



Decision Notice 240/2024

Safeguarding concerns

Authority: Aberdeenshire Council

Case Ref: 202200871

Summary

The Applicant submitted two requests for information to the Authority in relation to safeguarding concerns raised. She asked for information about whom the Chief Education Officer had contacted (and when), together with GIRFEC records completed. The Authority stated that it did not hold the information requested. The Commissioner investigated and found that the Authority held relevant recorded information for the first request, but did not hold the information requested in the second request. He also found that the Authority had failed to issue FOI-compliant review outcomes. He required the Authority to carry out fresh reviews and issue FOI-compliant review outcomes for both requests.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ sections 1(1), (2) and (4) (General entitlement); 17(1) (Notice that information is not held); 19 (Content of certain notices); 20(3) (Requirement for review of refusal etc.); 21(4), (5) and (10) (Review by Scottish public authority); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 12 June 2022, the Applicant made the following two requests for information to the Authority:

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

Request 1:

Who did the Chief Education Officer email/phone/video call or correspond with about safeguarding concerns raised by [a named individual] with [the Authority]? (Break down each one and the role of the person with whom contact was made)

Who did the Chief Education Officer email/phone/video call or correspond about the safeguarding concerns raised by [a named individual] with [the Authority]? (Break down each one and the role of the person emailed and provide either phone record or MS Teams/Skype record of calls)

When did these outward and incoming communication happen? (Break down each one)

Request 2:

Please share the GIRFEC [Getting it right for every child] forms/proformas/records completed by the Chief Education Officer or any other officer including Headteachers regarding the safeguarding concern [a named individual] raised in February 2020.

2. The Authority responded to both requests on 11 July 2022. It informed the Applicant that, having undertaken full searches, it did not hold the information requested.
3. On 21 July 2022, the Applicant wrote to the Authority requesting a review of its decision for both requests. The Applicant asked the Authority to recheck its records for the information requested.
 - For Request 1, the Applicant believed that, for the safeguarding concerns to be considered, it would be necessary to identify the pupils/individuals at the locus and take an assessment of risk. She further argued that it would also be necessary to carry out an initial information-gathering exercise and, to achieve this, it would be necessary to communicate with a number of individuals as that decision could not be taken unilaterally.
 - For Request 2, the Applicant believed that, for the safeguarding concern to be considered and processed, it would be necessary to identify the children/persons concerned and take an assessment of risk. That being the case, she believed GIRFEC documentation should exist.
4. The Authority notified the Applicant of the outcome of its review for both requests on 27 July 2022. The Authority stated that no children's names were ever identified when the matter was considered, and it was concluded that there were no safeguarding concerns.
5. The Applicant wrote to the Authority on 2 August 2022.
 - For Request 1, the Applicant commented that it had been reported in a number of press articles by an Authority spokesperson that "*Education, human resources and children's services colleagues reviewed matters*". She asked the Authority to confirm that it held no communication as per the terms of her request.
 - For Request 2, the Applicant stated that names were provided and should have been gathered as part of an initial information-gathering exercise as per GIRFEC, which would have identified vulnerabilities and allowed for an assessment of risk from the child's perspective - without following this GIRFEC process it was impossible to rule out any safeguarding or child protection matters. She asked the Authority to confirm that there were no records of any GIRFEC documentation held, as specified in her request.

6. On 6 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome of the Authority's review for both requests because she believed it had failed to provide the information requested. She also believed it was in the public interest to identify whether the Authority had complied with Freedom of Information legislation. In her view, the Authority's review outcomes did not equate with a recent press statement where the Authority stated that, as soon as concerns were received, a review and investigation process was started. She wished to identify whether the Authority's response under FOI was accurate as, if it was, documentation around this as a protocol should exist.

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 25 April 2024, the Authority was notified in writing that the Applicant had made a valid application, and the case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. These focused on the searches carried out by the Authority to identify whether (for both requests) it held the information requested. It was also asked to comment on whether it considered it had issued FOI-compliant review outcomes which had addressed the dissatisfaction raised in the Applicant's requirements for review.

Commissioner's analysis and findings

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

Whether the Authority held the information requested

11. 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 contained in section 1(6) are not applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). This is not necessarily to be 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 it to give the applicant notice in writing to that effect.
13. 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 of probabilities 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.

