

Decision Notice

Decision 135/2016: Professor Paechter and the City of Edinburgh Council

Letter to the Council's Chief Executive

Reference No: 201600529

Decision Date: 27 June 2016



Scottish Information
Commissioner

Summary

On 13 January 2016, Professor Paechter asked the City of Edinburgh Council (the Council) for a copy of the letter referred to in its evidence to the Scottish Public Services Ombudsman (SPSO).

The Council provided Professor Paechter with a letter sent to its Chief Executive from the Director of Children and Families on 27 January 2011. Professor Paechter asked for a review of this response, as he was seeking a letter sent in response to an email of 7 March 2011. Following a review, he remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Council had partially failed to respond to Professor Paechter's request for information in accordance with Part 1 of FOISA. Inasmuch as it did not hold a letter sent in response to the email of 7 March 2011, the Council was correct to give Professor Paechter notice that the information he had requested was not held, but in doing so, it made reference to information that was not within the scope of his request.

The Council also failed to provide advice and assistance to Professor Paechter as required by section 15(1) of FOISA. Given that more explanation has since been provided to Professor Paechter, the Commissioner did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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. Professor Paechter complained to the SPSO about the way in which the Council had handled certain complaints. During the ensuing investigation by the SPSO, the Council made submissions to the SPSO in which it referred to a series of actions that were taken in response to an email sent by its Head of e-Governance on 7 March 2011.
2. On 13 January 2016, Professor Paechter made a request for information to the Council. The information requested was:

A copy of the letter that the Director of Children and Families claims (in evidence to the SPSO) to have written to the Council's Chief Executive as a result of the Head of e-Government's warning of potential financial and reputational damage to the Council.
3. The Council responded on 9 February 2016. It provided Professor Paechter with a letter sent from the Director of Children and Families to the Council's Chief Executive on 27 January 2011.
4. On 9 February 2016, Professor Paechter wrote to the Council requesting a review of its decision on the basis that the Council had not provided him with the information he had requested. Professor Paechter explained that the letter he was seeking would have been sent after the Director of Children and Families received the Head of e-Government's email

of 7 March 2011. Professor Paechter referred to the Director of Children and Families' evidence to the SPSO, in which she claims to have written the letter on 18 April 2013 (later revised to 2011) in response to the 7 March 2011 email. Professor Paechter noted that the letter provided by the Council, dated 27 January 2011, could not possibly be a response to an email warning issued on 7 March 2011.

5. The Council notified Professor Paechter of the outcome of its review on 8 March 2016. The Council explained that there was a typographical error in its evidence to the SPSO and the reference to a letter of 18 April 2013 should have read 27 January 2011. The Council stated that a letter from the Director of Children and Families to the Council's Chief Executive dated 18 April 2013 does not exist and is not held.
6. On 23 March 2016, Professor Paechter applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Professor Paechter stated he was dissatisfied with the outcome of the Council's review because he was seeking a letter which the Council had claimed (in evidence to the SPSO) to have written in response to an email warning received on 7 March 2011. Professor Paechter argued that a response to a warning made on 7 March 2011 could not have been sent on 27 January 2011. Therefore, he was not satisfied that the response given by the Council was open or honest.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Professor Paechter made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 7 April 2016, the Council was notified in writing that Professor Paechter 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 answer specific questions regarding the information requested by Professor Paechter.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Professor Paechter and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 17(1) – information not held

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. This is subject to qualifications, but these are not applicable in this case. 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.

Submissions from the Council

12. During the investigation, the Council contacted Professor Paechter directly and explained why it did not hold the information he had requested. The Council asked the Commissioner to consider the content of this letter as part of its submissions in this case.
13. According to the letter from the Council to Professor Paechter, the Director of Children and Families contacted the Council's Chief Executive on 27 January 2011, asking for Professor Paechter's complaints to be investigated by someone outwith the Children and Families Department. On 18 April 2011, Professor Paechter himself sent Council staff an email entitled "Referral to Chief Executive". At some point in September 2014, it appears that Professor Paechter's email was conflated with correspondence sent by the Director of Children and Families, and the Director of Children and Families' evidence to the SPSO wrongly indicated that she contacted the Council's Chief Executive on 18 April 2013.
14. The Council explained that when the Director of Children and Families was interviewed in December 2015, she readily acknowledged there had been a mistake with the dates provided in the response to the SPSO. The Council noted that its response to Professor Paechter's request should have read "*the Director of Children and Families had written to the Chief Executive on 27 January 2011*" instead of the actual text which read "*The Director of Children and Families wrote to the Chief Executive on 18 April 2013*".
15. The Council was asked why, in its review response, it had notified Professor Paechter that it did not hold a letter dated 18 April 2013, when he had clarified that the letter he was seeking was dated 18 April 2011. In response, the Council contended that the review response did inform Professor Paechter that the revised information he was seeking was not held by the Council. However, the Council also expressed regret that its review outcome did not make it explicit that it did not hold a letter sent on 18 April 2011.
16. The Council submitted that, on 17 February 2016, its FOI department became aware of the error that led to Professor Paechter's email of 18 April 2011 being credited to the Director of Families and Children.
17. The Council was asked to confirm whether or not the Director of Children and Families contacted the Council's Chief Executive following her receipt of the email from the Head of e-Government on 7 March 2011. The Council was advised that the Commissioner was seeking correspondence that referenced or related to the content of the email of 7 March 2011, not general contact. In response, the Council explained that its investigations had not disclosed that the Director of Children and Families wrote to the Council's Chief Executive specifically about the Head of e-Government's email "on the date in question".
18. The Council explained that concerns "referenced or related to" the email from the Head of e-Government were widely discussed both before and after 7 March 2011 and were being discussed between the Director of Children and Families and the Council's Chief Executive during this period.

