commissioner finds that the Council complied with Part 1 of FOISA in giving notice to Ms Kerr that the information was not held.

#### *Section 15(1) of FOISA – duty to provide advice and assistance*

24. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.

25. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public authorities under FOISA and the EIRs <sup>1</sup> provides (at paragraph 9.3.1 to 9.3.3 in Part 2) details on assisting applicants when the authority does not hold the information requested.
26. The Commissioner is of the view that the Council complied with section 15 by directing Ms Kerr to other bodies that may hold the information she requested.

#### *Section 21 of FOISA – review by a Scottish public authority*

27. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to qualifications which are not relevant in this case.
28. It is a matter of fact that the Council failed to respond to Mr Kerr's requirement for review within the required timescales, so the Commissioner must find that in this respect it failed to comply with section 21(1).

## **Decision**

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The Commissioner finds that West Lothian Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Kerr.

The Commissioner finds that, by giving Ms Kerr notice in terms of section 17(1) of FOISA that it did not hold the information requested, the Council complied with Part 1.

However, by failing to respond to Ms Kerr's requirement for review within 20 working days, the Council failed to comply with section 21(1) of FOISA.

The Commissioner does not require the Council to take any action in respect of this failure in response to Ms Kerr's application.

## **Appeal**

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Should either Ms Kerr or the 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 June 2019**

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<sup>1</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

## Appendix 1: Relevant statutory provisions

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### 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.

...

#### 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.

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## **Appendix 2: Ms Kerr's request**

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### Part one

Is it an offence for the Cafcass FCA (Children and Family Court Advisory and Support Service) and (Scottish Social Worker) or any member of Cafcass or (SS - Scottish Social Workers) to provide a report to the family court/Sheriff court where mistruths have been told to the FCA SS - Scottish Social Workers and the FCA /SS Scottish Social Workers report is based on lies?

### Part two

What is the policy & procedure & in law regarding the "Duty of the family court Judge or Sheriff Court" who is presented with evidence that:

- a The other party lied?
- b The FCA / SS Scottish Social Workers was presented with 'evidence of lies' and ignored it?

### Part three

What are repercussions for the FCA or SS Scottish Social Workers who supplies the judge with dishonest reporting?

### Part four

What are the guidelines set out in law from Ministry of Justice/Scottish Government where the FCA and SS Scottish Social Workers misleads a Judge?

### Part five

What are the guidelines set out in law from the Scottish Government where the SS Scottish Social Work Department closes a case whilst there is still an order from a member of the judiciary that explicitly states their involvement?

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