

Decision Notice

Decision 176/2016: Mr Roy Mackay and Scottish Borders Council

Archiving of emails

Reference No: 201600260

Decision Date: 16 August 2016



Scottish Information
Commissioner

Summary

On 25 June 2015, Mr Mackay asked Scottish Borders Council (the Council) for information about archiving and retrieving emails of former Council employees. Following a review, the Council told Mr Mackay that no information was held. However, the Council's response to a later request made Mr Mackay question whether, after all, he should have received information in response to his request of 25 June 2015. He applied to the Commissioner for a decision.

The Commissioner investigated and accepted that the Council did not hold any information covered by Mr Mackay's request. However, she found that the Council had failed to provide Mr Mackay with reasonable advice and assistance, as required by section 15(1) of FOISA. She did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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 25 June 2015, Mr Mackay made a request for information to the Council. The information requested was:
 - all recorded information held in relation to the procedures and/or processes and/or "custom & practice" Scottish Borders Council has (or has had in effect at any time since 1 January 2013) to create a permanent (or archive) record of the documents, records, correspondence and/or e-mails (and/or the e-mail accounts) of Council staff once they are no longer employed by the Council and how those permanent (or archived) records are (or can be) accessed. (Request 1)
 - all recorded information you hold in relation to how any and all Council staff (including Heads of Department and Directors) involved (during the period February to April 2015 inclusive) in dealing with Freedom of Information requests were made aware of a) the information referred to in 1 above; and b) how to access the permanent (or archived) records - if required - when dealing with Freedom of Information requests (and any requests for review and any subsequent Scottish Information Commissioner investigations). (Request 2)
 - all recorded information you hold in relation to the number of times a "Journalled" (or otherwise archived) record relating to a former member of Council staff has been accessed (during the period February to April 2015 inclusive) in connection with a) FOISA; and b) otherwise. (Request 3)
2. The Council acknowledged receipt of this request on 26 June 2015.

3. Having received no substantive response from the Council, Mr Mackay wrote to the Council on 29 July 2015, requesting a review of its decision on the basis that the Council had not responded to his request.
4. The Council notified Mr Mackay of the outcome of its review on 11 August 2015. The Council apologised for not responding to Mr Mackay's request within the statutory timescale and stated that, in terms of section 17 of FOISA, the Council held no information falling within Mr Mackay's request.
5. On 10 February 2016, Mr Mackay applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council's review. He had recently received information in response to another request which he believed should have been provided in response to his earlier request of 25 June 2015. He believed that the Council had been wrong to inform him that it did not hold any information covered by his request. He also questioned whether the Council might hold other information which should also have been provided in response to his request of 25 June 2015.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Mackay 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.
7. 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 answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner considered all relevant submissions, or parts of submissions, made to her by both Mr Mackay and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 17 - Notice that information is not held

9. 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. This is subject to qualifications, but these are not applicable in this case. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
10. The Council's review stated that it held no information falling within any part of Mr Mackay's request. The Council maintained this position in its submissions to the Commissioner.

Information covered by the request

11. Mr Mackay's request of 25 June 2015 is set out in paragraph 1.
12. On 3 November 2015, Mr Mackay made a further request to the Council about staff who left the Council's employment between 26 February 2013 and 31 March 2015. He asked:

"...Please supply all recorded information you hold in relation to what was done with their personal e-mail accounts and all associated records (including, but not limited to all the

inbound, outbound, draft and deleted e-mail messages, attachments and related content), as a result of those staff members impending or actual cessation of employment. Please provide the number of personal e-mail accounts which were: a) permanently deleted b) "journalled" or otherwise archived c) dealt with in other ways (please specify).

13. In responding to his request of 3 November 2015, the Council said it did not record information on actions to individual mailboxes, but described its email storage process in some detail.
14. Mr Mackay believed the Council's description of its email storage system and process should have been provided to him in response to his earlier request of 25 June 2015. The Council acknowledged that it "largely held the information supplied to Mr Mackay on 24 November 2015" at the time of his request of 25 June 2015, but disagreed that the information was covered by that request.
15. The Council stated that Mr Mackay's request of 25 June 2015 was "specifically framed in terms of what processes for information on any system the Council had for the creation of a permanent record when an employee left the Council". The Council took the view that it had no such system: its journal system applied to all emails communicated throughout its systems and did not result in any separation of the emails based on whether or not a Council employee remained in the Council's employment. The Council argued that, in terms of Mr Mackay's request, a temporary archive did not exist and therefore it did not hold any information covered by this request.
16. As noted, the Council's response (24 November 2015) to a later request provided a detailed account of the system used to store all Council emails. The Council argued that its response of 24 November 2015 related to the archiving by the Council's overall email system in respect of when an employee left the Council and not a system designed to create a permanent archive for correspondence and files created by former employees. The information provided on that occasion outlined how the Council's email system operated in terms of journaling and archiving to provide context on what occurs when a member of staff leaves the Council. The Council added that:

"It is plain from this response that there is not a separate process in respect of the archiving and journaling of employee emails once they leave the Council and that the emails are simply retained for the usual retention period."

The Council therefore did not accept that the information supplied on 24 November 2015 should have been supplied earlier in response to Mr Mackay's request of 25 June 2015.
17. The Council noted that the information it supplied to Mr Mackay on 24 November 2015 was simply intended to assist him: the Council said that the information provided was not technically required in terms of the specific questions asked in Mr Mackay's request of 3 November 2015. The Commissioner accepts this, but must still decide whether the information supplied on 24 November 2015 fell within the terms of the request of 25 June 2015, and whether (in light of the explanation contained in this information) the Council provided Mr Mackay with reasonable advice and assistance in relation to that request.
18. The Council submitted that Mr Mackay's request of 25 June 2015 was specifically framed in terms of what processes the Council had for the creation of a permanent record when an employee left the Council. The Council has no such system. The Council said that the Journal System was a storage system that was applied by the Council for all emails communicated throughout its systems. The system did not result in any separation of the

emails stored based on whether or not a Council employee remained employed by the Council. Therefore, in terms of question 1 of Mr MacKay's request of June 2015, the Council said it had no information about a temporary archive, as a temporary archive did not exist.