Submissions from Professor Paechter

19. In his submissions, Professor Paechter contended that the Council gave him an inadequate explanation of why the letter he had asked about does not exist. Professor Paechter noted that the Council claimed there was a typographical error in the Director of Children and Families' evidence to the SPSO and that the date 18 April 2013 should have read 27 January 2011. Professor Paechter noted that if the April date was replaced with the January date, the

Council's evidence to the SPSO would not make sense, as it would claim an action in January 2011 took place in response to an email sent in March 2011.

20. Professor Paechter argued that the Council should have explained that there was no letter written in response to the warning and that the evidence to the SPSO had an error of fact (rather than a typographical error): it was he who had actually sent the letter "Referral to the Chief Executive" and not the Director of Children and Families.

Commissioner's conclusions

21. The Commissioner cannot comment on whether the Council gave factually inaccurate evidence to the SPSO, but she does accept that a letter written on 27 January 2011 could not possibly be a response to an email of 7 March 2011.
22. Having considered the submissions made by both parties, the Commissioner is satisfied that the letter of 18 April 2013 (now accepted to be 18 April 2011) does not exist and she accepts that the Council properly gave Professor Paechter notice of this fact in its review outcome. However, the notice given by the Council goes on to state that the reference to 18 April 2013 in the SPSO submission was wrong and should have read 27 January 2011. Essentially the Council is taking the position that the information requested by Professor Paechter was the letter of 27 January 2011.
23. Section 17(1) of FOISA requires an authority to give notice to an applicant that it does not hold the information that has been requested. Professor Paechter's request could only be answered by correspondence post-dating the warning received on 7 March 2011, and could not be answered by information dating from January 2011. As a result, the notice given under section 17(1) appears to relate to information not covered by the request. The Commissioner therefore finds that the notice given by the Council in relation to Professor Paechter's request was partially incorrect, and that the Council only partially complied with section 17(1) of FOISA.
24. Section 17 of FOISA does not require an authority to explain why information is not held. In the circumstances, however, the Commissioner considers that it would have been helpful for the Council to have explained to Professor Paechter why there was a discrepancy between the information he expected to be held and the information that was in fact held.

Section 15(1) – advice and assistance

25. Section 15(1) of FOISA requires a public authority, so far as it is reasonable to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
26. The Council claims that on 17 February 2016 it became aware that an "erroneous connection" had been made between the title of Professor Paechter's email of 18 April 2011 and the Director of Children and Families letter to the Council's Chief Executive. However, the Commissioner notes that none of this explanation was provided to Professor Paechter in the review outcome of 8 March 2016. In fact, the Council did not provide this explanation to Professor Paechter until 15 April 2016, after he had applied to the Commissioner for a decision.
27. The Commissioner acknowledges that Professor Paechter may not be completely satisfied with the explanation put forward by the Council on 15 April 2016. Nonetheless, she considers that the Council should have provided him with the explanation in its review outcome, under its duty to advise and assist.

28. In addition, the Commissioner notes that the Council has confirmed to her that its own investigations did not show that the Director of Children and Families wrote to the Council's Chief Executive in response to the specific email of 7 March 2011; however, it has not clearly confirmed this to Professor Paechter.
29. The Commissioner finds that the Council failed to provide Professor Paechter with sufficient advice and assistance to enable him to understand why it did not hold the letter he had asked for, and failed to provide a clear explanation of the correspondence that did or did not take place between the Director of Children and Families and the Council's Chief Executive in relation to the email sent by the Head of e-Governance. The Council therefore failed to comply with section 15(1) of FOISA. Given the additional explanation provided in this decision, she does not require the Council to take any action with respect to this failure.

Decision

The Commissioner finds that the 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 Professor Paechter.

The Commissioner finds that the Council was correct to give notice (in terms of section 17(1) of FOISA) that it did not hold a letter dated 18 April 2013 from the Director of Children and Families to the Council's Chief Executive. However, as the notice given by the Council also related to information which was not covered by the terms of the request, it failed to comply in full with Part 1 of FOISA in this respect.

By failing to give Professor Paechter reasonable advice and assistance, the Council failed to comply with section 15(1) of FOISA.

Given that the Council later supplied Professor Paechter with an explanation as to why it did not hold the information he asked for, the Commissioner does not require the Council to take any action in respect of these failures in response to Professor Paechter's application.

Appeal

Should either Professor Paechter or the City of Edinburgh 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

27 June 2016

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.

...

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.

...

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.

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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info