

Decision Notice



Decision 191/2010 Sustrans Scotland and the Scottish Ministers

Information relating to the Curriculum for Excellence

Reference No: 200902162

Decision Date: 17 November 2010

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Sustrans Scotland (Sustrans) requested from the Scottish Ministers (the Ministers) information about deletions in a specified section of the Curriculum for Excellence. The Ministers responded by releasing information to Sustrans. Following a review, Sustrans remained dissatisfied in that it felt that (a) the Ministers must hold further information and (b) the Ministers had not provided appropriate advice and assistance, and it applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to comply fully with Sustrans' request for information in accordance with Part 1 of FOISA. In general, the Commissioner was satisfied that the Ministers conducted appropriate searches to locate and provide relevant information to Sustrans. He also concluded that there had been no breach of the duty to provide advice and assistance in this case. However, he found that the Ministers had failed to provide all relevant information within its response to Sustrans.

By failing to provide certain relevant information, the Ministers acted breached Part 1 and, in particular, section 1(1), of FOISA. However, as the omitted information was identified and provided to Sustrans during the course of the investigation, the Commissioner did not require the Ministers to take any action in respect of this breach.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1) (General entitlement) and 15(1) (Duty to provide advice and assistance)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. The information request under consideration in this case is concerned with the development of the Curriculum for Excellence (the Curriculum), a new curriculum designed to reform education for pupils aged 3 to 18 years, which was implemented in Scotland's schools in August 2010. The development of the Curriculum took place over a number of years. Learning and Teaching Scotland (LTS) led this process, working in partnership with the Scottish Ministers and HM Inspectorate of Education, and consulting extensively with a wide range of stakeholders.
2. The overall Curriculum includes a number of subject areas, which in turn include "experiences and outcomes" describing the expectations for learning and progression in that area. Draft versions of these experiences and outcomes were subject to consultation with stakeholders before being finalised and launched in April 2009.
3. Sustrans' information request relates to references to safe and active travel within the draft experiences and outcomes for the Health and Wellbeing Curriculum area, which were omitted from the finalised version.
4. On 1 September 2009, Sustrans wrote to the Scottish Ministers (the Ministers) requesting the following information all documents relating to decisions to delete the following phrases from the Health and Well Being section in the Curriculum for Excellence just prior to launch in April 2009:
 - 1) "I know and can demonstrate how to travel safely whether on foot, on a bicycle, in a motor vehicle or on public transport."
 - 2) "I am encouraged and supported to travel actively and safely to and from my place of learning."Sustrans noted that the above phrases were contained in the original documents released for consultation in 2008 but removed from the final published document in April 2009.
5. The Ministers responded on 29 September 2009, enclosing a schedule and copies of all documents identified as falling within the scope of Sustrans' request.
6. On 2 October 2009, Sustrans wrote to the Ministers requesting a review of their decision. In particular, Sustrans stated that the documents supplied did not deal with the decision making process leading to the deletion of the key phrases, but only included correspondence entered into after these were removed. It indicated that it considered that only a partial release of documents had been actioned.
7. The Ministers acknowledged Sustrans' request for review in a letter dated 16 October 2009, which indicated that the Ministers would write shortly on the outcome of the review.



8. This letter also apologised for not bringing it to Sustrans' attention earlier that, since LTS led the process of writing the experiences and outcomes within the Curriculum, that public authority may be in a position to provide further information. The Ministers provided postal and email addresses for the Freedom of Information Officer at LTS. However, the email address provided at this stage was later found to be incorrect.
9. The Ministers notified Sustrans of the outcome of their review on 4 November 2009. They concluded that all information held by the Ministers and falling within the scope of Sustrans' request had been released to it.
10. However, the Ministers noted their duty to offer advice and assistance to applicants in terms of section 15 of FOISA. They acknowledged that their initial response should have advised Sustrans that LTS was more likely to hold information about the process leading up to the publication of the experiences and outcomes. The Ministers again provided contact details for LTS's Freedom of Information Officer, which once again included an incorrect email address.
11. On 22 December 2009, Sustrans wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying for a decision in terms of section 47(1) of FOISA.
12. The application was validated by establishing that Sustrans had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

13. On 9 April 2010, the Ministers were notified in writing that an application had been received from Sustrans and given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the Ministers was asked to explain in detail the types of searches they had carried out to locate information falling within the scope of Sustrans' request and the search terms used .
14. The Ministers responded, providing details of the searches carried out to locate the relevant information and confirmation that they considered they had provided all information falling within the scope of Sustrans' information request.
15. However, in subsequent correspondence with the investigating officer, the Ministers recognised that they had failed to provide to Sustrans certain relevant information. The Ministers supplied a copy of this information to Sustrans during the investigation.



