

Decision Notice

Decision 127/2019: Ms Samantha Kerr and West Lothian Council

Child protection

Reference No: 201900412

Decision Date: 23 August 2019



Scottish Information
Commissioner

Summary

The Council was asked various questions about detriment caused to children by social workers and about the recourse available to those children.

One question asked how many children had disclosed any form of detriment to social workers. The Council said that it would exceed the cost threshold of FOISA to supply information for part of the request. Following an investigation, the Commissioner agreed that responding to this question would exceed £600, but found that the Council had failed to provide reasonable advice and assistance.

He also found that the Council failed to address another question, but required no action as a response was provided during the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

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 27 December 2018, Ms Kerr made a request for information to West Lothian Council (the Council). In her request, Ms Kerr referred to “parental alienation” and requested the following information:
 - redress available to children who had their parental contact blocked or obstructed (part 1)
 - how many children have recorded detriment due to social work blocking or obstructing parental contact (part 2), and
 - how a child would seek recourse regarding the above (part 3)
2. On 4 February 2019, Ms Kerr wrote to the Council requesting a review of its decision on the basis that the Council had failed to respond to her request.
3. The Council notified Ms Kerr of the outcome of its review on 25 February 2019. The Council responded as follows:
 - it stated that information was not held (part 1)
 - it stated that it held the information in individual client files and to supply the information would cost in excess of £600 – it therefore refused the request under section 12 of FOISA applied (part 2)
 - no response was provided in relation to part 3 of the request

4. On 3 March 2019, Ms Kerr wrote to the Commissioner. Ms Kerr applied to the Commissioner for a decision in terms of section 47(1) of FOISA. She was dissatisfied with the outcome of the Council's review as she did not believe that the cost exemption would apply to part 2 of her request. She was also dissatisfied that the Council did not respond to the part 3 of her request (for information about a child seeking recourse for harm done).

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Ms Kerr 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.
6. 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.
7. The Council acknowledged that it had not replied to part 3 of Ms Kerr's request and offered to supply information to her. The Council did this on 13 June 2019. It supplied a link to its complaints procedure and advised that children can seek support or assistance from the Children's Rights Service or independent advocacy services. It also provided a web-link with contact details for these.
8. On 13 June 2019, Ms Kerr acknowledged the response to part 3 of her request, but remained dissatisfied with the response to part 2 of her request. She did not accept that it would cost in excess of £600 to respond.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both Ms Kerr and the Council. He is satisfied that no matter of relevance has been overlooked.

General entitlement – part 3 of the request

10. The Council acknowledged that it had not replied to part 3 of Ms Kerr's request. It provided her with a response on 13 June 2019.
11. 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.
12. The Commissioner is of the view that the Council should have responded to Ms Kerr at review. In failing to do so, the Council failed to comply with FOISA. As the Council has now responded to part 3 of Ms Kerr's request, the Commissioner requires no action on account of this failure.

Section 12(1) - Excessive cost of compliance – part 2 of the request

13. Section 12(1) 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 relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5 of the Fees Regulations). 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 exceeds this sum.

