

Practice Recommendation

001/2021

Alerting third parties to information requests

Public authority: Aberdeenshire Council

Case Ref: 202101228



Scottish Information
Commissioner

Summary

This Practice Recommendation asks the Council to take certain steps to ensure that its handling of information requests is appropriately applicant blind.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 43(1) and (8) (General functions of Commissioner); 44(1) and (2) (Recommendations as to good practice)

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. In July 2021, an applicant made a number of information requests to Aberdeenshire Council (the Council) under section 1(1) of FOISA.
2. The applicant's employer was known to the Council, although there was nothing in any of his requests for information to identify him as such an employee or to suggest that he was seeking the information in that capacity. The employer provides services to the Council.
3. Following these requests, a senior Council officer wrote to the applicant's employer, expressing concern in relation to the applicant's behaviour, with specific reference to the requests made in July 2021. This communication suggested that the requests had led to a serious loss of trust in the working relationship between the Council and the applicant's employer and identified potential consequences for that working relationship if the applicant's use of FOISA in this context was not satisfactorily explained.
4. Given the "applicant blind" principle underlying the right to information conferred by Part 1 of FOISA, the linkage described in the previous paragraph was clearly unacceptable, as indeed was any contact with the employer which identified the applicant as an employee of theirs. The applicant was simply exercising his statutory right under section 1(1) of FOISA, in a perfectly legitimate manner. He was entitled to do so without his employer being involved in the process, and without the Council linking wholly unrelated matters to the handling of the requests.
5. In terms of section 43(1) of FOISA, the Commissioner is required to promote the following of good practice by Scottish public authorities, with a view in particular to promoting their observance of FOISA and the codes of practice issued under sections 60 and 61 of FOISA. "Good practice" in this context is defined (section 43(8)) as such practice in the discharge of the authority's functions under FOISA as appears to the Commissioner to be desirable, which includes (but is not limited to) compliance with the requirements of FOISA and the provisions of the codes of practice issued under sections 60 and 61.
6. The Commissioner's role is to secure the implementation of FOISA and related good practice. The Council's wider working relationship with the employer is not his concern. It is the Commissioner's view that the aspects of the Council's response to these requests described in paragraph 3 above cannot be regarded as good practice, for the reasons set out in paragraph 4 above.

7. The Council has acknowledged that the senior officer's email to the applicant's employer was not justified in terms of FOISA or related good practice. It has confirmed (and evidenced) that the email has been withdrawn. It has also submitted, as appears to be the case, that the sending of the email had no effect on the proper handling of the requests in terms of Part 1 of FOISA. It has confirmed that it will take steps to ensure that similar contact will not be made again in relation to an information request, acknowledging that such contact has the inherent potential to undermine the effective exercise of the core right in FOISA, i.e. the right of access to information.
8. In terms of section 44(1) of FOISA, the Commissioner may give a Scottish public authority a Practice Recommendation if it appears to him that the authority's practice in relation to the exercise of its functions under FOISA does not conform with the code of practice issued by the Scottish Ministers under section 60 or 61 of FOISA. In this case, the Commissioner is not satisfied that the Council's practice has conformed with the Code of Practice issued under section 60 of FOISA (the Section 60 Code¹) in certain respects. Bearing in mind that the issues raised in this case go to the heart of the legislative scheme established by FOISA, he does not believe he can be satisfied that these matters have been addressed fully without further assurance from the Council. He is therefore giving the Council this practice recommendation, with a view to securing that assurance.
9. As required by section 44(2) of FOISA, the Commissioner will set out in the following sections which specific provisions of the Section 60 Code he believes are not being conformed with and the steps he considers the Council ought to take in order to conform. In his view, the following areas of good practice in Part 2 of the Section 60 Code ought to be addressed by the Council:
 - Responsibility for FOI [Freedom of Information] within an authority (specifically, senior management responsibility and training)
 - Consulting third parties (in relation to identifying the applicant)

