

Decision Notice



Decision 287/2013 Mr Stewart V. Mackenzie and Perth and Kinross Council

Handling of request and request for review

Reference No: 201302251

Decision Date: 16 December 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 6 August 2013, Mr Mackenzie asked Perth and Kinross Council (the Council) for information regarding its Anti-Social Behaviour Strategy. The Council disclosed some information in response to the request and disclosed further information following a review of its response. Mr Mackenzie was dissatisfied with the Council's handling of the request and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the initial response from the Council had failed to comply with some requirements in FOISA, but that this had been rectified in the review response, as permitted by section 21(4) of FOISA. Consequently, the Commissioner found that the Council had complied with Part 1 of FOISA in dealing with Mr Mackenzie's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 16(1)(c) and (d) (Refusal of request); 21(1) and (4) (Review by public authority); 47(1) (Application for decision by Commissioner)

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 6 August 2013, Mr Mackenzie asked the Council for information regarding its Anti Social Behaviour policy, including the roles and remits of the investigation officers in relation to Anti-Social Behaviour complaints.
2. The Council responded on 15 August 2013. It provided a redacted copy of the Safer Communities Team Operational Instruction and Guidance Document (the Guidance Document).
3. On 20 August 2013, Mr Mackenzie telephoned the Council to express dissatisfaction with the way his request had been dealt with. He followed up his phone call with a letter (again, 20 August 2013) in which he detailed his concerns.



4. On 26 August 2013, the Council wrote to Mr Mackenzie to acknowledge receipt of “your verbal request for review on 20 August 2013”. The Council summarised Mr Mackenzie’s reason for requesting a review as “...you believe that the redactions to the “Safer Communities Team Operational Instruction and Guidance” Document supplied in answer to question 3 are inappropriate and have not been carried out in compliance with the FOI legislation.” The Council asked Mr Mackenzie to get in touch if he did not agree with the interpretation of his request for review.
5. On 29 August 2013, Mr Mackenzie faxed a letter to the Council in which he stated that he did not agree with its interpretation of his phone discussion regarding his request for review. He stated that his reasons for requesting a review were those detailed in his letter of 20 August 2013.
6. The Council notified Mr Mackenzie of the outcome of its review on 17 September 2013. The Council disclosed a revised version of the Guidance Document, showing where information had been withheld and the relevant exemptions in FOISA. The Council stated that it had found no material difference between the request for review contained in Mr Mackenzie’s letter of 20 August 2013 and the Council’s summary, provided in its letter of 26 August 2013.
7. On 26 September 2013, Mr Mackenzie wrote to the Commissioner, 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 Mackenzie 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

9. On 31 October 2013, the investigating officer contacted Mr Mackenzie to clarify the scope of his application, as it appeared that only one of the issues he had raised could be the subject of a decision from the Commissioner: this was whether the Council had complied with section 21(4) of FOISA in dealing with his request for review.
10. On 10 November 2013, Mr Mackenzie confirmed that he accepted he had received “the correct document” after review. He sought a decision on potential procedural failings in the way the Council had responded to his initial request, and on the Council’s misinterpretation of his request for review. Mr Mackenzie’s application is described in greater detail in the next part of this decision.



11. On 14 November 2013, the Council was notified in writing that an application had been received from Mr Mackenzie and was asked to provide its comments on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions. In particular, the Council was asked to comment on its handling of the request for review under section 21(4) of FOISA.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Mackenzie and the Council. She is satisfied that no matter of relevance has been overlooked.
13. Mr Mackenzie's application to the Commissioner covers the following grounds for dissatisfaction:
- a) There were errors in the way in which the Council had dealt with his request for review: the Council had not referred to his letter of 20 August 2013, which contained required points of review.
 - b) The Council did not respond to the last paragraph, or paragraph 3, of his request for review (letter of 20 August 2013). (These paragraphs contained complaints about the way in which information from the Guidance Document appendices had been removed.)
 - c) The document he had initially received comprised 38 pages, but the document sent to him following review had 79 pages. Mr Mackenzie asked the Commissioner to condemn the fact that staff who did not work for the Council's Freedom of Information office had taken it upon themselves to deal with his request and, in doing so, had created a document completely different to the original, which resulted in him being misled.
 - d) The Council was wrong to say that there was no material difference between its interpretation of his request for review (as summarised from a phone call with a Council official and provided to him) and the written request for review he sent on 20 August.
 - e) The words "removed as inappropriate for circulation", which were used to indicate where text had been redacted from the Guidance Document [the version provided in the initial response to his request], were "complete nonsense".



14. Some parts of Mr Mackenzie's application (parts c) and e) above) concern the Council's initial handling of his request and the response issued to him on 15 August 2013. The Commissioner wishes to make it clear at this point that section 21(4) of FOISA permits an authority to modify or change its initial response at the review stage. Where this occurs, it is the authority's review response which determines whether it has complied with FOISA in dealing with the request (see section 47(1) of FOISA). The only exceptions are "technical" failures relating only to the initial request, and which cannot be put right at review – for example, a failure to respond to the request within 20 working days.
15. The Commissioner therefore cannot comment on parts c) and e) of Mr Mackenzie's application, as they relate to matters which were put right after the Council reviewed its response to his request, in line with section 21(4) of FOISA.
16. In considering the grounds for dissatisfaction identified in Mr Mackenzie's application, the Commissioner notes that, after review, the Council provided Mr Mackenzie with a more complete version of the Guidance Document, which showed clearly where information had been withheld and under which exemption in FOISA. Even though the Council did not respond directly to some of the specific complaints raised in Mr Mackenzie's request for review (see points a), b) and c) above), the Commissioner accepts that the Council complied with section 21(4) of FOISA in responding to the request for review by providing a modified version of its initial response.
17. Part d) of Mr Mackenzie's application, as numbered above, concerns the Council's interpretation of his review request. The Commissioner has compared the version prepared by the Council following a phone call with Mr Mackenzie with the written review request which Mr Mackenzie submitted by fax. The Commissioner cannot find any significant difference, and must conclude that there is no evidence to support Mr Mackenzie's view that the Council overlooked a material difference between the two versions.
18. Part e) of Mr Mackenzie's application (as numbered above) raises further issues about the initial response to his request, and whether it complied with FOISA, particularly in relation to the decision to withhold certain information. The Commissioner finds that the Council's initial response was, in effect, a refusal notice in terms of section 16 of FOISA. The response did not comply with section 16(1)(c) and (d) of FOISA, in failing to specify which exemption had been applied to the withheld information, or to explain why the exemption applied. However, the Commissioner notes that these failures were rectified in the Council's review response.
19. Section 21(4) of FOISA allows a Scottish public authority to modify or confirm its initial response after review. The Commissioner therefore finds that Council was entitled to amend its initial response, and, having done so, complied fully with Part 1 of FOISA.



DECISION

The Commissioner finds that Perth and Kinross Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made Mr Stewart Mackenzie.

Appeal

Should either Mr Mackenzie or Perth and Kinross 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
16 December 2013



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.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

...

- (c) specifies the exemption in question; and
(d) states (if not otherwise apparent) why the exemption applies.

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.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached...