

Decision Notice 092/2021

Edinburgh Central Library Development

The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202000944



Scottish Information
Commissioner

Summary

The Council was asked for information relating to a review of its Library and Information Services.

The Council explained why it believed the information in question had been destroyed several years previously.

The Commissioner accepted that, by the end of the investigation, the Council had conducted thorough and adequate searches and located no information within scope.

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 24 October 2019, the Applicant made a request for information to the City of Edinburgh Council (the Council). The information requested related to a review of the Council's Library and Information Services in 2008 and fell into two parts, the second of which is the subject of this decision. The Applicant asked for:

Part A

- 1) Minutes of the Council's Culture and Leisure Committee 29 April 2008 and
- 2) Under Appendix C of a report to that meeting, documentation relating to an assertion that "land was purchased in 1899 to ensure future scope for expansion".

Part B

- 3) Copy of a report referred to under the heading "Refurbishment of Central Library" paragraph 3.1 of Central Library Development Issues Policy and Strategy Committee 10 June 2008 (results of a space planning exercise/funding sources for first phase of the development of Central Library).
 - 4) All documents relating to the debate/decision to dispose of the adjacent site.
 - 5) All documents that relating to the assertion that "development of the site has not been possible due to funding issues".
2. The Council responded on 21 November 2019 under the Environmental Information (Scotland) Regulations 2004 (the EIRs), notifying the Applicant that information for Part B was not held. It also responded in relation to Part A.
 3. On 20 January 2020, the Applicant wrote to the Council, requesting a review of its response, stating it was inconceivable that the information described (Part B) was not held unless it had been deleted by the Council.
 4. The Council notified the Applicant of the outcome of its review on 17 February 2020, this time under FOISA but upholding its original decision that it did not hold the information. It noted

how the information would have been categorised under its records retention policies, with the result that it would have destroyed the information several years previously.

5. On 18 August 2020, 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 as he remained of the view that the information for Part B should exist and be provided.
6. For Part A of the request (above), the Applicant did not express dissatisfaction with the Council's decision either in his requirement for review or in their appeal. Consequently, the Commissioner is unable to consider Part A further in this decision.

Investigation

7. 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.
8. On 4 September 2020, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
9. 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. These related to the searches it had undertaken and its records retention policies going back to the time in question.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of 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

11. Although it responded to the request originally under the EIRs, the Council carried out its review under FOISA and provided submissions under FOISA in responding to the Commissioner. Given the terms of the request and the nature of the response, the Commissioner sees no need to query the Council's application of FOISA rather than the EIRs.
12. Section 1(4) 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 contained 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 in section 1(4). This is not necessarily to equated with information an applicant believes the authority should hold. 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.
14. 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 reason 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

15. The Commissioner has noted the Applicant's reasons for dissatisfaction, to the effect that an answer has still to be provided and the Applicant believes the information should be held.
16. In its submissions, the Council set out how it had established what information it held (if any), including explanations of who was involved and the resources it had considered in doing so. The search methodology and parameters used were explained, with supporting evidence of outcomes.
17. Aspects of these searches, including queries raised by the Applicant about destruction of information, were the subject of further clarification during the investigation. These included records retention practices circa 2008-2011, changes to those practices thereafter, and whether legal conveyancing records had been properly searched, given elements of the request related to disposal of a site. The Council acknowledged that, for records created in the period in question, it had no record or way of identifying when exactly the material sought was actually destroyed, only that it expected and believed it was destroyed, as evidenced by the searches (which had not identified relevant material).
18. The Council explained that its archives would hold sale of property information and searches were conducted by the Records Management and Archive Team in response to the Applicant's request, looking for any conveyancing records held (but none were located). Checks with the Legal Services Team were also undertaken, in its electronic case management system: this is where case records for all legal activities by that team would be held. No information within scope was identified during these searches.
19. Further searches carried out during the investigation did, however, identify two further archive boxes relating to the Central Library, neither with an inventory of contents. While these did not turn out to contain any relevant material, they should have been identified and checked in dealing with the request or the requirement for review. In the circumstances, the Commissioner must find that there was a failure to conduct fully adequate searches.
20. The Council acknowledged this deficiency, recognising that, in the absence of an inventory, both boxes should have been searched previously.

Commissioner's conclusions on section 17(1)

21. Having considered all relevant submissions, the Commissioner is satisfied that, by the end of the investigation, the Council had taken adequate and appropriate steps to establish what information was held and whether it held information capable of addressing the terms of the Applicant's request.
22. The Commissioner notes the explanations provided by the Council in its correspondence with the Applicant and the submissions it has provided during this investigation, including clarifications of its records retention and destruction practices and further searches.
23. The Commissioner accepts that proportionate searches for any information held and falling within the scope of the request have been conducted and that the Council was correct to notify the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information

requested. As indicated above, however, fully adequate searches were not conducted until during the investigation, with the result that the Council failed to comply fully with section 1(1) of FOISA.

24. The Commissioner can only consider what relevant information is actually held by the Council (or was held, at the time it received the Applicant's request). He cannot consider what information it should hold, or what the Applicant believes it should hold.

Decision

The Commissioner finds that, in respect of the matters specified in the application, City of Edinburgh 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 the Applicant.

He finds that the Council correctly notified the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested. Given that the searches carried out in responding to the Applicant were not wholly adequate, however, the Commissioner must find that the Council failed to comply fully with section 1(1) of FOISA in dealing with the Applicant's request.

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

9 June 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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