The Applicant's submissions

14. The Commissioner has taken account of the relevant arguments in both the Applicant's requirement for review, her application and her subsequent communications, in which she provided reasons as to why she considered the Authority should hold the information requested.
15. In her submissions to the Commissioner, the Applicant referred to a press statement² by the Authority's Director of Children's Services stating that disciplinary action had been taken once he was aware of the issue. She further submitted that it had been reported in a number of press articles³ that members of the Authority's staff, including "*Education, human resources and children's services colleagues reviewed matters before ensuring staff received additional training, including appropriate guidance about the use of online platforms*". The Applicant argued that, if these were accurate, then records of communications between officers would exist.
16. In support of her view, the Applicant also provided the Commissioner with extracts of a report commissioned by the Authority into the actions taken following the safeguarding concerns raised. She submitted that the redacted report contained a number of references to shared decision-making and actions taken which, in her view, did not align with the Authority's responses to her requests.
17. The Applicant believed the Authority's alleged FOI breach [in relation to its handling of her requests] was part of a pattern of actions taken by the Authority to cover a failure to properly investigate safeguarding concerns. In this respect, she referred to safeguarding concerns which were being taking forward by the Children and Young People's Commissioner for Scotland, as set out on page 29 of its Annual Report 2022⁴.

The Authority's submissions

18. In relation to the searches and enquiries carried out to identify the information held falling within the scope of the requests, the Authority explained that the staff involved at that time would have carried out relevant searches; however, those staff had since left the Authority's employment. While no formal audit record had been completed for either request, the Authority believed relevant searches would have been carried out within the Service whose remit the requests fell under. The Authority provided the Commissioner with the supporting evidence it held of the enquiries carried out at that time, and of further enquiries carried out during the investigation. It confirmed it was unable to provide any further detailed information, given that no audit forms had been completed and also that, due to the passage of time, many of the staff involved were no longer in the Authority's employment.
19. On reviewing the information held for Request 1, the Authority stated that there was an indication of who was contacted but that it held no formal record reflecting this. It believed, therefore, that it held no information falling within the scope of this request.

² <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-62421151>

³ <https://www.pressandjournal.co.uk/fp/news/aberdeen-aberdeenshire/4300265/aberdeenshire-teachers-whatsapp-messages-disabled-pupils/>

⁴ cypcs.org.uk/wp-content/uploads/2022/10/CYPCS-AR-2022.pdf

20. For Request 2, the Authority confirmed that no GIRFEC documents were completed and therefore the information requested was not held. It submitted that, while an independent review had been carried out, the results of that review did not constitute a GIRFEC document.

The Commissioner's views on whether the Authority held any relevant information

21. Having considered all relevant submissions and the terms of the Applicant's requests, the Commissioner is satisfied that, by the end of the investigation, the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the requests. He has considered the reasons and supporting evidence provided by the Authority which explained its position in relation to both requests.
22. The Commissioner is satisfied that, although somewhat limited given the passage of time and the fact that many of the staff involved were no longer employed by the Authority, the searches and enquiries described by the Authority would have been capable of identifying any information held relevant to the Applicant's requests.
23. In relation to Request 1, the Commissioner has considered the Authority's submissions where it stated that there was an indication of who was contacted but no formal record reflecting this, and its conclusion that it held no relevant information. Having also considered the evidence of searches carried out, the Commissioner cannot agree with the Authority's conclusion here. In the Commissioner's view, the evidence provided by the Authority clearly records information falling within the scope of Request 1, listing individuals with whom the Chief Education Officer made contact. While he accepts that the Authority may not hold any records of any such communications with these individuals, or of when any such communications had taken place, this appears to him to be academic. The fact remains that the Authority holds information falling within the scope of Request 1 which it neither disclosed to the Applicant nor withheld under an exemption in FOISA.
24. In relation to Request 2, again the Commissioner has considered the Authority's submissions together with the evidence of searches carried out. Having done so, he is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of that request.

Did the Authority's review outcomes comply with FOISA?

25. The Authority was asked to provide comments on whether it considered its review outcomes, for both requests, corresponded to the information originally requested and the dissatisfaction raised by the Applicant in her requirements for review.
26. In its submissions to the Commissioner, the Authority stated that it had no record of having received any formal requests for review to its responses [of 11 July 2022]. This, it submitted, was confirmed by checks of its Axlr8 database for administering FOI requests, and with the Services involved. In light of this, the Authority stated, it had closed the Applicant's cases at the end of the 40 working day period allowed for requesting a review.
27. The Authority confirmed that it considered the Applicant's emails of 21 July 2022 to be requests for clarification of its original responses [of 11 July 2022], as opposed to being requests for review of those original responses.