19. This is a relatively narrow interpretation of the request of 25 June 2015: emails from ex-employees are archived in the Council's Journal system, even if this is by default and not the result of an active process specifically targeting the emails of ex-employees, and even if the archive is not specifically designed to hold emails from staff that have left. The emails may not technically be stored in an archive designed specifically for that purpose, but the emails are retained and accessible, albeit to specialist IT staff, for a period of three years.
20. It is understandable why Mr Mackay considered that the information included in the Council's response of 24 November 2015 could fall within the scope of his earlier request of 25 June 2015. However, the Commissioner accepts the distinction which the Council has made between the two requests, and accepts that the information in the November response was not captured by the terms of the request made on 25 June 2015. She agrees that there is sufficient difference between the terms of the two requests to allow the Council to draw a legitimate distinction between the information that would be covered by each of them.

Was all information located?

21. In his application, Mr Mackay explained that, after receiving the response of 24 November 2015, he now questioned whether other information should have been provided in response to his earlier request of 25 June 2015. The Commissioner will now consider whether all information has been supplied.
22. The Council acknowledged that it did not carry out searches to locate any information following Mr Mackay's request of 25 June 2015. At review, the Council had considered how an email search was carried out and, from the detailed explanation, concluded that it did not hold the information requested by Mr Mackay as there were no formal procedures in place for the archiving of ex-employees' emails.
23. The Council was reminded that the request referred to other documents such as correspondence and records and was asked whether any recorded information was held about such information. The Council confirmed that it did not hold any such information: it had no specific archiving system in place for this information and, accordingly, there is no guidance document on this issue.
24. The Council was asked whether, if a temporary archiving system existed in the period that Mr Mackay's request stipulated, the Council held any recorded information showing whether the archive was accessed in relation to FOI requests: e.g. did the Council's IT staff keep any record of occasions on which journaled emails were accessed in relation to FOI requests. The Council reiterated that it did not hold any such information as no temporary archiving system existed during the relevant period. The Council confirmed, in respect of the Journal system that did exist, that where the Council's IT department assisted with an FOI request then they would provide an FOI return detailing the searches that they had undertaken and the dates that these were done.
25. Having accepted that the request was limited in scope to information about a permanent email archive, which did not exist, the Commissioner accepts that no further information about such an archive is held by the Council.

Section 15(1) - duty to provide advice and assistance

26. The Commissioner has considered whether the Council provided sufficient advice and assistance to Mr Mackay in relation to his request of 25 June 2015, given that it provided him with information which was closely related to that request in response to a differently-worded request on the same subject in November 2015. In the circumstances, it is reasonable to ask whether, in June 2015, the Council should have provided Mr Mackay with the information he later received in November 2015, in order to provide him with reasonable advice and assistance in making his request.
27. Section 15(1) of FOISA requires a public authority, so far as it reasonable to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Scottish Ministers' Code of Practice on the discharge of Functions by Scottish Public Authorities under FOISA and the EIRs¹ ("the Section 60 Code") gives guidance to authorities on providing such advice and assistance.
28. The Section 60 Code states, at paragraph 5.1.1:
- "Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded."*
29. The Section 60 Code cautions:
- "Applicants should not be expected to always have the technical knowledge or terminology to identify the information they seek".*
30. At paragraph 1.10 (Providing additional information), the Code says:
- "The duty to provide advice and assistance does not extend to providing additional information which falls outside the scope of the information request, or locating information held by other public authorities. However, in some situations it may be helpful to provide some form of clarification or context to their response to avoid the information disclosed being misunderstood or misinterpreted."*
31. As stated above, the Council considered that the questions contained in Mr Mackay's request of 25 June 2015 were quite distinct from those in his request of 24 November 2015. The Council acknowledged it has a duty to provide advice and assistance, but felt it had fully complied with that duty.
32. Paragraph 1.10 of the Code would suggest that, under the duty to provide advice and assistance, the Council was not required to supply Mr Mackay with the additional information contained in its response of 24 November 2015, given that this information fell outside the scope of his request of 25 June 2015. However, the information was clearly relevant to the subject of the request, and would have helped Mr Mackay understand how, and for what period, the Council retained emails sent by former employees.
33. As has been stated previously, people making information requests, however experienced they are, cannot have knowledge of the information held by a public authority equal to that of the public authority itself. Although Mr Mackay is an experienced user of FOISA, in this case he must be regarded as requiring a degree of assistance from the Council in being able to

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

clearly word a request relating to a technical area such as email storage, of which he could not be expected to have any prior detailed knowledge.

34. Accordingly, the Commissioner has concluded that the Council failed to comply with section 15 of FOISA, in failing to provide reasonable advice and assistance to Mr Mackay. The Commissioner accepts that the information which would have provided such advice and assistance was made available to Mr Mackay in response to his request of November 2015, and, therefore, she does not require the Council to provide it now.

Decision

The Commissioner finds that Scottish Borders Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mackay.

The Commissioner finds that the Council does not hold information falling within the scope of Mr Mackay's request. However, the Council failed to give reasonable advice and assistance to Mr Mackay and so failed to comply with section 15 of FOISA. For the reasons set out above, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr Mackay 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.

Margaret Keyse
Head of Enforcement

16 August 2016

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.

...

15 Duty to provide advice and assistance

- (1) 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.

...

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.

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