

Decision Notice



Decision 017/2009 Alan Arkison and North Ayrshire Council

Employees' duties and expenses claimed

Reference No: 200801210

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Summary

Mr Arkison requested from North Ayrshire Council (the Council) information relative to the duties and travel and other expenses of two of the Council's employees, together with information relating to the nomination of a journalist for an award. The Council responded by claiming either that the information was not held or that (insofar as it was the personal data of the individuals concerned) it was exempt in terms of section 38 of FOISA. Following a review, as a result of which the Council released some information, Mr Arkison remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council released further information to Mr Arkison and Mr Arkison withdrew certain of his requests, the Commissioner found that the Council had partially failed to deal with Mr Arkison's remaining requests for information in accordance with Part 1 of FOISA. While he found that the Council had acted correctly by notifying Mr Arkison in terms of section 17 of FOISA that it did not hold the requested information, he also found that it had breached the requirements of section 21(1) by failing to respond to Mr Arkison's request for review within the specified timescales.

The Commissioner does not require the Council to take any action with respect to this particular failure in response to this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held); and 21(1) (Review by Scottish public authority).

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. On 10 June 2008, Mr Arkison wrote to North Ayrshire Council requesting the following information:

Request 1 - Can you please supply a copy of expenses and travelling claimed by a named employee [referred to in this decision as "employee A"] for 27 and 28 August 2007.



Request 2 - The same for another named employee [referred to in this decision as “employee B”] for these two dates. Can you please show who authorised payment for each officer.

Request 3 - A copy of the attendance register showing employee A’s duties for these two days and any record of his activities during these duties.

Request 4 - The same for employee B for these two dates.

Request 5 - A copy of the attendance register for employee A showing the days he worked between 31 August and 8 September 2007, inclusive.

Request 6 - A copy of the attendance register showing employee A’s attendance on 26 September 2007, his expenses and fares paid and who authorised these. Any record of his duties and activities that day.

Request 7 - A copy of the fares and expenses claimed by employee B for the period 12 September 2007 to 17 November 2007 inclusive and who authorised them.

Request 8 - A copy of the attendance register for the same period in respect of employee B showing his duties. If this includes any leave can it be stated whether this was leave within his annual leave allowance or special leave for a specific purpose, and if so what that purpose was and who authorised it.

Request 9 - Can you please state whether employee B as Chief Trading Standards Officer, North Ayrshire Council, nominated Jane Barrie, Editor of “The Judge” in the Sunday Mail for Scottish Consumer Journalist of the Year 2006 (she won) and provide a copy of the statement he provided in support of that nomination.

Request 10 - Employee B nominated Jane Barrie for National Consumer Journalist of the Year 2007 in his capacity as Chief Trading Standards Officer, North Ayrshire Council. He provided a 500 word statement in support of that nomination. As this was done in the course of his duties as a reward for services rendered to assist him in these duties, can you please provide a copy of that statement.

2. The Council responded on 23 June 2008. The information covered by requests 1 to 8 inclusive was refused as the personal data of the individuals concerned under section 38 of FOISA. With regard to requests 9 and 10, the Council advised that employee B had put his name forward in support of the nomination in his personal and private capacity as a member of the Trading Standards Institute (TSI), rather than in his capacity as an employee of the Council. It added that the Council did not hold any information about the nomination.
3. On 27 June 2008, Mr Arkison wrote to the Council requesting a review of its decision. Specifically, he disputed the Council’s reliance on section 38 of FOISA .He also argued that requests 9 and 10 related to information about employee B’s professional life as an employee of the Council.
4. On 1 July 2008 the Council acknowledged receipt of Mr Arkison’s request for a review, stating that a decision would be made within 20 working days from 30 June 2008.



5. On 7 August 2008, Mr Arkison applied to the Commissioner regarding the Council's failure to respond within 20 working days of his request for review: however, he later withdrew that application after the Council responded.
6. The Council notified Mr Arkison of the outcome of its review on 6 August 2008, apologising for the delay. In relation to requests 9 and 10, the Council confirmed its earlier arguments that the information in question was not held. It released some of the information requested in requests 1 to 8 inclusive, while arguing that certain other elements were not held and adhering to its reliance on section 38 of FOISA in relation to the remainder.
7. On 9 August 2008, Mr Arkison wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Arkison 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.

Investigation

9. On 20 August 2008 the Council was notified in writing that an application had been received from Mr Arkison and asked to provide the Commissioner's Office with any information withheld from the applicant. The Council responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. During the investigation, the Council provided Mr Arkison with further information in response to elements of requests 1 to 8 inclusive. Consequently Mr Arkison withdrew his application for a decision by the Commissioner in relation to these requests. The Commissioner's decision will therefore consider the Council's handling of requests 9 and 10 only.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr Arkison and the Council and is satisfied that no matter of relevance has been overlooked.