14. 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) 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. The public authority may not charge for the cost of determining whether it actually holds the information requested, or whether it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
15. The Council explained that responding would involve checking individual files and it had 70,000 open files on its client recording system. Due to the confidential nature of the files, Social Workers would be needed to check the files for the requested information, and the cost rate would therefore be the maximum (£15 per hour). The Council based its estimate on 30 minutes to check one file, but said that some files "may contain volumes of information and could take days to check". Based on 30 minutes per file for 70,000 files at a cost of £15 per hour the Council estimated a cost of £525,000.
16. Ms Kerr had disputed the Council's reliance on excessive costs as she believed the information she requested was held in electronic records, and therefore would be easily searchable. The Council was asked about this point and it replied that the 70,000 files were electronic files, but in addition, there were historic paper files. The Council acknowledged that it was possible to search electronic files, but "this is not likely to be effective in these circumstances". The Council believed this difficulty was due to the nature of the request: for example, using the term "detriment" as a search parameter would be likely to provide numerous results in all sorts of different contexts. It is also the case, the Council said, that children would be unlikely to use the term "detriment".
17. The Council was asked whether any alleged detriment caused by Council staff (e.g. social workers or Council Child Protection Unit) would be categorised by the Council as a complaint and therefore fall within a subset of social work files and therefore be more easily searchable.
18. The Council submitted that it would depend on the context of the situation as to whether such an allegation would be recorded as a complaint: an allegation could be in the individual case records or in the complaints system. The Council explained there was no functionality available to search the content of complaints in the system in which complaints are stored and the only way to search the content of a case which has been recorded was through a raw data extract in Excel format. Whilst there is word or phrase search functionality within Excel, the Council believed that searching would still be difficult for the same reasons as above. For an accurate result, the Council said it would need to read the complaint files.
19. The Council provided two estimates of the time it would take to read the complaint files. As the size of files will vary, the Council again based one estimate on half an hour per file and the other estimate on one hour per file, with both estimates exceeding the £600 limit, namely £4,440 and £2,220.

The Commissioner's conclusion

20. Ms Kerr's request is for a number and is narrowed by the subject. Her request does not stipulate a time limit, and therefore is unbounded and would involve all social works records held, electronic or paper.

21. The Commissioner accepts that the Council would need to search actual records to assess the information held. Such searching would involve addressing how to search and whether “detriment” would be the best search term to use in the context of children. The Council is correct to note that it may have to use other search terms and that these could result in identifying information that does not fall within the request: for example a word like “harm” is highly likely to occur in other contexts.
22. Even limiting searches to complaints (on the basis that an allegation of detriment may make such a case a complaint of some sort) would still exceed the cost threshold, and the Commissioner does accept that any suggestion of detriment by a child would automatically be classed as a complaint is not necessarily a valid assumption.
23. Taking account of all the above circumstances, the Commissioner is satisfied that the cost of complying with Ms Kerr's request would exceed £600 – and exceed it by a considerable amount. He therefore finds, in line with section 12(1) of FOISA, that the Council was not obliged to comply with this part of the request.

Section 15 - Duty to provide advice and assistance

24. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Section 15(2) states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms to the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004¹ (the Section 60 Code), is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
25. The Section 60 Code provides guidance to Scottish public authorities on the practice with Scottish Ministers consider desirable for authorities to follow in connection with the discharge of their functions under FOISA. The Section 60 Code provides (at 9.4.3):

When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice, you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.
26. The Commissioner considers this important if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA. Frequently, a dialogue between the authority and the applicant will be desirable, if the applicant is to understand fully what can be provided within the cost limit.
27. The Council apologised that it did not contact the applicant about the request after determining that the excessive cost exemption applied. The Council commented that, as individual files would require to be checked, narrowing down the request by time period would not assist. The Commissioner notes that the Council failed to respond to the initial request, consequently missing an opportunity to provide advice and assistance and/or to clarify this request in line with section 1(3) of FOISA.

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

28. In the circumstances of this case, the Commissioner finds that the Council should have included some assistance, even if it were simply to indicate that narrowing down the request by time period would not assist in its review outcome. In the circumstances, the Commissioner finds that the Council failed to comply with their duty under section 15(1) of FOISA to provide Ms Kerr with adequate advice and assistance in relation to part 2 of her request. As further explanations were provided during the investigation as set out above, the Commissioner does not require any action in respect of this failure.

Decision

The Commissioner finds that West Lothian 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 Ms Kerr.

The Commissioner finds that the Council failed to comply with section 1(1) by failing to respond to part 3 of Ms Kerr's request in the response or the review decision. As a further response was provided to Ms Kerr during the investigation, the Commissioner does not require any action in respect of this failure.

The Commissioner also finds that the Council was entitled to rely on section 12 of FOISA to refuse to comply with part 2 of the request, but failed to provide adequate advice and assistance in terms of section 15(1) of FOISA. Again, the Commissioner does not require any action in respect of this failure.

Appeal

Should either Ms Kerr 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 August 2019

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.

...

- (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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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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