

Decision Notice

Decision 184/2015: Mr Kevin O'Donnell and the Crown Office and Procurator Fiscal Service

Procurement details for IT equipment

Reference No: 201500045

Decision Date: 18 November 2015



Scottish Information
Commissioner

Summary

On 20 September 2014, Mr O'Donnell asked the Crown Office and Procurator Fiscal Service (COPFS) for details of payments to Ricoh for specified services between given dates, and for other details of the related procurement exercise.

COPFS responded by providing information to Mr O'Donnell. Following a review, Mr O'Donnell was dissatisfied with the information given to him and applied to the Commissioner for a decision.

The Commissioner investigated. Following the disclosure of further information during the investigation (subject to appropriate redactions), the Commissioner was satisfied that COPFS had provided Mr O'Donnell with the information it held falling within the scope of his request. However, she found that the information should have been provided to Mr O'Donnell at an earlier stage.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 3(2)(b) (Scottish public authorities)

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. It may be helpful to explain the background to this request. Approximately 8-10 years ago, COPFS "outsourced" its procurement function to the Scottish Government for activity greater than £50,000. COPFS approached the Scottish Government procurement team to undertake a procurement exercise for their printing devices and the process started in 2010, with the award of a contract to Ricoh in 2011. The procurement process took the form of a "mini competition", within the scope of an existing framework agreement.
2. On 20 September 2014, Mr O'Donnell made a request for information to COPFS about this process. He asked for details of:
 - (i) all the payments made to Ricoh from 1 April 2013 to 1 September 2014 in respect of software, hardware, licensing, professional services (including training and technical support) and leasing;
 - (ii) the formal procurement exercises that were undertaken and where details of these could be found.

Mr O'Donnell made a further request dated 11 October 2014 but, as he did not refer to this in his application, the Commissioner cannot consider it here.

3. COPFS responded to Mr O'Donnell's request on 10 October 2014. COPFS provided payment details, broken down by category in line with Mr O'Donnell's request, explaining that the more recent of these figures had not yet been audited. It included a brief paragraph explaining the formal procurement exercise. COPFS also included a weblink to guidance on the Scottish Government's Framework Agreements.

4. On 11 November 2014, Mr O'Donnell wrote to COPFS requiring a review of its decision. This communication followed intervening correspondence on the same subject, including Mr O'Donnell's request of 11 October 2015. However, insofar as it states -

"There must be a more detailed invitation to tender and award notice issued"

(and on these points only) the Commissioner is satisfied that it can be interpreted as seeking a review of its response to his request of 20 September 2014.
5. COPFS notified Mr O'Donnell of the outcome of its review on 8 December 2014, confirming that it considered it had met its obligations under FOISA in relation to his request, while providing some further information on the tendering process. It confirmed that there was no requirement to publish a contract award notice, and explained why.
6. On 6 January 2015, Mr O'Donnell wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr O'Donnell stated he was dissatisfied with the outcome of COPFS's review because he believed he was given a response which was lacking in specification. He questioned the absence of further details of the goods and services procured by COPFS, and of a published contract award notice.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr O'Donnell 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 12 February 2015, COPFS was notified in writing that Mr O'Donnell had made a valid application. COPFS was asked to send the Commissioner the information withheld from him. At this point, COPFS did not consider any information to have been withheld. 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. COPFS was invited to comment on this application and to answer specific questions, including an explanation of the procurement process and any relevant records held, with details of what information was published in relation to the award of the contract. It was asked to explain why it considered it had responded to Mr O'Donnell's request in full.
10. COPFS provided submissions and further discussion followed, involving both COPFS and a Scottish Government procurement specialist. During the investigation, COPFS provided Mr O'Donnell with a copy of the "Invitation to Quote" specific to this "mini competition". Mr O'Donnell remained dissatisfied, believing his request had not been answered in full.

Commissioner's analysis and findings

11. 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 Mr O'Donnell and COPFS. She is satisfied that no matter of relevance has been overlooked.

Information held

12. Mr O'Donnell's application relates to details of the goods and services procured by COPFS in his requirement for review (he refers specifically to the invitation to tender) and of the award of the relevant contract (in the form of a published contract award notice). The Commissioner is satisfied that these fall within the scope of the second part of Mr O'Donnell's information request (i.e. details of the formal procurement exercises that were undertaken). It might have been prudent for COPFS to endeavour to clarify this element of the request, but there is no doubt that it would embrace information contained in documents of these descriptions.
13. There may be other aspects of the procurement process Mr O'Donnell is interested in, but the Commissioner is not satisfied that these were identified with sufficient clarity in either his requirement for review or his application for a decision. In particular, neither makes any mention of the first part of his original request, relating to payments.
14. In relation to the contract award notice, COPFS has explained that (in its view) there was no requirement to publish such a notice in the circumstances of this particular procurement exercise. Clearly, this position is shared by Scottish Government procurement specialists. It is not for the Commissioner to determine whether this position is correct in law, merely whether such a notice would be likely to be held. In all the circumstances of this particular case, the Commissioner is satisfied that COPFS could not reasonably be expected to hold such a notice.
15. With regard to details of the goods and services procured, in the form of an invitation to tender, the Commissioner is satisfied that this is met by the "Invitation to Quote" supplied to Mr O'Donnell during the investigation. It has been supplied subject to redactions, but Mr O'Donnell has not disputed these.
16. Mr O'Donnell may believe goods and/or services to have been purchased outwith the scope of this document. If that is the case, he may wish to know why. These are matters the Commissioner can consider only insofar as they are the subject of recorded information held by (or on behalf of) COPFS. In this case, the Commissioner can consider them only insofar as they fall within the scope of the present application. She is not satisfied that they do. In her view, the only question remaining for her to consider in relation to the information in this document is whether it should have been provided to Mr O'Donnell in response to his original request or his requirement for review.
17. 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. In this case, COPFS has submitted that it did not hold the document at the time Mr O'Donnell asked for it: it was not obtained until during the investigation, from the Scottish Government procurement staff who carried out the procurement exercise.
18. COPFS is a department of the Scottish Ministers, in common with the unit which carried out the procurement exercise. In any event, even if they are considered to be separate entities, both are Scottish public authorities for the purposes of FOISA and it is clear that the procurement was carried out on COPFS's behalf. That being the case, the Commissioner is satisfied that the relevant documentation was, in line with section 3(2)(b) of FOISA, held on behalf of COPFS, at the time the request was received by COPFS. Thus, it was captured by Mr O'Donnell's request. In failing to provide the relevant information from this document, COPFS failed to respond to Mr O'Donnell's request in accordance with Part 1 of FOISA.

19. The Commissioner is pleased to note that confusion of the kind which appears to have arisen in this case should be less likely to arise in future, as practice has been changed to ensure that COPFS will receive copies of the relevant tender document on award of the ensuing contract.

Decision

The Commissioner finds that the Crown Office and Procurator Fiscal Service (COPFS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr O'Donnell. In failing to identify the "Invitation to Quote" as falling within the scope of the request and provide it to Mr O'Donnell (subject to redaction, where appropriate) COPFS failed to comply with section 1(1) of FOISA. Given that this information was supplied to Mr O'Donnell during the investigation, the Commissioner does not require COPFS to take any action in respect of this failure.

Appeal

Should either Mr O'Donnell or COPFS 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

18 November 2015

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.

...

3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held –

...

- (b) by a person other than the authority, on behalf of the authority.

...

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