13. Mr Arkison made submissions relative to an ongoing dispute with the Council and his reasoning for asking for the information. Some of Mr Arkison's comments and questions were outwith the remit of the Commissioner, who by law is restricted to considering Mr Arkison's request for information as contained in his letter of 10 June 2008 and whether the Council dealt with that request in accordance with Part 1 of FOISA.

Technical breaches of FOISA – Section 21

14. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt by it of the requirement, subject to certain exceptions which are not relevant here. In this case, Mr Arkison made his requirement for review on 27 June 2008 and it was acknowledged by the Council on 1 July 2008. The Council did not respond to that request, however, until 6 August 2008, after the expiry of this timescale.
15. Therefore, the Commissioner finds that the Council breached Part 1 (and in particular section 21(1)) of FOISA in this case. However, since the Council provided Mr Arkison with a response, albeit belatedly, the Commissioner does not require the Council to take any action in respect of this particular breach in response to Mr Arkison's application.

Section 17 – Notice that information is not held

16. In order to determine whether the Council was correct to give Mr Arkison notice under section 17(1) of FOISA that it did not hold the information he was seeking, the Commissioner must be satisfied that, at the time of Mr Arkison's request, the Council did not hold the information in question.
17. In his application, Mr Arkison claimed that a 500 word statement had been submitted by employee B in support of the nomination. He contended that employee B made the nomination in the course of his employment, sanctioned by the Council as his employer. He referred to information which, he submitted, supported his argument that the Council accepted employee B's TSI activities as an essential part of his employment duties, noting that documentation produced for the award ceremony identified him as an employee of the Council.
18. The Council, on the other hand, maintained that employee B was acting in a personal capacity as a member of the TSI in making the nomination and consequently any such action was not in connection with his employment.
19. The Commissioner acknowledges Mr Arkison's point that material produced by the TSI and Consumer Direct identifies employee B, as nominator, as being from North Ayrshire Trading Standards. However, that could be for identification purposes only and may not mean that the nomination was made on behalf of the Council or as an employee of the Council.
20. The Commissioner also acknowledges that information regarding the TSI Media Awards make reference to nominations being accompanied by a supporting statement of up to 500 words. In that respect the basis of Mr Arkison's request is understandable.



21. The issue then is whether such information exists and if so whether it is held by the Council.
22. The Commissioner accepts employee B's membership of the TSI is personal to him and not a consequence of his employment by the Council. In which circumstance, the Council has argued, any nomination made by employee B for the award in question was made as a member of the TSI rather than as an employee of the Council. The Commissioner has not had sight of any nomination form or letter submitted by employee B in respect of the TSI Media Awards. However, if it had been made in a personal capacity then it would be expected that any information held by the Council in respect of the nomination would be held by it on behalf of employee B in that capacity rather than in its own right, and accordingly section 3(2)(a)(i) of FOISA would apply to the effect that the information would not be held by the Council for the purposes of FOISA.
23. That said, the Commissioner generally expects a Scottish public authority to take such steps as are reasonable in the circumstances to satisfy itself as to what relevant information it does in fact hold with a view to responding appropriately to any request of this kind. Here, as previously indicated, the Council intimated that in relation to the awards and nomination in question, employee B was acting as an individual and not in his capacity as an employee of the Council and as such the Council had no reason to and did not hold the information requested. However, it went on to advise that employee B had been questioned regarding his involvement in the nomination and whether or not any relevant information was held. As a result, it concluded that no information was held, not least because employee B maintained that no statement had ever been written by him in support of the nomination.
24. In order to satisfy himself that nothing was held by the Council, the Commissioner served an Information Notice in terms of section 50 of FOISA on the Council asking it to confirm that nothing was in fact held and the steps taken to establish this. The Council responded to that Information Notice confirming the steps taken and its position that nothing was held.
25. Having considered all the submissions by Mr Arkison and the Council, the Commissioner accepts that that the Council was correct in the circumstances of this particular case to respond to requests 9 and 10 by giving notice in terms of section 17(1) of FOISA , on the basis that the information requested was not held by the Council.



DECISION

The Commissioner finds that North Ayrshire Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr Arkison.

By notifying Mr Arkison in terms of section 17(1) of FOISA that it did not hold the requested information, the Council acted in accordance with Part 1 of FOISA.

In failing to respond to Mr Arkison's request for review within the specified timescales, the Commissioner finds that the Council breached the technical requirements of section 21(1) of FOISA. Given the Council's subsequent response, the Commissioner does not require it to take any action in response to this particular application in respect of this breach.

Appeal

Should either Mr Arkison or North Ayrshire Council 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.

Kevin Dunion
Scottish Information Commissioner
18 February 2009



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.

...

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-

(a) by the authority otherwise than-

- (i) on behalf of another person; or

...

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.

...



21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...