28. The Authority acknowledged the Applicant's position that she was dissatisfied with its decision. It explained that it regularly received further email correspondence from requesters seeking to clarify the information provided or the answers given. These clarification emails were passed directly to the relevant Service to action.
29. The Authority confirmed that requesters are advised of their right to seek a review of the original response and, if unhappy with any clarification, of the process by which they can seek a review of the formal process. However, it had been unable to confirm that this final reminder had been given in relation to the Applicant's requests. The Authority stated that the Applicant was fully aware of the review process and had done so for other requests, but not for these cases.
30. The Authority's position was that the Applicant was not re-advised of how to request a review in any responses provided to her clarification emails [of 21 July 2022] and confirmed it was happy to put in place processes to ensure that this was not repeated in future.
31. The Authority was asked to explain why its responses of 27 July 2022 did not appear to correspond with the Applicant's original information requests and why it did not carry out a full review of its original responses of 11 July 2022, as requested by the Applicant on 21 July 2022. In response, the Authority reiterated that it had found no evidence of the Applicant having lodged formal requests for review in either case, and clarification emails lodged by the Applicant [on 21 July 2022] were passed to the Service to address further points of clarity. The Authority understood that the Applicant had received no response to her last emails [of 2 August 2022].

The Commissioner's views on the Authority's handling of the Applicant's requests for review

32. Section 20(1) of FOISA provides that a person who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information may require it to review its actions and decisions in relation to that request. Section 20(3) of FOISA provides that a requirement for review must be in writing or some other form of permanency, it must state the name of the applicant and an address for correspondence, and it must specify the request for information to which the requirement for review relates and the matter which gives rise to the applicant's dissatisfaction.
33. Having considered the Applicant's emails of 21 July 2022, the Authority's responses of 27 July 2022 and the Authority's comments on these, the Commissioner does not agree with the Authority's view that the Applicant's emails of 21 July 2022 were merely seeking clarification of its original responses. The Applicant's emails referred to the Authority's responses to her requests, and clearly raised dissatisfaction with those responses, thereby satisfying the requirements of section 20(3) of FOISA. The Commissioner is therefore satisfied that the Applicant's emails of 21 July 2022 were valid requests for review.
34. It therefore follows that the Authority's responses of 27 July 2022 were, by default, review outcomes. Having considered the content of these review outcomes, the Commissioner does not accept that these corresponded to the information actually requested in either initial request. In these review outcomes, the Authority informed the Applicant that no children's names were ever identified when the matter was considered, and it was concluded that there were no safeguarding concerns. This is clearly not what was asked for in either of the Applicant's initial requests, and nor did the review outcomes address the Applicant's suggestion, in her requests for review, that the Authority recheck its records for the information originally requested.

35. The Commissioner is further concerned to note that the Authority's review outcomes did not appear to meet the notice requirements set out in section 21(4) and (5) of FOISA. These provide that the review outcome must inform the requester what steps the public authority has taken (i.e. confirm its original decision; substitute a different decision, or reach a decision where no decision had been reached) (section 21(4)), and why it has taken these steps (section 21(5)). Nor did the review outcomes contain particulars of the requester's rights of application to the Commissioner and of appeal to the Court of Session, as required by sections 19 and 21(10) of FOISA.
36. It is a matter of fact that the Authority's responses of 27 July 2022 (the review outcomes) failed to meet the requirements set out in paragraph 35 above. The Commissioner must therefore find that the Authority failed to comply with section 19 and section 21(4), (5) and (10) of FOISA in those respects, by failing to provide FOI-compliant review outcomes.
37. The Commissioner therefore requires the Authority to carry out a fresh review for both requests, and to issue revised review outcomes compliant with the requirements of sections 19 and 21 of FOISA, and in line with his findings in paragraphs 23 and 24 above.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to carry out reviews which met the requirements of section 19 and section 21(4), (5) and (10) of FOISA.

The Commissioner therefore requires the Authority to carry out a fresh review for both of the Applicant's requests, and to issue FOI-compliant revised review outcomes in line with his findings in paragraphs 23 and 24 of this Decision Notice, by **16 December 2024**.

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.

Euan McCulloch
Head of Enforcement

30 October 2024