

Decision Notice 195/2021

Racist incidents in schools

Applicants: The Applicants

Public authority: Comhairle nan Eilean Siar

Case Ref: 202001247



Scottish Information
Commissioner

Summary

The Council was asked for the number of racist incidents, or incidents which may have a racial element, reported in the Council's schools in 2017/18 and 2018/19. The Council was also asked for its procedure for recording and promulgating the incidents, and about the race-equality training offered. The Council provided information.

Although accepting that the Council had supplied all information in relation to Part 1 of the request, the Commissioner found that the Council took an overly narrow interpretation of Part 3 of this request and required the Council to respond again.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 73 (definition of "information") (Interpretation)

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 6 June 2020, the Applicants made a request for information to Comhairle nan Eilean Siar (the Council). The information requested was:
 - How many racist incidents were reported in the Council's schools in academic sessions 2017/18 and 2018/19 and what procedure was followed for recording and promulgating these? [Part 1]
 - How many other incidents which may have a racial element were reported in these two academic sessions? [Part 2]
 - To what extent in this period was race-equality training offered and to what extent completed by teachers? [Part 3]

The Applicants stated that they wished a reply similar in format to that published on the Council's website¹ in response to a previous request for information related to 2015/16 and 2016/17.

2. On 13 July 2020, the Council responded. It provided a partial response to the Applicants with some information supplied, but stated that it was awaiting figures from some schools and would forward these figures to the Applicants as soon as it could.
3. On 25 July 2020, the Applicants wrote to the Council requesting a review of its decision on the basis that the Council's response to Part 1 had stated that three incidents were reported in 2017-18 and recorded in the 'Racist Incidents section in SEEMiS' [the Education Authority's database] whilst the Applicants were aware of, for the same period (2017/18), documented correspondence that referred to more racist incidents within a particular school. For Part 3, the Applicants were dissatisfied with a blank Excel entry for that particular school, under the column "Race Equality Training", as that did not provide the information requested.

¹ <https://www.cne-siar.gov.uk/your-council/freedom-of-information/published-fois/?s=Racist>

4. The Council notified the Applicants of the outcome of its review on 24 August 2020. The Council explained to the Applicants why the information provided differed from the information they were aware of for the named school. The Council concluded that its original response on this point was inaccurate due to changes in recording the data and inadequate searches, and acknowledged that its response to the question concerning training was inadequate too. The Council apologised and said it would send an amended response.
5. A spreadsheet containing the completed information was sent by the Council to the Applicants on 17 September 2020. This spreadsheet supplied figures for all the schools. The Council apologised for the late response.
6. The Applicants wrote to the Council on 28 September 2020. They stated that the response was unsatisfactory for the same reasons they had outlined on 25 July 2020. The Applicants re-iterated that the three racist incidents recorded for the named school in 2017-18 do not accord with the multiples of this number for which the Applicants had evidence. Also, for the named school there remained a 'blank Excel' response to the question 'To what extent in this period was race-equality training offered and to what extent completed by teachers?'
7. On 20 October 2020, the Applicants wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicants were dissatisfied with the Council's response to Parts 1 and 3 of this request. The Applicants stated they were dissatisfied with the outcome of the Council's review as it had not accurately reflected their awareness of racist abuse, "with only a fraction of even the documented in-school abuse reflected" in the Council's response in respect of one school. The Applicants were dissatisfied with an empty cell in the Excel spreadsheet for the extent to which Race-awareness training was offered and completed. Although the Council's review of both aspects of this dissatisfaction apologised for its response being "inaccurate" and "inadequate", the subsequent response was, in the Applicants' view, "similarly inaccurate and inadequate and thus remains unsatisfactory."

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicants 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.
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 to answer specific questions. These related to how the Council had established the information held by it falling within the request.
10. The Council responded to the questions posed to it by the investigating officer and supplied evidence of how it had handled the request.

Commissioner's analysis and findings

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

Section 1 - General entitlement

12. 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. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
13. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. from a person's memory).
14. The Applicants were dissatisfied with the information provided in response to Part 1, with particular reference to a named school, as they believed the data supplied were inaccurate. They were also concerned about the lack of information for Part 3 i.e. training, again in respect of the named school. The Applicants made clear that they were not dissatisfied with the data provided by the Council for any of the other schools in the Council area. The Commissioner will look at each part of the Applicants' dissatisfaction in turn.

Part 1 – reported racist incidents

15. The Council supplied information in Excel format with data for all schools in the Council area in the two time periods specified by the Applicants.
16. The Applicants argued that the Council's review had not accurately reflected their awareness of racist abuse in a named school, and they claimed that only a fraction of the incidents of abuse was reflected in the Council's recorded data for that school. They stated that for the period 2017/18 they had evidence with documented reference to 19 racist incidents. They explained in detail (the detail has not been repeated in this decision notice) the examples they are aware of.
17. The question of whether recorded information is held by a public authority is a factual one. The Council was asked how it had established what information it held for Part 1 of the request. The Council referred to the explanation given in its review, which had explained that the Council had verified the information about the school with the head teacher. The head teacher had explained that, until late in session 2017-18, the school recorded all behaviour incidents in "Behaviour Management" under the perpetrator's name, with the name of the victim anonymised. In May 2018, the school began to use "Racist Incidents" to record such incidents. The review had explained to the Applicants about some of the recorded incidents. In September 2018, the school moved to recording incidents involving protected characteristics in "Bullying and Equalities". It was these two sections to which the school had gone for the information, but it had not checked the previous record-keeping area.
18. There were a number of incidents earlier in 2017-18 that were reported and recorded in 'Behaviour Management'. However, as those incidents were uncategorised, the Council did not regard these as recorded information for the purposes of FOISA and so did not feature in the Council's response. At that point, early in 2017-18 session, although the school was recording racist incidents, it was not recording them in a special section in SEEMiS or categorising them as such, until it was instructed to do so. Even then, the school initially used the "Racist Incidents" category rather than "Bullying and Equalities".
19. The Council was asked by the investigating officer whether there were any qualifying criteria before the school would formally record something as an "incident". The Council replied that,

in using the general behaviour management section in SEEMiS, there are no set criteria for what constitutes an incident: what one teacher deems to be something which needs to be recorded might not be seen as such by another teacher. The Council said that this has been made more objective by the use of the “Bullying and Equalities” section in SEEMiS, which categorises behaviours which must be recorded, taking the personal judgement out of the decision to record. The Council explained that it is now using this system for recording such incidents, but it was not at the time.

