



Decision Notice 189/2024

Forth Valley Rape Crisis Centre; LGBT Youth Scotland

Authority: Clackmannanshire Council
Case Ref: 202300279

Summary

The Applicant asked the Authority for any recorded information held by a named school about or in relation to Forth Valley Rape Crisis Centre and LGBT Youth Scotland. The Authority disclosed some information, but the Applicant believed further information was held. During the investigation, it became clear that the Authority's searches were inadequate, and that further information was held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner); 50(1)(a) (Information notices)

Background

1. On 11 February 2020, the Applicant made a request for information to the Authority. The information requested was in relation to a named school (and insofar as relevant to this decision) any recorded information held by the school about or in relation to:
 - (i) the Forth Valley Rape Crisis Centre (FVRC) since 2017.
 - (ii) LGBT Youth Scotland since 2017
2. The Authority responded on 9 March 2020. It stated that these were repeated requests and applied section 14(2) (Vexatious or repeated requests) of FOISA.

3. On 10 March 2020, the Applicant wrote to the Authority, requesting a review of its decision on the basis that she disputed that requests (i) and (ii) were repeated requests.
4. The Authority notified the Applicant of the outcome of its review on 7 April 2020, upholding the original response.
5. On 15 September 2020 (and following an appeal to the Commissioner), the Authority issued a second review outcome to the Applicant, withdrawing its reliance on section 14(2) of FOISA and instead applying section 12(1) of FOISA, stating that the costs of providing a response would be in excess of the £600 limit.
6. On 28 September 2021 (and following a second appeal to the Commissioner), the Authority issued a third review outcome to the Applicant, withdrawing its reliance on section 12(1) of FOISA and providing the Applicant with what it claimed to be all of the information falling with the scope of requests (i) and (ii).
7. On 9 February 2023 (and following a third appeal to the Commissioner), the Authority issued a fourth review outcome to the Applicant, providing the Applicant with what it claimed to be all of the information falling within the scope of requests (i) and (ii), with some limited information withheld under section 38(1)(b) of FOISA.
8. On 2 March 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she did not believe that the Authority had provided her with all of the information falling within the scope of requests (i) and (ii), and she questioned its redaction of personal data.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 9 March 2023, the Authority was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to its reliance on section 38(1)(b) of FOISA to withhold personal data, and whether it had identified and disclosed all relevant information to the Applicant.

Information disclosed during the investigation

12. During the investigation the Authority disclosed some information it had withheld under section 38(1)(b) of FOISA.
13. In the absence of submissions to the contrary, the Commissioner must find that the information disclosed by the Authority was not exempt from disclosure and that the failure to disclose it in response to the initial request was a breach of section 1(1) of FOISA.

14. When questioned, the Applicant confirmed that she was not challenging any other personal data redactions made by the Authority. Given this, the Commissioner will not consider the Authority's reliance on section 38(1)(b) of FOISA any further in this decision notice.

Commissioner's analysis and findings

15. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Does the Authority hold more information?

16. 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 applicable in this case.
17. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).
18. The Applicant expressed dissatisfaction with the Authority's handling of her information request. She was dissatisfied with the review outcome issued on 9 February 2023, arguing that it did not include all of the information falling within the scope of her request and that information was missing. She also submitted that the schedule which accompanied the disclosure on 9 February 2023, did not include the information that the Authority had previously disclosed to her on 21 May 2021, 28 June 2022, 15 September 2022 or 7 October 2023. The Applicant questioned the presentation of the information she had received on 9 February 2023, noting that it contained many blank pages and it was very difficult to know if an emails in a chain were missing or to know who had sent or received the emails. The Applicant commented that she did not believe that the Authority had carried out all necessary searches, nor did she consider that all relevant staff had been asked to conduct searches.
19. The Authority was provided with the Applicant's grounds of dissatisfaction and it was asked to comment on the points raised by the Applicant and to answer questions about the searches it had conducted.
20. The Authority acknowledged that its first disclosure of information contained blank pages and it submitted that this was an administrative error. It explained that a member of staff had scanned the documents using the one-sided option on the scanner rather than double sided and it noted that it had explained this to the Applicant. The Authority submitted that as soon as the issue was raised by the Applicant, the documents were rescanned correctly, checked and the information was disclosed. The Authority acknowledged that the second set of documents disclosed to the Applicant also contained some blank sheets, but this was because the documents were printed with a blank sheet as the second sheet.
21. In relation to questions about the searches it had carried out, the Authority stated that it does;
...not instruct each service how to conduct the searches for information requested but are available to provide guidance if required. As we are now six years on from the original request, many staff have left the Council and their email folders have been deleted. No further information can be provided.
22. The Authority further commented that;

The school was requested to ask all relevant staff to search their emails for the information requested. Many requests were made by colleagues verbally and as such there is no record of how the request was worded. We do not keep a record of the parameters used to search for information.

