

Decision Notice 116/2020

Children subject to child protection investigations, etc.

Applicant: The Applicant

Public authority: Perth and Kinross Council

Case Ref: 201901037



Scottish Information
Commissioner

Summary

The Council was asked for a range of statistics about children aged five and under between August 2012 and July 2013.

The Council initially stated it did not hold the information. However, during the investigation, it accepted (with the exception of one request) that it did hold the information.

With the exception of that one request, the Commissioner found that the Council was not entitled to claim that it did not hold the information. The Council provided the Applicant with information in relation to two requests and submitted (and the Commissioner accepted) that to respond to the remaining requests would cost in excess of £600.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 17(1) (Notice that information is not held); 73 (Interpretation) (definition of “information”)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. On 29 April 2019, the Applicant made a request for information to the Council. The Applicant requested a range of statistics about children under the age of five between August 2012 and July 2013. The requests (numbered 1-17) are set out in full in Appendix 2.
2. Following clarification of the request, the Council responded on 28 May 2019. The Council stated that it would cost more than £600 to comply with request 1 and applied section 12(1) of FOISA. In response to requests 2, 3, 6, 10 and 11, the Council stated that it did not hold the information in a format that would allow it to answer the requests, but, in each case, explained what information it did hold. The Council indicated that responses to these requests would require the creation of new information and that section 17(1) therefore applied. The Council disclosed information in response to the remaining 11 requests.
3. Later that day, the Applicant wrote to the Council requesting a review of the responses to requests 2, 3, 6, 10 and 11. He believed the Council held the information and suggested that a simple SQL script could provide him with the information. He commented that most other local authorities had been able to provide him with the information.
4. The Council notified the Applicant of the outcome of its review on 19 June 2019. The Council confirmed its original decision.

5. The Applicant wrote to the Commissioner later that day, 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 the Council did not hold the information. He told the Commissioner that the local authorities provide the information to the Scottish Government in a return since 2012-13.

Investigation

6. 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.
7. On 29 July 2019, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. 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 how the information is held, the steps required to create new reports, whether information could be obtained or collated from other information held. The Commissioner also sought evidence in support of the application of costs. The Council was also asked to comment on the Applicant's statements that other local authorities had provided the information and that it was required to provide this information to the Scottish Government.
9. With respect to requests 2 and 10, the Council changed its position and accepted that it did hold the information. The Council apologised and explained the oversight. This information was provided to the requester during the investigation.
10. With respect to requests 3 and 6, the Council again accepted that it held the information. However, it submitted that retrieval of the information would require a manual trawl of the case files: this would incur a cost in excess of £600 and, according to the Council, section 12 applied.

Commissioner's analysis and findings

11. 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.

Section 17(1) - Information not held

12. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. 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.
13. The Commissioner's remit is to investigate and reach a determination on information held by a Scottish public authority, including whether any relevant information is held. He cannot comment on what information an authority ought to hold, but he can consider whether an authority took adequate, proportionate steps to establish what information, if any, it held and which fell within the scope of a request.

14. "Information" is defined by section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. about a person's intentions or opinions).

15. The Commissioner's guidance states¹:

There's a distinction between creating new information, and compiling information. Where a request can be answered by compiling information from readily-available resources held by the public authority, this is not the same as creating new information. However, if collation of the information would require skill and complex judgement, the information is not held.

Council's submissions

16. The Council provided some background information regarding the work undertaken to determine whether information was held or could be provided in response to the request. This detailed issues with the specific wording of the request, details of the reporting process and what would be required to create new business reports to extract some of the information, the need to interrogate individual records and technical issues regarding the adoption process.

17. Following the Commissioner's request for submissions and for the Council to consider whether it was possible to derive the information required from other sources, the Council explained that information falling under this request is held in the Council's Social Work Case Management System, which, for each client, comprises a "record" made up of many fields and multiple case notes made up of specific identifier fields and free text and associated documents.

Requests 2, 3, 6 and 10

18. Given that the Council has now confirmed that it holds recorded information with regard to requests 2, 3, 6 and 10, the Commissioner must find that the Council was not entitled to rely on section 17(1) of FOISA in responding to these requests.

Request 11

19. Request 11 asked how many children "left care on a kinship care order" before their fifth birthday.

20. The Council explained that children do not leave care because a Kinship Care Order has been granted; rather they leave care when their Compulsory Supervision Order is terminated. The Council confirmed that a Kinship Care Order and termination of the Compulsory Supervision Order may occur at the same time as part of parallel processes, but this is not necessarily so in all cases.

21. The Council continued to rely on section 17(1) in relation to request 11. Given the explanation detailed above (i.e. that children do not leave care on a Kinship Care Order), the Commissioner is satisfied that the Council does not hold information which could satisfy the terms of request 11. The Commissioner is therefore satisfied that the Council was entitled to rely on section 17(1) in response to this request.