Specific areas of failure

Responsibility for FOI within an authority

10. It is apparent that the failure to handle requests in an applicant blind manner emanated from the Council's senior levels of management. Paragraph 1.2.1 in Part 2 of the Section 60 Code makes it clear that "meeting the requirements of the legislation and bringing about a culture of openness depends significantly on leadership from the top", while paragraph 1.2.3 states that "senior managers should ... take responsibility and be accountable for FOI in their areas". Clearly, this includes setting an appropriate example in the proper handling of any information requests, something which cannot be said to have happened in relation to the requests under consideration here.
11. In this respect, therefore, the Commissioner is not satisfied that the Council has conformed with paragraph 1.2.3 in Part 2 of the Section 60 Code.
12. Training is, of course, central to the effective embedding of good FOI practice throughout any Scottish public authority. Paragraph 1.3.1 states that "authorities should provide training to ensure that all staff have sufficient knowledge of the regimes". More specific expectations as

¹ [FOI/EIR: section 60 code of practice - gov.scot \(www.gov.scot\)](http://www.gov.scot)

to training for those with particular roles in the process are set out in the paragraphs following 1.3.1, but the Commissioner takes the view that the overarching expectation in that initial paragraph should be read as meaning that any FOI training given within the authority should be adequate and relevant in relation to the role any given officer is expected to perform. This should include, for example, the expectations the Council places on its senior managers to lead the effective and proper implementation of FOI in their respective service areas.

13. In the present circumstances, the Commissioner cannot be satisfied that these expectations of leadership are adequately instilled across the Council's senior management and, in this respect, finds that the Council has not conformed with paragraph 1.3.1 in Part 2 of the Section 60 Code.

Consulting third parties

14. The Section 60 Code devotes a number of paragraphs to the process of consulting third parties in relation to an information request. While none of these address the specific circumstances in which the Council engaged with the [employer] in this case, paragraph 7.5.2 in Part 2 makes it abundantly clear that:

"If the applicant is an individual their identity should almost always remain withheld from third parties as this is personal data and its disclosure is likely to be in breach of the Data Protection Principles. There may be occasions when the identity of the applicant is relevant to the request but it should not be shared with third parties unless permission is sought and granted, or the request was made in the public domain (e.g. via whatdotheyknow.com)."

15. In other words, even where consultation with a third party is appropriate (and the Commissioner is not satisfied that it was in this case, for reasons discussed above), there should be no reason in any circumstances (except, possibly, where it is necessary for a very limited purpose subject to a clear obligation of confidentiality, for example, in obtaining legal advice) for a Scottish public authority sharing any of the applicant's personal data with a third party without the applicant's permission.
16. The Commissioner can identify no basis for the applicant's personal data being shared with the [employer] in this case and finds that the Council has not conformed with paragraph 7.5.2 in Part 2 of the Section 60 Code in this respect.

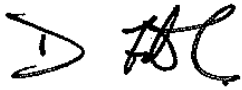
Action required

The Council is recommended to ensure that all staff, including senior managers, are adequately trained in understanding the principle that all information requests should be dealt with on an applicant blind basis and the identity of the applicant (and matters relating to that identity) should be shared with third parties in very limited, lawful, circumstances only.

Training for senior managers should emphasise the leadership to be provided, and the example to be shown, in this and all other aspects of the management and delivery of Freedom of Information across the authority.

The Council is asked to report back to the Commissioner, with details of the training provided and

evidence that it has been provided to all staff (including the more focused training to be provided to senior managers), by **28 February 2022**.

A handwritten signature in black ink, appearing to read 'D' followed by a stylized 'AFC'.

Daren Fitzhenry
Scottish Information Commissioner

07 December 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

43 General functions of Commissioner

- (1) The Commissioner, with a view in particular to promoting the observance by Scottish public authorities of the provisions of—
 - (a) this Act; and
 - (b) the codes of practice issued under sections 60 and 61,is to promote the following of good practice by those authorities.

...

- (8) In this section “good practice”, in relation to a Scottish public authority, means such practice in the discharge of its functions under this Act as appears to the Commissioner to be desirable, and includes (but is not limited to) compliance with the requirements of this Act and the provisions of the codes of practice issued under sections 60 and 61.

44 Recommendations as to good practice

- (1) If it appears to the Commissioner that the practice of a Scottish public authority in relation to the exercise of its functions under this Act does not conform with the code of practice issued under section 60 or 61, the Commissioner may give the authority a recommendation (in this Act referred to as a “practice recommendation”).
- (2) A practice recommendation must -
 - (a) be in writing and specify the code and the provisions of that code with which, in the Commissioner’s opinion, the authority’s practice does not conform; and
 - (b) specify the steps which that officer considers the authority ought to take in order to conform.

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