23. The Commissioner expressed concern that the Authority was still failing to keep a record of the searches that were carried out in response to FOI requests, or in response to searches required by the Commissioner, and that it continued to give advice on carrying out searches only if the Service itself asked. The Authority was referred to paragraph 33 of [Decision 139/2022](#)¹, which stated;

The Commissioner is concerned that, while the Authority repeatedly tried to assure him that no further information was held, it does not appear to have taken any steps to ensure that the searches that were being claimed to have been carried out, were in fact conducted, or that the submissions it was putting forward in this case were correct. The Commissioner must advise the Authority that he is deeply concerned with its failings in this case, which appear to be systemic, and that he is considering further action under his Enforcement Policy.

24. The Authority was asked to provide the Commissioner with copies of;
- (i) the guidance the Authority's Information Governance team provide to Services who seek advice on carrying out searches,
 - (ii) any other Authority guidance regarding the execution of searches in response to FOI requests,
 - (iii) a copy of the Authority's retention schedules for the information it holds including, staff / third party correspondence and teaching materials, etc., and
 - (iv) the Authority's plans for reviewing/improving practice and guidance in relation to searching for information in response to a request.
25. The Authority provided the Commissioner with the information asked for in bullet point (iii) but it could not provide the other information as it was not held. The Authority submitted that it would be updating its guidance to staff on searches.
26. The Commissioner remained concerned that the Authority had failed to carry out sufficient searches for relevant information and he issued two Information Notices, using his powers under section 50(1)(a) of FOISA. This required the Authority to provide him with all internal communications relating to searches for information in relation to the Applicant's request (Information Notice 1), as well as all communications held by the named school that were sent to, or received by other Authority departments or employees and which related to Forth Valley Rape Crisis Centre or LGBT Youth Scotland in the time period 1 January 2017 to 11 February 2020 (information Notice 2).
27. In response to Information Notice 1, the Authority provided the Commissioner with a list of the staff whose emails were searched, and included the emails found by each staff member. The Authority noted that one member of staff had since left its employ and so they could not access their emails. The remaining emails contained discussions about the original request and its handling, including the searches that were asked for and questions about the scope of the request.

¹ <https://www.foi.scot/decision-1392022>

28. In its response to Information Notice 2, which sought information relating to the original FOI request of 11 February 2020, the Authority provided the Commissioner with more than 90 documents, most of which had already been disclosed to the Applicant. However, within this group of documents, the Authority identified a number which it could not evidence that it had previously provided to the Applicant. The Commissioner reviewed the content of these documents, and he determined that some documents fell within the scope of the Applicant's information request. The Commissioner acknowledged that it was possible that the Authority had previously disclosed these documents to the Applicant, but that it had no record of doing so. He asked the Authority to disclose these documents to the Applicant and to provide the Applicant with an updated schedule that listed each document held, and stated the date on which each document had previously been disclosed to her.
29. The Authority provided this information to the Applicant and the Applicant commented that some of these documents had never been disclosed to her previously, while others had been provided before, either in response to this current FOI or other FOI requests she had made. The Applicant argued that the Authority must have known of the existence of these documents but they had been deliberately concealed from her. She argued that this demonstrated that the Authority was still knowingly withholding information in response to her FOI requests. She submitted that she believed that further information was held.
30. As he has commented in previous decisions, the standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
31. In this case, given the information that has since been identified and disclosed to the Applicant, as a result of Information Notice 2, and the Authority's previous failures in conducting thorough searches, the Commissioner cannot say that he is fully persuaded that the Authority does not hold any further information falling within the scope of the Applicant's request, but he considers it likely, on the balance of probabilities, that all relevant information has now been identified and disclosed. However, as the Authority has since confirmed that it deleted an employee's email inbox, he cannot be satisfied that the Authority has identified and disclosed all of the relevant information that was held *at the time* it received the original FOI request, he considers it possible that some relevant information may no longer be held by the Authority.
32. As the Authority disclosed further information to the Applicant during the investigation, and as it failed to identify all of the information falling within the scope of the request, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA.
33. The Commissioner notes the Applicant's concerns about the presentation of the information that was disclosed originally in response to Decision 139/2022 but, having considered the Authority's submissions, he accepts that the inclusion of blank pages was a result of an administrative error. However, he would remind the Authority that it is important that information is disclosed to applicants in a way that can be easily understood. Including blank pages will understandably raise suspicions that information has been withheld, and failing to include transmission data for emails can make it very difficult, if not impossible, for applicants to follow an email chain and understand the order of the communications and how it was circulated. The Commissioner would remind Authorities that care must be taken when disclosing information under FOISA.

