

Decision Notice

Decision 051/2016: Ms Katherine Alexander and South Lanarkshire Council

Dates of Adult Protection Committee case discussions

Reference No: 201501647

Decision Date: 3 March 2016



Summary

On 13 April 2015, Ms Alexander asked South Lanarkshire Council (the Council) for the dates when a particular case was discussed at the South Lanarkshire Adult Protection Committee (the APC).

The Council responded by stating it did not hold this information: any information it held was held on behalf of the APC. Following a review, Ms Alexander remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had not carried out adequate searches to ascertain whether or not it held information falling within the scope of the request on its own behalf.

She required the Council to consider Ms Alexander's requirement for review again, and communicate a fresh outcome to her.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held)

Adult Support and Protection (Scotland) Act 2007 (the 2007 Act) sections 42 (Adult Protection Committees); 43 (Membership); 44 (Committee procedure); 45 (Duty to provide information to the Committee)

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 13 April 2015, Ms Alexander made the following request for information to the Council:
"I require to be advised of each and every date in which the case involving [named individual] and the [date] incident in which [that individual] was injured, was formally discussed by the [APC] between 2009 and 2013".
2. The Council responded on 12 May 2015. The Council stated that it did not hold any information and applied section 17(1) of FOISA. The Council stated that the information would be held by the APC, which was not subject to FOISA.
3. On 10 June 2015, Ms Alexander wrote to the Council, requiring a review of its decision on the basis that she believed the Council should hold the information. She argued that the APC was a function of the Council.
4. The Council notified Ms Alexander of the outcome of its review on 9 July 2015. The Council upheld its reliance on section 17(1) of FOISA, as it did not accept that the APC was a function of the Council. It provided reasons why it believed the APC was a separate body, with its own distinct functions. The Council argued that any relevant information it held was held on behalf of the APC (and therefore, in terms of section 3(2)(a)(i) of FOISA, was not information it held for the purposes of FOISA).

5. On 8 September 2015, Ms Alexander wrote to the Commissioner. Ms Alexander applied to the Commissioner for a decision in terms of section 47(1) of FOISA. She stated she was dissatisfied with the outcome of the Council's review because she considered the APC to be a working function of the local authority and that any information generated by the APC was held by the Council in its own right.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms Alexander 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. On 10 September 2015, the Council was notified in writing that Ms Alexander had made a valid application. The case was then allocated to an investigating officer.
8. 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 provide details of any searches carried out to establish whether it held any information. It was also invited to comment further on its view that any relevant information it held was held on behalf of another person, not subject to FOISA.
9. The Council responded, stating that it was likely that it would hold minutes relevant to the request but those minutes would be held on behalf of the APC, a separate legal body, and it was "not within its powers" to search records held on that basis. The Council confirmed that it had carried out no searches for the information, as it did not believe it held any relevant information in its own right. It confirmed that it had consulted members of Council staff who were also members of the APC in connection with the request, but submitted that any relevant information they held would be held by virtue of their APC membership and therefore would not be held for the purposes of FOISA.
10. The Council also provided further submissions in relation to the legal status of the APC, focusing on the provisions of sections 42 to 47 of the Adult Support and Protection (Scotland) Act 2007 (the 2007 Act):

Commissioner's analysis and findings

11. 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 Ms Alexander and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 1(1) of FOISA

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not relevant in this case.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). 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.