16. Sustrans was invited to comment on the case, and in particular to confirm why it was dissatisfied with the Ministers' handling of its request. Its response indicated that it did not consider that the Ministers had identified and disclosed all relevant information falling within the scope of its request. Sustrans also expressed dissatisfaction with the fact that it was only once it sought a review of the response to its request that the Ministers directed it to LTS. It noted that the provision of an incorrect email address had caused delays in the progression of a separate information request to LTS.
17. At the investigating officer's request, the Ministers conducted further checks to establish whether any information of relevance to Sustrans' request was held within minutes of the Curriculum Governing Group (CGG). This request was prompted by research which identified that the CGG was involved with the process of reviewing and finalising the outcomes and experiences within the Curriculum, and the observation that no information relating to the activities of the CGG had been included within the documents supplied to Sustrans.
18. The Ministers' response indicated that they did not hold minutes of the CGG, but provided copies of two documents relating to its work that had been identified. The Ministers indicated that they considered these documents to fall outwith the scope of Sustrans' request.
19. The submissions made by the Ministers and by Sustrans will be discussed in more detail in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Sustrans and the Ministers and is satisfied that no matter of relevance has been overlooked.

Submissions by Sustrans

21. As noted above, Sustrans expressed dissatisfaction with the Ministers' handling of its request for two reasons. These were:
 - it felt that the Ministers had not disclosed all the information they held which fell within the scope of the request, and
 - it was unhappy that the Ministers had not, at the initial response stage, advised it to contact LTS, and when subsequently giving this advice, they had twice provided an incorrect email address, leading to delays in making an information request to LTS.



22. Sustrans referred the Commissioner to Scottish Parliamentary Questions that were answered by the Cabinet Secretary for Education and Lifelong Learning on 26 October 2009¹. Sustrans understood the Cabinet Secretary's responses to have indicated that a decision was taken to remove the pertinent statements regarding active travel from the Curriculum for Excellence. Sustrans argued that such a decision must surely be supported by documentary evidence, otherwise the Minister would not have been in a position to make such a statement to Parliament.
23. Sustrans also provided the Commissioner with a copy of a letter it had received from LTS in response to a review request made to LTS by Sustrans.

Submissions by the Ministers

24. On being asked about the extent of the searches carried out in response to Sustrans' information request, the Ministers responded that they had searched all electronic records (paper files no longer being maintained). Searches were conducted of records held in the Scottish Ministers' electronic filing system (eRDM) and on the Ministerial Correspondence System (MCS).
25. The Ministers stated that, in addition, officials also conducted searches of personal inboxes, electronic files and any paper records but failed to produce any further documents. The Ministers explained that searches have been conducted on electronic filing systems using key words and phrases that would be found in files names and documents such as 'curriculum for excellence', 'health and wellbeing', 'travel safely', 'active travel' etc.
26. The Ministers submitted that they did not believe that any additional searches could be undertaken to find further information and that all information held within scope had been provided in response to the request.
27. However, the Commissioner notes that, on being asked by the investigating officer to provide her with copies of the information provided to Sustrans, the Ministers discovered some further information, which fell within the scope of the request, but had not been disclosed to Sustrans. This information was disclosed to Sustrans during the investigation, once this error was identified.
28. In response to requests for further background information about the development of the Curriculum, the Ministers explained that LTS (which is a separate non-departmental public body) had led the development process and that decisions on content during the development of the Curriculum were based on advice and guidance from steering groups. The Ministers stated that it did not hold detailed records on the day-to-day development process for each area within the Curriculum.

¹ <http://www.scottish.parliament.uk/business/pqa/wa-09/wa1026.htm> (S3W-27966 onwards)



29. The Ministers advised that they played no role in the drafting and finalising of the Curriculum, and that Ministerial approval for publication was sought after an extensive process of drafting and refinement. They explained that the conclusions of this consultative process were considered by the Curriculum for Excellence Management Board (which is made up of representatives of a range of bodies) in advance of Ministerial approval being requested.
30. After being asked about whether they held information relating to the work of the GCC, the Ministers advised that they did not hold any Minutes of meetings of the CGG but that they had located two documents which were related to the CGG but fell outwith the scope of the request.

