

Decision Notice 123/2021

Information on Forth Valley Rape Crisis Centre and LGBT Youth Scotland

The Applicant

Public authority: Clackmannanshire Council

Case Ref: 202001160



Scottish Information
Commissioner

Summary

The Applicant asked the Council for information, held by a named school, concerning Forth Valley Rape Crisis Centre and LGBT Youth Scotland.

The Council stated that it would cost too much to respond to the requests.

The Commissioner investigated and found that the Council was not entitled to refuse to comply with the requests on the basis that it would cost too much.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 19 (Content of certain notices); 21(10) (Review by Scottish public authority)

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 Appendix forms part of this decision.

Background

1. On 11 February 2020, the Applicant made a request for information to the Council. The information requested was, in relation to a named school:
 - (i) *Any recorded information held by the school about or in relation to the Forth Valley Rape Crisis Centre since 2017.*
 - (ii) *Any recorded information held by the school about or is in relation to LGBT Youth Scotland since 2017*
 - (iii) *Any recorded information held by the school about or in in relation to Gender, Gender Stereotypes, Gender based abuse and bullying, Gender imbalance, Gender equality, Positive Gender Roles, Positive Gender Relationships and Sexism since 2017.*
2. The Council responded on 9 March 2020. In respect of requests (i) and (ii), the Council stated that these were repeated requests and applied section 14(2) (Vexatious or repeated requests) of FOISA. In respect of request (iii), the Council stated that no specific information was held (applying section 17(1) (Notice that information is not held) of FOISA). However, the Council provided links to its website containing general policy documents.
3. On 10 March 2020, the Applicant wrote to the Council requesting a review of its decision on the basis that she disputed that requests (i) and (ii) were repeated requests.
4. The Council notified the Applicant of the outcome of its review on 7 April 2020, upholding the original response.
5. On 15 September 2020 (and following an earlier appeal to the Commissioner), the Council issued a fresh review response to the Applicant, withdrawing its reliance on section 14(2) of

FOISA and instead applying section 12(1) of FOISA, stating that the costs of providing a response would be in excess of the £600 threshold.

6. On 24 September 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Council's review of 15 September 2020 because the Council had told her it would cost too much to respond to her request. She also felt that she had not been provided with suitable advice and assistance, nor advised of her appeal rights to the Commissioner.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and asked the authority to review its response to the request before applying to him for a decision.
8. On 5 October 2020, the Council was notified in writing that the Applicant had made a valid application and 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 how the Council had calculated that it would cost in excess of £600 to respond to the request.
10. On 5 May 2021, the Council withdrew its reliance on section 12 of FOISA in respect of part (i) of this request and, on 21 May 2021, supplied the Applicant with four documents that fell within the scope of part (i).
11. On 24 May 2021, the Applicant wrote to the Council, copying the Commissioner, submitting that she remained dissatisfied with the response, arguing that there must be further information held as the documents provided could not be held in isolation i.e. there must be related covering correspondence, or attachments.
12. The Council maintained that section 12(1) applied to part (ii) of this request. The Council was asked on a number of occasions to provide submissions to support its reliance on section 12 of FOISA.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered 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 12(1) – Excessive cost of compliance

14. Section 12(1) of FOISA provides that 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 in the Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for information would exceed that sum.
15. The projected costs the 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, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA.

16. The authority may not charge for the cost of determining whether it:

- (i) actually holds the information requested or
- (ii) should provide the information.

17. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

Part (i) of the request

18. During the course of the investigation, the Council withdrew its reliance on section 12(1) of FOISA in relation to part (i) of the request. The Commissioner must therefore conclude that the Council was not entitled to rely on section 12(1) of FOISA in responding to part (i).

Part (ii) of the request

19. The Council submitted that specialist IT searches would be required to locate information falling within the scope of part (ii) of the request. The Council submitted that its email system would be required to be searched in order to identify any information falling within the scope of the request. To identify the information based on the search words "Forth Valley Rape Crisis Centre" and "LGBT Youth Scotland" would take approximately 100 hours and this would have to be carried out by IT. The Council further submitted that interrogation of the GLOW emails (the system used by school staff) would require individual school staff to run searches in all their email folders as the Council's IT staff do not support this system.

20. The Council was asked to justify why it would take over 100 hours to check systems, when the request was restricted to one school and very specific search terms (initially the information related to two specific organisations, part (ii) only related to the organisation LGBT Youth Scotland). The Council was also asked to explain why all departments within the school would be involved, why a specialist IT search would be required and to confirm the staff grade/hourly rate of pay of the member of staff that would be required to undertake the searches.

21. On 5 May 2021, the Council confirmed its reliance on section 12(1) of FOISA. It commented that the theme of equality is very important to the school's ethos. The Council submitted that it is not a matter which is covered just in personal and social education classes where LGBT issues are addressed and discussed, but woven through many aspects of the curriculum. The Council submitted that there would be material available in various locations throughout the building, including guidance areas and afterschool activities. The Council further submitted that LGBT matters are also covered either directly or indirectly by way of consideration of themes, in other subjects such as English, Social subjects and expressive subjects. On that basis, the Council continued to rely on section 12 of FOISA.

22. Although the Commissioner recognises that LGBT issues may run as a theme through many subject matters, this request is strictly limited to information held related to LGBT Youth Scotland – an organisation as opposed to a theme. On that basis, the Commissioner is unable to accept the justification of section 12(1) submitted by the Council in this case. It is clear to the Commissioner that the Council has misinterpreted the scope of this request and the searches described by the Council would not be proportionate to the terms of this request.

23. In the absence of the Council's providing evidence in support of its application of section 12(1) of FOISA, including a clear breakdown of the searches required and the costings for such searches, the Commissioner cannot uphold the application of the provision.
24. He requires the Council to carry out a further review and to respond to part (ii) of the request other than in line with section 12(1) of FOISA.
25. He also requires the Council to carry out further searches in respect of part (i) of the request to identify whether any further information may be held in addition to that already provided to the Applicant.

Handling of the request

Appeal rights

26. The Commissioner notes that the Council's response to the Applicant's request and requirement for review did not contain particulars about her rights of review or application to the Commissioner and of appeal to the Court of Session, as required by sections 19 and 21(10) of FOISA.
27. The Commissioner has issued guidance on the content of notices¹ which sets out what information authorities must include both in the response to a request for information and in response to a request for a review.
28. Given that the Applicant submitted a review, and was able to submit a valid application, the Commissioner does not require the Council to take any action in response to these failures, in response to the Applicant's application. However, he has noted the Council's handling of the request in his case management system.

Decision

The Commissioner finds that Clackmannanshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. The Commissioner found that the Council was not entitled to rely on section 12(1) of FOISA in responding to these requests.

The Commissioner requires the Council to:

- carry out additional searches for information in respect of part (i) of the request and issue a new review response to the Applicant either disclosing the information or notifying the Applicant why the information cannot be provided under a provision in Part 1 or 2 of FOISA and
- provide the Applicant with a new review response in respect of part (ii) of FOISA (other than in line with section 12(1) of FOISA).

The Council must carry out these steps and notify the Applicant of the outcome of its review, by 1 October 2021.

¹ https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content_of_notices.aspx

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.

Enforcement

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

Margaret Keyse
Head of Enforcement

17 August 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.

...

- (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.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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.

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