14. The Council provided comprehensive submissions on why it considered the APC to be separate from it in law. Having considered these, and the relevant provisions of the 2007 Act, the Commissioner is satisfied that this was the intention of the Scottish Parliament. The Council may have distinct responsibilities in relation to the APC, but the APC is established under statute with functions of its own and is charged with regulating its own procedures. Specifically, the APC convener must not be a member or officer of the Council (section 43(6) of the 2007 Act). The Commissioner also acknowledges the Council's point that it would not be necessary to require the Council to provide the APC with information were they one and the same (section 45(1) of the 2007 Act).
15. The APC does not appear to have legal personality in the strict sense, but the Commissioner accepts that it still falls within the definition of "another person" for the purposes of section 3(2)(a)(i) of FOISA. The Interpretation Act 1978 (which applied to the interpretation of Acts of the Scottish Parliament when FOISA was enacted) defines "person" as including "a body of persons corporate or unincorporated": the definition in the Interpretation and Legislative Reform (Scotland) Act 2010 is in the same terms.
16. The Council provides the APC with administrative and related support, and in this capacity it will hold records of the APC's meetings. The Commissioner accepts that information held in this capacity will be wholly under the control of the APC and must be deemed to be held by the Council on the APC's behalf. In terms of section 3(2)(a)(i), therefore, this information will not be held by the Council for the purposes of FOISA.
17. The position is not so clear in relation to equivalent information held by Council officers appointed to the APC. The Commissioner acknowledges, as the Council has submitted, that these APC members are appointed as individuals and not simply as delegates of the Council. It is true that the Council has no control over the use and storage of this information. If the APC and Council operated in entirely separately contexts, with no interdependence, the Commissioner might accept that such information would, in all circumstances, be held on the APC's behalf rather than by the Council in its own right. Then, it would be conceivable that this information would be used (and held) for the APC's purposes alone and not those of the Council.
18. However, from section 42 of the 2007 Act, it is clear that the APC is intended to help secure co-operation between, and co-ordination of the work of, various public agencies exercising responsibilities for safeguarding adults at risk. In various ways, it is also intended to provide support to these agencies in exercising their individual responsibilities in relation to such adults. That is the statutory context in which it operates, the agencies concerned including the Council.
19. The Council is clearly a key player amongst these agencies. It has considerable responsibilities of its own in relation to adults at risk, imposed by the 2007 Act. More broadly, it is the social work authority for its area and has general responsibilities for the social welfare of its citizens. By virtue of all of these responsibilities, it is clearly intended to work closely with the APC, in the public interest. The activities of the APC are clearly, and quite legitimately, of direct interest to the Council. If those attending the Committee were to use information acquired there in furtherance of their duties at the Council, it would be unsurprising: if that use were in pursuit of the common purposes of the APC and the Council, there is no obvious reason why it should be other than legitimate.
20. It would be difficult to characterise information so used as held other than by the Council. In other words, the distinction the Council is seeking to draw, while perhaps neat, is unlikely to

be wholly tenable in practice. In any event, given the inevitable degree of interdependence between the Committee and the agencies with whose functions it is concerned, the Commissioner is surprised that minutes of the APC's meetings are not supplied to the Council (and the other agencies concerned) as a matter of routine.

21. Ms Alexander simply asked the Council for information on a particular matter. She may have understood any information would be held because she believed the Council and the APC were one and the same, but the Commissioner does not believe this absolved the Council from considering, and ascertaining, whether it held the information in its own right, because of functions it was required to discharge in its own right. The Council does not appear to have considered this necessary.
22. The Commissioner has considered the context within which the Council and APC operate above. The notion that the case to which the request refers would have been discussed in a dimension wholly divorced from that context, without relevant officers of the Council being aware of that discussion, seems unlikely, to say the least. If such discussion took place, it would be reasonable to expect that the Council, by virtue of its own distinct (but not unrelated) functions, would have recorded that somewhere.
23. Given that reasonable expectation, and the likelihood that records of the APC's meetings will be held (and used) by the Council for its own purposes somewhere, the Commissioner would expect the Council to have considered where references to these discussions might be found in its own records and to have searched accordingly. It did not do so and she requires it to do so now.
24. The Council has referred to provisions of FOISA it would consider applicable should the Commissioner determine that it holds relevant information, but the Commissioner considers it premature to consider these before appropriate searches have been carried out. Once relevant searches have been carried out, the Council should provide Ms Alexander with a fresh review outcome, in accordance with section 21(4) of FOISA, in line with the outcome of these searches.

