



Decision Notice 072/2023

Organisations in receipt of a PERF award offer: criteria

Authority: Highlands and Islands Enterprise
Case Ref: 202200945

Summary

The Applicant asked the Authority for the total number of organisations that received a PERF award offer from the Authority, having been given a geographic location score greater than the score for their business address. The Authority informed the Applicant, in line with section 17 of FOISA, that it did not hold the requested information. The Commissioner investigated and found that the Authority had failed to interpret the Applicant's request correctly and required the Authority to reconsider the Applicant's request and issue a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (3) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

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 12 July 2022, the Applicant made a request for information to the Authority. It asked for the total number of organisations that received a Pivotal Enterprise Resilience Fund (PERF) award offer from the Authority, having been given a Geographic Location score greater than that required by the sub-criteria given their business address.
2. The Authority responded on 27 July 2022. The Authority informed the Applicant that one of the assessment criteria was the location of business activity and not business address. The

Authority informed the Applicant that, in line with section 17 of FOISA, it did not hold any information covered by its request.

3. On 27 July 2022, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that it was dissatisfied with the decision because it considered the Authority understood the nature of the information covered by the request but had manufactured an excuse for refusing to provide it. The Applicant also noted that the Authority had made no attempt to clarify what information was sought.
4. In its requirement for review, the Applicant explained that it was seeking the total number of organisations that received a PERF award offer from the Authority, where the Geographic Location score given was greater than it would have been had the Authority scored Geographic Location based on the business address provided by the applicant, i.e. where there was a mismatch. The Applicant also set out an example of what it would consider such a mismatch to look like. The Applicant also challenged the Authority's contention that it did not hold information which would fulfil the request and set out the nature of the information it understood the Authority to hold.
5. The Authority notified the Applicant of the outcome of its review on 24 August 2022. The Authority upheld its original decision and continued to argue that, in line with section 17 of FOISA, it did not hold any recorded information which would fulfil the Applicant's request. The Authority re-iterated that the reason it does not hold any information was because the assessment criterion applied was the location of business activity, rather than business address. It noted that these were not the same criteria.
6. On 25 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated it was dissatisfied with the outcome of the Authority's review as it considered the Authority did hold information covered by the request and had misconstrued the request in an effort to avoid disclosing information. The Applicant was also unhappy because the Authority had not explored with it whether the provision of alternative information might fulfil its request.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 4 January 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
9. The Authority provided submissions to the Commissioner and the case was subsequently allocated to an investigating officer.
10. The submissions from the Authority and Applicant are considered below.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 1(1) – General entitlement

12. 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 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 in section 1(6) are not applicable in this case.
13. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).
14. Where an authority is unclear about the nature of the information covered by an Applicant's request they can, in line with section 1(3), ask for further information to enable them to identify and locate the requested information.

The Applicant's submissions

15. The Applicant argued that the Authority had misconstrued their request and manufactured an excuse to avoid providing information it held.

The Authority's submissions

16. The Authority explained that PERF was a scheme introduced by the Scottish Government, in response to the Covid-19 pandemic, to provide assistance to businesses across Scotland. The scheme was administered by Scottish Enterprise, with criteria set at a national level, although enterprise agencies were given discretion at regional level to assess an applicant's economic importance.
17. As part of the assessment template, a section was included to assess the geographic location of the business activity. The Authority submitted that the criteria noted this was an assessment based on the geographic location of the business activity and not the location of the business address.
18. Following receipt of the Applicant's request in this case, the Authority stated that it explained to the Applicant that the criteria of the scheme referenced in the request referred to the location of business activity and not business address(es).

Interpretation of request

19. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 ([the Section 60 Code](#))¹ covers, at section 5 of part 2, the duty on the part of a public authority (under section 15(1) of FOISA) to provide advice and assistance to Applicants. It also covers the steps that should be taken, where necessary, to seek clarification of a request.
20. Paragraph 5.3.1 makes it clear that authorities should remember that applicants cannot reasonably be expected to always possess identifiers, such as file references or the description of a particular record. Nor should applicants be expected to always have the technical knowledge or terminology to identify the information they seek.

¹ [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

21. Therefore, if an authority is unclear about the nature of the information the applicant wants, it should obtain clarification by performing its duty to provide advice and assistance to the applicant. Where a request is not reasonably clear, advice and assistance could include:
- providing an outline of the different kinds of information which might meet the terms of the request;
 - providing access to detailed catalogues and indexes, where available, to help the applicant ascertain the nature and extent of the information held by the authority;
 - providing a general response to the request setting out options for further information which could be provided on request;
 - contacting the applicant to discuss what information the applicant wants.
22. The intended aim of providing advice and assistance is to give the applicant an opportunity to discuss their application with the authority, with the aim of helping the applicant describe the information being sought reasonably clearly, so the authority is able to identify and locate it.
23. Having considered the submissions from the Authority, while not satisfied that further advice and assistance was necessary in this case, the Commissioner is concerned about the manner in which it has interpreted the Applicant's request.
24. The Commissioner has considered the strict wording of the original request:
- "We seek the total number of organisations that received a Pivotal Enterprise Resilience Fund (PERF) award offer from the Authority having been given a Geographic Location score greater than that required by the sub-criteria given their business address."
25. It appears to the Commissioner that, in its interpretation of the request, the Authority has focused on the terminology used by the Applicant where they refer to the Geographic Location score being greater than that "required" by the sub-criteria given their business address. This interpretation appears to proceed on the basis that the Applicant is assessing the criterion relating to Geographic Location to be the same as that covering business address. The Commissioner does not agree that this is a fair or accurate interpretation.
26. The Commissioner is satisfied that the nature of the information the Applicant was seeking is clear from reading the request submitted on 12 July 2022.
27. Furthermore, were the Authority to be in any doubt as to the intention of the request, in its requirement for review, the Applicant stated:
- "for the avoidance of doubt, we seek the total number of organisations that received a PERF award offer from the Authority and where the Geographic Location score given was greater than it would have been had the Authority scored Geographic Location based on the business address provided by the applicant, i.e. where there was a mismatch."
28. The Applicant then went on to provide an example of what they considered such a mismatch to look like. Therefore, it is apparent that the Applicant is aware and understands that these are two different criteria.
29. Given the requirements in the Section 60 Code, the Commissioner takes the view that the Authority should have interpreted the Applicant's request in a more favourable, common-sense manner, particularly given that the Applicant should not be expected to know what information is held by a public authority, or how it is held.

30. Because the Commissioner considers that the Applicant's request was clear and he is not satisfied with the Authority's interpretation of it, he will not go on to consider whether the Authority was entitled to notify the Applicant, in line with section 17 of FOISA, that it held no relevant information which would fulfil their request.
31. The Commissioner finds that in failing to interpret the Applicant's request in a reasonable manner, the Authority failed to comply with section 1(1) of FOISA.
32. The Commissioner therefore requires the Authority to carry out a fresh review and to issue a new review outcome to the Applicant.

Decision

The Commissioner finds that by failing to interpret the Applicant's request correctly, the Authority failed to comply with Part 1 (in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

The Commissioner therefore requires the Authority to carry out a fresh review and to issue a new review outcome to the Applicant, by **28 August 2023**.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

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

Margaret Keyse
Head of Enforcement

14 July 2023

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- (3) If the authority –
 - (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
...
- (6) This section is subject to sections 2, 9, 12 and 14.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