The Commissioner's comments on the Authority's handling of the request

34. In paragraph 28 of Decision 139/2022, the Commissioner stated that;

The Commissioner has grave concerns about the Authority's handling of the Applicant's information request. He notes that this request was made on 11 February 2020, and yet the Authority is still locating information falling within the scope of the request. In fact, the Authority has indicated that it has identified so much information that it was unable to send it to the Commissioner as an email attachment. It is clear that the searches that the Authority has carried out throughout this investigation have fallen far short of the standard expected. The Authority has repeatedly stated that the school did not hold any further information and that all relevant records had been searched. Given the late identification of large amounts of information, these claims were clearly wrong.

35. The Commissioner is disappointed that the concerns he raised in that case, involving the same request and the same Applicant, in relation to searches, have not been addressed by the Authority and that that paragraph is equally as relevant to this decision. On 9 February 2023, the Authority claimed that it had provided the Applicant with all of the information it held that fell within the scope of the request. Yet, since then, the Authority has identified additional documents that fall within the scope of the request. Furthermore, the Applicant has confirmed that some of these additional documents had never previously been provided to her in response to her FOI request.
36. By way of explaining why it failed to identify all relevant information when it sought to comply with the requirements of Decision 139/2022, the Authority submitted that it had ongoing issues with its IT systems, particularly with searches of older documents and it contended that this could have caused some documents not to be identified in the searches. The Commissioner rejects these arguments. He notes that the information request was made in February 2020 and yet the Authority did not make any mention of IT difficulties until October 2023. He takes the view that if there were "ongoing issues" with its IT systems then the Authority would have raised these concerns with him earlier. Even if the Commissioner accepts that IT issues were a factor in the Authority's failure to conduct appropriate searches, it is not the sole factor.
37. The Authority does not appear to retain any record of searches carried out, it does not have any written guidance for staff on how to carry out searches, nor does it appear to have a good understanding of what information was actually captured by the Applicant's information request. It is evident, from the information disclosed during the investigation, that the Authority failed to comply with the requirements of Decision 139/2022, as it did not carry out adequate searches. If adequate searches had been carried out, the new information identified in response to Information Notice 2, would have been identified in its review outcome of 9 February 2023. The Commissioner considers that the Authority's failure to carry out thorough searches goes far beyond IT issues.
38. The Commissioner also notes that a key member of staff, who has been involved in some of the existing correspondence captured by the request, has since left the Authority's employ and the Authority has deleted their inbox and the emails contained therein. The Commissioner considers it possible, from the correspondence that has been identified in this case, that further information of relevance may have been held in this inbox. The Commissioner acknowledges that deletion of the inbox may well have complied with the Authority's records management procedures (although there must, surely, be a corporate need to check whether anything in such an inbox requires to be retained more permanently),

but he would stress that once an information request has been received, information captured by that request cannot and should not be deleted until the request has been complied with or the Commissioner's investigation has been completed.

39. The Commissioner considers that the issues in this case go beyond a simple failure to comply with a single FOI request and they signify systemic failures in the Authority's ability to carry out its statutory functions under FOISA. The Commissioner has serious concerns about the Authority's ability to manage and comply with FOI requests, particularly in relation to searches, and he considers that these issues cannot be resolved with a single Decision Notice. He notes that the Applicant made her FOI request in February 2020, yet in September 2023, the Authority was still finding information captured by the request that it had not previously disclosed. Even if he were persuaded that IT problems were a factor, this speaks to particularly poor FOI practices and needs to be addressed.
40. In light of this, the Commissioner is considering the scope of an intervention to assist the Authority in identifying any internal issues that may be negatively impacting on its ability to comply with the requirements of FOISA and thereafter improving its FOI performance. The Commissioners [Intervention Procedures](#)² are available on his website and his [Enforcement Policy](#)³ sets out what the Commissioner will enforce and the outcomes that enforcement aims to achieve.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

By failing to identify and locate all of the information that fell within the scope of the request the Authority failed to comply with section 1(1) of FOISA.

As the Commissioner will be initiating an intervention with the Authority in order to improve its FOI performance, he does not require the Authority to take any action in response to this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner
03 September 2024

² <https://www.foi.scot/interventions-procedures>

³ <https://www.foi.scot/sites/default/files/2022-06/EnforcementPolicy.pdf>