Decision

The Commissioner finds that South Lanarkshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Alexander.

In failing to carry out searches to ascertain whether any information was held, the Council failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to carry out appropriate searches for the requested information and issue a fresh review outcome to Ms Alexander, in terms of section 21(4) of FOISA, by **20 April 2016**.

Appeal

Should either Ms Alexander or South Lanarkshire 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 South Lanarkshire Council (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

3 March 2016

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. (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.

...

(6) This section is subject to sections 2, 9, 12 and 14.

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.

Adult Support and Protection (Scotland) Act 2007

42 Adult Protection Committees

- (1) Each council must establish a committee (an “Adult Protection Committee”) with the following functions—
 - (a) to keep under review the procedures and practices of the public bodies and officeholders to which this section applies which relate to the safeguarding of adults at risk present in the council's area (including, in particular, any such procedures and practices which involve co-operation between the council and other public bodies or office-holders to which this section applies),
 - (b) to give information or advice, or make proposals, to any public body and officeholder to which this section applies on the exercise of functions which relate to the safeguarding of adults at risk present in the council's area,
 - (c) to make, or assist in or encourage the making of, arrangements for improving the skills and knowledge of officers or employees of the public bodies and officeholders to which this section applies who have responsibilities relating to the safeguarding of adults at risk present in the council's area,
 - (d) any other function relating to the safeguarding of adults at risk as the Scottish Ministers may by order specify.
- (2) In performing its functions, an Adult Protection Committee must have regard to the desirability of improving co-operation between each of the public bodies and officeholders to which this section applies for the purpose of assisting those bodies and officeholders to perform functions in order to safeguard adults at risk present in the council's area.
- (3) The public bodies and office-holders to which this section applies are—
 - (a) the council,
 - (b) SCSWIS,
 - (ba) Healthcare Improvement Scotland,
 - (c) the relevant Health Board,
 - (d) the chief constable of the Police Service of Scotland,
 - (e) any other public body or office-holder as the Scottish Ministers may by order specify.

43 Membership

- (1) It is for the council to appoint the convener and the other members of its Adult Protection Committee in accordance with this section.
- (2) Each public body and office-holder to which section 42 applies (other than the council and SCSWIS) must nominate a representative who appears to the body or office-holder to have skills and knowledge relevant to the functions of the Adult Protection Committee to be a Committee member.
- (3) SCSWIS may nominate a representative who appears to it to have skills and knowledge relevant to the functions of the Adult Protection Committee to be a Committee member.
- (4) The council must appoint the representatives nominated under subsections (2) and (3) as Committee members.
- (5) The council may also appoint as Committee members such other persons who appear to it to have skills and knowledge relevant to the functions of the Adult Protection Committee.
- (6) The Committee convener must not be a member or officer of the council.

44 Committee procedure

- (1) It is for an Adult Protection Committee to regulate its own procedures.
- (2) But those procedures must allow a representative of—
 - (a) the Mental Welfare Commission for Scotland,
 - (b) the Public Guardian,
 - (c) SCSWIS (where it has not nominated a representative to be a member of the Committee), and
 - (d) any other public body or office-holder as the Scottish Ministers may by order specify,to attend Committee meetings.

45 Duty to provide information to the Committee

- (1) Each of the public bodies and office-holders set out in subsection (2) must provide the Adult Protection Committee with any information which the Committee may reasonably require for the purposes of performing the Committee's functions.
- (2) Those public bodies and office-holders are—
 - (a) each of the public bodies and office-holders represented on the Adult Protection Committee by virtue of section 43(4),
 - (b) the Mental Welfare Commission for Scotland,
 - (c) the Public Guardian,

- (d) SCSWIS (where it is not represented on the Committee), and
- (e) any other public body or office-holder as the Scottish Ministers may by order specify.

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