20. The Council also commented that the Applicants’ concern “really seems to relate to the Education Authority’s practices in respect of racism, not the way in which their request has been handled.”
21. The Commissioner must decide whether the Council complied with section 1 of FOISA in responding to Part 1 of the request i.e. the Council held further recorded information falling within the request.
22. The Commissioner’s remit extends only to the consideration of whether the Council has provided recorded information to the Applicants that falls within their request and, therefore, whether the Council complied with Part 1 of FOISA in responding to the Applicants’ request. The Commissioner cannot comment on whether a Scottish public authority such as the Council should have recorded any, or more, information about a particular event or process, or have a different criterion or recording process. The Commissioner cannot decide whether there are incidents that have occurred in the named school that should have been categorised and included within the number recorded and supplied to the Applicants.
23. The Commissioner is of the view that that the Applicants’ concern is related more to the proper categorisation and recording of such incidents. That is a highly reasonable concern, especially given the nature of what is being recorded and the background to their request, but it is not a concern that the Commissioner can address in terms of compliance FOISA.
24. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
25. The Commissioner accepts that the Council complied with Part 1 of FOISA in its response to Part 1 of the Applicants’ request. The information supplied is recorded information held by the Council at the time of request and review that gives the data for the number of *recorded* racist incidents in the school for the period at issue.
26. Having considered all relevant submissions, the Commissioner accepts that the Council has taken adequate and proportionate steps to establish the recorded information held that falls within the scope of the Applicants’ request. In reaching this conclusion, the Commissioner has taken into account that the Council has explained the recording practices in place during the time period at issue and how these changed over the period, which may account for the disparity in figures between the Applicant and the Council. The Council has checked the data with those best placed to be aware of the recorded information held i.e. the head teacher of the school in question. The Council has provided information and an explanation of how the information was recorded.

Part 3 - Training

27. Part 3 of the Applicants' request was "to what extent in this period was race-equality training offered and to what extent completed by teachers?" The Excel spreadsheet initially supplied by the Council did not contain this information for the school in question – the cell was empty. This absence was raised by the Applicants, and the Council's review conveyed directly the explanation given by the head teacher of the school that:

All members of staff had an awareness-raising sessions on the Equality Act and the importance of recording instances of racial abuse in August 2018. It was not formal training offered by [the Council] as such which is why I did not record it, but I am happy to have this recorded on the form, as it was delivered by me as an officer of [the Council]. All teaching staff were present on that occasion. In addition, the school participated in Show Racism the Red Card in October 2018...

28. The Applicants were still dissatisfied with the empty cell in the Excel spreadsheet for the extent to which race-awareness training was offered and completed for the school. Although the Council's review apologised for its initial response being "inaccurate" and "inadequate", the subsequent response was, in the Applicants' opinion, "similarly inaccurate and inadequate and thus unsatisfactory."
29. The Council was asked to confirm that neither the school nor the Council more widely retained records of who had attended the training sessions. The Council replied that there was a register kept of training, and a sederunt taken at staff meetings. For instance, a session on dealing with incidents of racism was part of Staff Meeting in August 2018, so participation was recorded by sederunt.
30. The Council was asked whether it regarded the register of training or the sederunt taken at staff meetings as recorded information falling within the terms of the request. The Council replied that it did not consider that information to fall within the terms of Part 3 of the request. The Council commented that there was no specific request for records of training, or for numbers of teachers who had undertaken it.
31. The Council was also asked about the email given to the Applicants stating that all members of staff had an awareness-raising sessions on the Equality Act and the importance of recording instances of racial abuse in August 2018. The Council was asked if a copy of this training was retained and, if it were, did the Council regard this information to fall within the terms of the request? In response, the Council said that it understood that the head teacher did retain a record of the training, but it was not considered that that information fell within the terms of the request.
32. The Commissioner disagrees with the Council's interpretation of this request. The clear meaning of this request was for the Applicants to obtain information on the training provided/offered to teachers within the time period specified. The Council has confirmed that training on this subject took place during this timeframe and a record of who attended is held. Although the Commissioner accepts that the request does not cover all training materials held, it does encompass whether training was offered and the extent to which teachers completed the training, which may be contained within the sederunt or other recorded information held. To that extent, the Commissioner does not agree with the Council's interpretation of this request and requires the Council to respond again to the Applicants.

Decision

The Commissioner finds that Comhairle nan Eilean Siar (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicants. He accepts that the Council that no further recorded information is held with regard to the number of incidents recorded.

However, he finds that the Council took an overly narrow interpretation of Part 3 of this request and consequently failed to comply with section 1(4) of FOISA, in failing to identify information falling within the scope. The Commissioner requires the Council to provide a review outcome to the Applicants with respect to Part 3 of this request for the school in question by **24 January 2022**.

Appeal

Should either the Applicants 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

9 December 2021

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.

...

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.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) [Information notices] and 64(2) [Power to amend or repeal enactments prohibiting the disclosure of information] means information recorded in any form;

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