The Commissioner's conclusions

31. The key question to be addressed by the Commissioner in this case is whether the Ministers response to Sustrans' information request identified and supplied all relevant information. The test he must apply in considering whether any further information is held beyond that already supplied is not one of certainty, but rather the balance of probabilities. When drawing his conclusions in a case such as this, the Commissioner considers whether the searches undertaken by the public authority were adequate and sufficient to identify any relevant information; and whether they considered all likely sources of any information.
32. With regard to the quality, scope and thoroughness of the searches, the Commissioner accepts that the Ministers have carried out thorough and robust searches for the information requested by Sustrans and is of the view that, on the balance of probabilities, all of the relevant information held by the Ministers has, by the time of issuing this decision, been provided to Sustrans
33. In reaching his conclusion, the Commissioner has noted that the limited role of the Ministers in the development of the experiences and outcomes within the Curriculum. He accepts that this limited role means that they would not be expected to hold documentary evidence that would explain each difference between the draft version that was subject to consultation and the finalised version that was launched in April 2009.
34. The Commissioner has reviewed the documents that the Ministers identified as relating to the work of CGG in response to the request from the investigating officer. He agrees that this information does not fall within the scope of Sustrans' information request.
35. However, while the Commissioner accepts that the searches conducted by the Ministers were appropriate, and on balance that these identified all relevant information, he notes that it was established during the investigation that their response to Sustrans failed to include all of the relevant information.
36. The information omitted related to Ministerial correspondence, which was referred to within the bundle of documents that were disclosed to Sustrans. The searches undertaken were therefore sufficient to allow this information to be identified as relevant to Sustrans' request. However, it appears that an administrative oversight means that this additional information was not included within the response to Sustrans.



37. This error was rectified promptly once it was identified during the investigation. Nonetheless, the Commissioner must conclude that by failing to provide this information to Sustrans at the point where it first responded to Sustrans' request and conducted a review, the Ministers acted in breach of the requirements of Part 1, and in particular section 1(1), of FOISA.
38. Notwithstanding this error, the Commissioner finds in general that the Ministers complied with their obligations under section 1(1) of FOSIA by locating the information that they held which fell within the scope of the request, and disclosing it to Sustrans.

Section 15 – duty to provide advice and assistance

39. Sustrans also expressed dissatisfaction with the way in which the Ministers had handled the information request in that providing an incorrect email address on two occasions had not been helpful and had caused delays in the process of making a subsequent request to LTS, and by not making it clear at the initial response stage that LTS may hold relevant information.
40. 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.
41. Having considered all the circumstances the Commissioner is satisfied that overall the Ministers fulfilled its obligations in terms of section 15(1) in this case.
42. He accepts that the Ministers did not direct Sustrans towards LTS until after Sustrans had asked for a review of the initial decision. However, advice was offered immediately upon receipt of this request for review within an acknowledgement letter.
43. In this case (and in line with his general practice, following guidance on his obligations from the Court of Session), the Commissioner has considered the Ministers' handling of Sustrans' request at the point where they notified it of the outcome of their review.
44. The review process allows public authorities to rectify any deficiencies in their initial handling of the request. In this case, on receiving the request for review, it is clear that the Ministers immediately recognised that they might have advised Sustrans to make a separate request to LTS. They took steps to provide this advice without delay, rather than wait until the review had been finalised. By the point where the review outcome was notified, therefore, the Ministers had alerted Sustrans to the likelihood that further information would be held by LTS. This was in line with the duty to provide advice and assistance.
45. However the advice given to Sustrans both on receipt of the request for review, and when notifying Sustrans of the outcome of the review, included an incorrect email address. The Commissioner considers this to be unfortunate, but an error made in good faith.
46. While the Commissioner does not consider that this error amounts to a breach of the duty under section 15(1) of FOISA, he would suggest that the Ministers remind staff dealing with requests for information that it is good practice to check the accuracy of any contact information given out in such circumstances.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Sustrans Scotland (Sustrans).

The Commissioner finds that the Ministers complied with Part 1 of FOISA by providing some information to Sustrans in response to the initial request.

However, the Commissioner finds that, by failing to identify and provide the information that was supplied to Sustrans during the investigation, the Ministers breached section 1(1) of FOISA.

As the Commissioner is satisfied that the Ministers have now identified and provided all information covered by the terms of Sustrans' request, he does not require them to take any action in relation to this breach.

Appeal

Should either Sustrans or the Ministers wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
17 November 2010



Appendix

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.

...

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.

...