¹ <http://www.itspublicknowledge.info/Law/FOISAEIRsGuidance/Informationnotheld/InformationnotheldFOISA.aspx>
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Section 12(1) – Excessive cost of compliance (requests 3 and 6)

Request 3

22. Request 3 asked how many children had a child protection investigation commencing before their fifth birthday.
23. The Council explained that it does not record when a case was commenced, but that it records and reports when an investigation is completed, in line with the Scottish Government Child Protection Survey Guidance Notes.² These state:
What to include – This should contain information on all children who have had an investigation which ended between 1 August 2018 and 31 July 2019.
24. Case notes will include the decision that an investigation is to be undertaken, but to determine whether this includes the date the investigation commenced, the Council explained that a manual review of all the case notes would be required. For the reason given by the Council, the Commissioner is satisfied that this is the case.

Request 6

25. Request 6 asked how many referrals were made on the children (covered by requests 1 to 5) before their fifth birthday.
26. The Council explained that any referral being made would be recorded in the free text case notes for each child. As such, automatic reporting of those notes is not possible and reports would require to be collated manually. Again, for the reason given by the Council, the Commissioner is satisfied that this is the case.

Calculating costs

27. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of compliance with a request exceeds this some.
28. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, the authority reasonably estimates it is likely to incur in:
 - locating,
 - retrieving; and
 - providing the information requested in accordance with Part 1 of FOISA.
29. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
30. An authority can take into account the time taken to redact information in order that a response can be provided when calculating the costs involved, but cannot take into account the cost of determining whether it:

² <https://www2.gov.scot/resource/0054/00547505.docx>

- actually holds the information requested, or
- should provide the information.

Council's submissions

31. The Council argued that it is not required to comply with requests 3 and 6 as complying with each of the requests would incur costs exceeding the £600 cost ceiling set out in the Fees Regulations.
32. The Council provided the investigating officer with a breakdown of the estimated costs. The Council submitted that the estimation was based on its experience of reviewing case notes and that it estimated that to review 629 children's case notes would take a minimum of five minutes per record, but realistically would take an average of 15 minutes each. Therefore, it considered that the minimum time required would be 52 hours, but was more likely to be 157 hours. Carried out by an appropriate officer at a rate in excess of £14, the estimated total cost would be £778 at the lowest level, but in reality would be much higher.

Applicant's submissions

33. The Applicant was provided with an opportunity to comment on the Council's reliance on section 12(1), but the submissions focussed on whether individual files would have to be reviewed (which the Commissioner has already accepted), as opposed to the estimates provided by the Council.

Commissioner's conclusions

34. Taking account of all the circumstances, the Commissioner is satisfied that the only way to retrieve the specific information required to answer requests 3 and 6 would be to interrogate each individual child's case records. The Commissioner is satisfied that to comply with requests 3 and 6, the Council would incur costs in excess of £600. This means it was not obliged to comply with these requests, in line with section 12(1) of FOISA.

Decision

The Commissioner finds that Perth and Kinross Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by the Applicant.

The Commissioner found that the Council was not entitled to rely on section 17(1) of FOISA in response to requests 2, 3, 6 and 10. However, he accepted that no information was held in relation to request 11. (As the Council provided the Applicant with the information held in relation to requests 2 and 10 during the investigation, he does not require any action in respect of this failure.)

The Commissioner also found that it would cost more than £600 to comply with each of requests 3 and 6. He therefore accepted that, under section 12(1) of FOISA, the Council was not obliged to comply with these requests.

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

1 October 2020

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.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- ...

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.
- ...

73 Interpretation

In this Act, unless the context requires a different interpretation –

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

Appendix 2: the information request

Please provide the following information in the attached spreadsheet for Children born between 1st August 2012 and 31st July 2013 (inclusive).

Before their fifth birthday how many children:

1. Had been the subject of a multi-agency meeting under GIRFEC
2. Had been referred to Children's Social Work
3. Had a child protection investigation commencing before their fifth birthday
4. Had a child protection case conference
5. Had been on the child protection register

Before their fifth birthday how many

6. referrals were made on these children
7. investigations were carried out

How many children before their fifth birthday have:

8. been looked after
9. been looked after and placed away from home
10. been adopted
11. left care on a kinship care order

On their fifth birthday how many children were:

12. looked after
13. looked after and placed away from home
14. on a permanence order under s.80 Adoption and Children (Scotland) Act 2007
15. on a permanence order under s.83 Adoption and Children (Scotland) Act 2007

Before their fifth birthday how many children had been

16. looked after but never been on the child protection register
17. on the child protection register but never been looked after

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