

Decision Notice 183/2021

Survey report relating to a named property

Applicant: The Applicant

Public authority: Aberdeenshire Council

Case Ref: 202100619



Scottish Information
Commissioner

Summary

The Council was asked for a survey report carried out around February – March 2018, by a specialist contractor, at a named address. The Council told the Applicant that it did not hold a survey report, but provided some related information.

The Commissioner was satisfied that, by the end of the investigation, all relevant information falling within the scope of the request had been disclosed, but found that the Council breached FOISA initially by informing the Applicant that it did not hold the information.

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 28 February 2021, the Applicant made a request for information to Aberdeenshire Council (the Council). The information requested was a survey report completed by a specialist contractor, Richardson and Starling, around February – March 2018 at a named property.
2. On 2 March 2021, the Council asked the Applicant some questions about the information he was seeking.
3. On 5 March 2021, the Applicant clarified that the information he was seeking was a survey commissioned to investigate woodworm and repair costs at the property, which was owned by the Council.
4. The Council responded on 29 March 2021 informing the Applicant that it had conducted a full search and concluded that the information was not held.
5. On 5 April 2021, the Applicant wrote to the Council, requesting a review of its decision as he did not agree that the information was not held.
6. The Council notified the Applicant of the outcome of its review on 28 April 2021. It upheld its original decision that no survey report was held, but provided the Applicant with information showing the extent of the work carried out at the property. Copies of these documents were provided to the Applicant:
 - the Invoice from Richardson and Starling for the work
 - the Warranty
 - a drawing showing where the floor was repaired
7. On 17 May 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he did not accept that the Council did not hold the information and believed it must have a copy.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
9. On 7 June 2021, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
10. 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 to answer specific questions, focusing on the steps it had taken to identify and locate any information falling within the scope of the request.
11. During the investigation, the Council located further information falling within the scope of the request and provided this the Applicant.

Commissioner's analysis and findings

12. 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 him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Information held by the Council

13. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to the qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
14. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes an authority *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 this effect.
15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority *should* hold, ultimately the Commissioner's role is to determine what information *is actually held* by the public authority (or was, at the time the request was received).
16. In its submissions to the Commissioner, the Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of the Applicant's request, including staff consulted, searches carried out and the results of those searches. It explained that the information disclosed to the Applicant during the investigation was only found after the Applicant had been provided with his review outcome.

Interpretation of the request

17. The Applicant, in his request, asked for a survey report, naming the contractor, the date and the address of the property concerned. When asked by the Council for clarification, he explained that the survey was to investigate woodworm at the property and to cost floor repairs.
18. In its submissions, the Council maintained its position that no building survey had been carried out and no report had been produced. However, the Council provided information to the Applicant during the investigation, detailing the results of an inspection of the property carried out by Richardson and Starling, outlining the remedial work it had identified as necessary and its quotation for this work.
19. The Commissioner considers that the request should have been interpreted in the widest sense, giving its terms their plain, ordinary meaning. He recognises that, in technical building terms, “survey” and “report” may mean particular things, but considers it was unduly restrictive to take such a narrow, technical approach to this request, made by a lay person. In this case, it was quite clear, from the Applicant’s description of the information he was looking for, that he was seeking the outcome of a particular inspection, carried out at the property in question for a specific purpose. It appears clear to the Commissioner (and he considers it should have been apparent to the Council) that the information described in the preceding paragraph, prepared by a specialist in the field and falling within the other parameters set by the Applicant, fell within the scope of the request under consideration here.
20. In the circumstances, the Commissioner considers it unfortunate that this information was not provided to the Applicant at the earliest opportunity after the Council discovered it.
21. Having considered all of the relevant submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) the Council had identified, located and provided all of the information it held falling within the scope Applicant’s request.
22. In all the circumstances, however, the Commissioner finds that the Council was incorrect to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of the request. By doing so, the Council failed to comply with section 1(1) of FOISA.

Decision

The Commissioner finds that Aberdeenshire Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by incorrectly advising the Applicant that it did not hold information falling within the scope of the request, the Council failed to comply with section 1(1) of FOISA.

Given that the information has since been provided to the Applicant, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant’s application.

Appeal

Should either the Applicant 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

15 November 2021

Appendix 1: 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.

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