

Decision Notice 189/2021

Drag Queen Story Hour event

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202100186



Scottish Information
Commissioner

Summary

The Council was asked for information concerning a Drag Queen Story Hour event. The Council provided some information, but the Applicant believed further information was held. The Commissioner investigated and found that, with the exception of her own complaint, the Council had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), 1(4) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 16(1)(c) (Refusal of request); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible)

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

Background

1. On 7 September 2020, the Applicant made a request for information to City of Edinburgh Council (the Council). The information request was for information relating to the Drag Queen Story Hour event which took place on 16 June 2020, including the initial proposal, plans around the replacement event following its cancellation and details of complaints made. The request is reproduced in Appendix 2.
2. On 4 October 2020, having been asked by the Council the previous day to clarify her request, the Applicant stated that she required all discussions between the named artist and the Council's Library Organiser, plus all internal discussions between those staff members involved with the artist and the Library Organiser in planning or organising a cancelled live event or a Facebook event that went ahead.
3. The Council responded on 23 October 2020, and dealt with the respective parts of the request as follows:
 - Part 1 – withheld information under section 38(1)(b) (Personal information) and section 33(1)(b) (Commercial interests and the economy) of FOISA
 - Parts 2 and 3 – notified the Applicant that no information was held in line with section 17 of FOISA
 - Part 4 – provided a report
 - Part 5 – provided information on number and nature of complaints and on actions taken
4. On 10 November 2020, the Applicant wrote to the Council requesting a review of its decision on the basis that she was disappointed with the very limited information that she had received from the Council when it was compared to the amount of information disclosed by Leeds City Council in relation to a similar event with the same artist.
5. The Council notified the Applicant of the outcome of its review on 9 December 2020. The Council stated that the correspondence had been examined again and consultation had been undertaken between senior Libraries staff. This had resulted in confirmation that there was no further information held within the scope of the request other than that already provided. The Council also apologised for providing a late response to her initial request.

6. On 12 February 2021, 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 because she disagreed with the Council withholding some of the information and felt that the FOISA exemptions had not been correctly applied. (The Applicant did not question the fact that a small amount of information had been redacted from the document provided in response to request 5.)

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 17 March 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information 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 the Council's reasoning for withholding any information and whether it held any further information falling within the scope of the request.
10. On 22 July 2021, the Council provided the Applicant with the information which it had been withholding under section 33(1)(b) of FOISA, after seeking and receiving permission to do so from the artist in question. The Applicant confirmed during the investigation that she no longer wished to appeal that aspect of her request.
11. After receiving the withheld information, the Applicant stated that she still wished to proceed with the remaining aspects of her appeal to the Commissioner because she was of the view that the Council held further feedback information which had not been provided to her. In particular, she questioned why her own complaint had not been provided to her within the feedback information supplied.

Commissioner's analysis and findings

12. 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.

Information held within the scope of the request

13. During the course of the investigation, the investigating officer asked the Council to carry out further searches to ascertain whether any further information within the scope of the request may be held. This was to address the outstanding matters which the Applicant felt had still not been sufficiently addressed by the Council. The points in question are noted below (with the Applicant's points of contention in italics).

There appears to be no documentary evidence of the internal discussions about the event carried out by the relevant Libraries staff members.

14. The Council stated that the discussions were carried out via telephone and therefore not recorded. There was no written documentation of the telephone discussions. The decision to agree to the staging of the event was taken by the Lifelong Learning Strategic Officer (LLSO) after considerable research that the event was being undertaken by a reputable Children's Entertainment Association and that all their associates were the equivalent of PVG checked.

I would like to see communications around the social media profile of this provider.

15. The Council confirmed that the communications were discussions with the leader of the Children and Young People Service and the LLSO via telephone, and as such there were no written documents or recorded telephone conversations.

Are there internal communications between staff members or solely between the library officer and the provider?

16. The Council explained that all communications other than those already forwarded to the Applicant were carried out by telephone or had been informal talks at a desk.

Why are there no transcripts of the calls made?.

17. The Council explained that they did not routinely record telephone calls and transcribe them.

There is no clear information of how decisions were made to include [the artist in question] with a "live" event, planned then cancelled, and reorganised in a new format i.e. a Facebook event.

Where are the communication around these two separate events?

18. The LLSO explained that the decisions made were solely her responsibility as Strategic Officer for Libraries. The decision to move from a live event to a recorded (Facebook) event was taken by the LLSO to ensure a smooth performance. If any errors in performance were made, the shots could be re-taken. The LLSO explained that it was decided that this would make for a more professional look and feel to the performance.

Why did the Council state that "a lot of information had to be collated" before a response could be provided to the Applicant? This indicates that there may be more information held than was provided.

