

Enforcement Notice

Failure to adopt a publication scheme approved by the Scottish Information Commissioner

ENF002/2016 Daldorch House School

Reference no: 201602012

Notice date: 29 November 2016



Scottish Information
Commissioner

Summary

Daldorch House School (Daldorch) is a grant-funded school and is subject to the Freedom of Information (Scotland) Act 2002 (FOISA).

It has a duty, in line with section 23 of FOISA, to adopt and maintain a publication scheme which is approved by the Scottish Information Commissioner (the Commissioner), and to publish information in accordance with that scheme.

Daldorch has failed to adopt and maintain a publication scheme and to publish information in accordance with the scheme. It has accordingly failed to comply with a provision of Part 1 of FOISA.

The Commissioner requires Daldorch to submit a publication scheme to her for approval by **31 January 2017**.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 3(1)(a)(ii) (Scottish public authorities); 5 (1) to (3) (Further power to designate Scottish public authorities); 23(1) to (4) (Publication schemes); 24(1) and (2) (Model publication schemes); 51(1) to (3) (Enforcement notices)

The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016 (the 2016 Order) regulation 2(1) (Extension of coverage of the 2002 Act) and Schedule 1 (part)

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.

Introduction

1. Where the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part 1 of FOISA, she may, under section 51(1) of FOISA, give the authority a notice requiring it to take steps to comply with Part 1, within a specified period.
2. This notice sets out:
 - (i) the provision of Part 1 of FOISA with which the Commissioner is satisfied that Daldorch has failed to comply, and
 - (ii) the respect in which it has failed to comply.
3. This notice also specifies the steps Daldorch must take in order to comply with Part 1 of FOISA.

Background

Section 23(1) – Publication Schemes

4. Section 23(1) of FOISA requires all Scottish public authorities to adopt a publication scheme, which has been approved by the Commissioner.

5. Section 3(1) of FOISA sets out the definition of “Scottish public authority.” In terms of section 3(1)(a)(ii), this includes any body which, any other person who, or the holder of any office which is designated by order under section 5(1).
6. Under section 5 of FOISA, the Scottish Ministers may by order designate as a Scottish public authority a specified person or persons falling within a specified description. Daldorch was, by virtue of the 2016 Order, designated as a Scottish public authority for the purposes of section 3(1)(a)(ii) of FOISA from 1 September 2016.
7. On 8 February and 3 March 2016, the Commissioner wrote to Daldorch to alert it to the fact that it would be subject to FOSIA from 1 September 2016. The Commissioner also wrote to Daldorch on 5 September 2016 to remind it of its duties under FOISA, including the requirement to comply with section 23 of FOISA. The correspondence from the Commissioner set out the options available to Daldorch in relation to its publication scheme duty.
8. The Commissioner subsequently wrote to Daldorch on 7 November 2016 to advise that enforcement action would be taken in the event that it did not comply with section 23. Further guidance was given to Daldorch on 8 November 2016.
9. On 14 November 2016 Daldorch responded to the Commissioner’s letter of 7 November 2016. It confirmed it intends to adopt the Commissioner’s Model Publication Scheme (MPS). It indicated that although it wished to do this quickly, it may take some time.
10. The Commissioner recognises that Daldorch is now taking steps to comply. However, she cannot let this situation continue indefinitely. In any case, it is not clear in the correspondence with Daldorch why no publication scheme has been set up, given the history of correspondence from the Commissioner’s office reminding Daldorch of its duties under FOISA.
11. It is clear from the latest correspondence between the Commissioner and Daldorch that Daldorch has still not taken the steps required to adopt and maintain a publication scheme. As such, Daldorch is in breach of section 23(1) of FOISA and has been since 1 September 2016.

Findings

The Commissioner finds that Daldorch House School (Daldorch) failed to adopt and maintain a publication scheme approved by her, and to publish information in accordance with that scheme. Daldorch has therefore failed to comply with Part 1 (and, in particular, with section 23(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Commissioner requires Daldorch to take steps to comply with section 23(1)(a) and (b) of FOISA, and submit a publication scheme to her for approval in line with guidance previously provided, by **31 January 2017**.

Appeal

Should Daldorch House School wish to appeal against this enforcement notice, it has 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.

Enforcement

If Daldorch House School fails to comply with this notice, the Commissioner has the right to certify to the Court of Session that Daldorch has failed to comply. The Court has the right to inquire into the matter and may deal with Daldorch as if it had committed a contempt of court.

**Margaret Keyse
Head of Enforcement**

29 November 2016

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

3 Scottish public authorities

- (1) In this Act, “Scottish public authority” means—
- (a) any body which, any other person who, or the holder of any office which—
 - ...
 - (ii) is designated by order under section 5(1); or
 - ...

5 Further power to designate Scottish public authorities

- (1) The Scottish Ministers may by order designate as a Scottish public authority for the purposes of this Act any person mentioned in subsection (2) who—
- (a) is neither for the time being listed in schedule 1 nor capable of being added to that schedule by order under section 4(1); and
 - (b) is neither a public body nor the holder of any public office.
- (2) The persons are those who either—
- (a) appear to the Scottish Ministers to exercise functions of a public nature; or
 - (b) are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
- (3) An order under subsection (1) may designate a specified person or persons falling within a specified description.
- ...

23 Publication schemes

- (1) A Scottish public authority must—
- (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner;
 - (b) publish information in accordance with that scheme; and
 - (c) from time to time review that scheme.
- (2) A publication scheme must specify—
- (a) classes of information which the authority publishes or intends to publish;
 - (b) the manner in which information of each class is, or is intended to be, published; and

- (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.
 - (3) In adopting or reviewing its publication scheme the authority must have regard to the public interest in—
 - (a) allowing public access to information held by it and in particular to information which—
 - (i) relates to the provision of services by it, the cost to it of providing them or the standards attained by services so provided; or
 - (ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it;
 - (b) the publication of reasons for decisions made by it.
 - (4) The authority must publish its publication scheme but may do so in such manner as it thinks fit.
- ...

24 Model publication schemes

- (1) The Commissioner may, in relation to Scottish public authorities falling within particular classes –
 - (a) prepare and approve model publication schemes; or
 - (b) approve such schemes prepared by other persons.
 - (2) If an authority which falls within the class to which an approved model publication scheme relates adopts that scheme without modification, no further approval of the Commissioner is required so long as that model scheme remains approved; but the approval of the Commissioner is required in relation to any modification of the scheme by the authority.
- ...

51 Enforcement notices

- (1) If the Commissioner is satisfied that a Scottish public authority has failed to comply with a provision of Part 1 of this Act, the Commissioner may give the authority a notice (referred to in this Act as “an enforcement notice”) requiring the authority to take, within such time as is specified in the notice, such steps as are so specified for so complying.
- (2) An enforcement notice must contain—
 - (a) a statement of the provision with which the Commissioner is satisfied that the authority has failed to comply and the respect in which it has not done so; and
 - (b) particulars of the right of appeal conferred by section 56.
- (3) The time specified under subsection (1) must not expire before the end of the period within which an appeal may be brought under section 56 against the notice and, if such an appeal is brought, the notice need not be complied with before the cause is finally determined.

The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016

2 Extension of coverage of the 2002 Act

- (1) The persons described in column 1 of the table of Schedule 1 to this Order are designated under section 5(2)(a) of the 2002 Act as a Scottish public authority in relation to the functions specified in column 2 of that table.

Schedule 1

Column 1	Column 2
Description of persons	Functions
Grant-aided schools	the running of a grant-aided school as defined by section 135(1) of the Education (Scotland) Act 1980

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