19. The Council stated that the service area in question had advised that information would need to be supplied to the Information Rights Officer over several emails. This had led the Information Rights Officer to understand there was a large volume of emails. However, it was the individual size of the email files that necessitated this and not the volume of responses. The LLSO accepted that this may have led the Applicant to believe there would be a greater amount of responses to be provided to her, and apologised for the confusion. The Council confirmed that all of the information within scope had been provided.

Why was the Applicant not provided with a copy of her own complaint which she sent in to the Council?

20. The Applicant's request included information on the number and nature of complaints made. The information disclosed did not include any reference to the complaint made by the Applicant.
21. The Council explained that the Applicant's own complaint had not been provided to her because it was assumed that she would already have a copy of this.

22. Section 25(1) of FOISA states that information which the applicant can reasonably obtain other than by requesting it under FOISA is exempt information. Therefore, the Council would not be obliged to provide a copy of the Applicant's own complaint to her if it was otherwise available to her outwith FOISA.
23. The Commissioner has considered the points of contention raised by the Applicant and the responses provided by the Council. He will first address the likelihood of whether the Council holds any further information and then he will consider whether the Applicant's own complaint should have been provided to her.

Section 17(1) - Notice that information is not held

24. 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, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
25. The Commissioner can understand that the fact that her own complaint was not provided to the Applicant as part of the information held may have led her to believe that other complaints may also have been held and not provided to her.
26. Similarly, the fact that the Council advised the Applicant that it had to collate a volume of information before responding to her may have led her to believe that more information was held than actually was.
27. He notes, however, that the Council has now explained to the Applicant why her own complaint was not provided to her in response to her request. The Council has also now explained that its reference to volume of emails referred to files sizes containing attachments and not to the numerical volume indicating the number of responses received.
28. The Commissioner also notes that the Applicant questions why the telephone discussions undertaken between staff members internally and between staff members and the artist in question, were not recorded and transcribed. However, he can only take account of what information was held at the time the request was received. The submissions from the Council confirm that telephone calls are not routinely recorded and transcribed, and in this case the discussions in question were not. There is no requirement for an authority to create information in order to respond to an information request, so the Council is not obliged to attempt to recreate those telephone conversations from memory and transcribe them in response to a FOISA request.
29. The Applicant commented that, because a larger amount of information had been disclosed regarding Leeds City Council's involvement in hosting a similar event with the same artist, more information should also be held by the Council. However, many different factors could be involved in determining how much information may be held by different public authorities in respect of different events (albeit being undertaken by the same named artist). The Commissioner is unable to accept this as evidence that there should be more information held by the Council in this case.
30. Having considered all the relevant submissions, the Commissioner is satisfied that the Council took adequate and proportionate steps to establish what recorded information it held falling within the scope of the Applicant's request.

31. Taking account of all the information before to him, and the circumstances as outlined above, the Commissioner is satisfied, on the balance of probabilities, that, other than her own complaint (considered below) the Council was correct to notify the Applicant, under section 17(1) of FOISA, that it held no further information other than that already provided to her.

Section 25(1) of FOISA - Information otherwise accessible

32. Under section 25(1) of FOISA, information which an applicant can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
33. The Commissioner notes that the Applicant emailed a complaint to the Council regarding the staging of the event in question. The email was composed by the Applicant herself and sent from her own email address.
34. In the circumstances therefore, the Commissioner is satisfied that the content of the complaint email sent by the Applicant to the Council is reasonably obtainable by her, other than by requesting it under section 1(1) of FOISA.
35. As a result, the Commissioner finds that this information is exempt from disclosure under section 25(1) of FOISA.
36. However, under section 16(1)(c) of FOISA, public authorities must specify the exemption or exemptions which they are relying on to withhold information. The Council accepts that it should have made it clear to the Applicant that it was relying on section 25(1) to withhold her own complaint. Failure to do this was a breach of section 16(1)(c) of FOISA.

Decision

The Commissioner finds that 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.

With the exception of information about the Applicant's own complaint, the Commissioner is satisfied that the Council identified and disclosed all of the information it held falling within the scope of the Applicant's request.

While the Commissioner is satisfied that information on the Applicant's complaint is exempt from disclosure under section 25(1) of FOISA, the Council breached section 16(1)(c) of FOISA by failing to notify the Applicant that it was applying this exemption.

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

23 November 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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
...
 - (c) specifies the exemption in question; and
...

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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

Appendix 2 – Information request

“Please send me the following:

All recorded information on communications between [the named performing artist] and [name redacted] the Council’s Lifelong Learning Strategic Officer for Libraries, including -

1. [The artist’s] initial approach and business proposal to the library (date unknown but presumably pre-March 2020)
2. Information of the discussions held on the "live" event planned then cancelled due to lockdown in March and
3. Information on the discussions held around the replacement Facebook event that took place on 16th June 2020

Also request -

4. All assessments to do with both the cancelled live event and the Facebook event (e.g. Risk Assessments, Equality Impact Assessments etc)
5. Information on number and nature of complaints made prior to this event and information on any investigations/actions made by council officers into nature of complaints.”

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