



Scottish Information
Commissioner
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Decision Notice 162/2025

Lesson resources delivered by external providers

Authority: Orkney Islands Council
Case Ref: 202500519

Summary

The Applicant asked the Authority for copies of all lesson resources used by Orkney Rape and Sexual Assault Service (ORSAS) and/or Rape Crisis Scotland (RCS) to “deliver inputs” at Kirkwall Grammar School. The Authority stated that it did not hold the information requested. The Commissioner investigated and found that the Authority did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 3(2)(b) (Scottish public authorities); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner); 73 (Interpretation) (definition of “information”).

Background

1. On 26 January 2025, the Applicant made a request for information to the Authority. The Applicant asked for a copy of all lesson resources used by ORSAS and/or RCS to “deliver inputs” at Kirkwall Grammar School. The Applicant asked that these be broken down by year groups and lesson titles.
2. The Authority responded on 27 February 2025. The Authority explained that Kirkwall Grammar School had recently arranged an evening for parents to talk with staff about its approach to teaching sensitive subjects. The Authority advised the Applicant that

arrangements could be made to view the lesson materials within Kirkwall Grammar School and asked her to contact the Head Teacher to arrange this.

3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because she did not consider it appropriate for Kirkwall Grammar School to “gate keep” any learning materials presented to school children. The Applicant requested that the materials be sent to her so that she could read and digest them in her own time.
4. The Authority notified the Applicant of the outcome of its review on 4 April 2025. The Authority provided the Applicant with a breakdown (by year groups and lesson titles) of the plan for lessons delivered by ORSAS. However, the Authority stated that neither the Authority’s Education Department nor Kirkwall Grammar School held the lesson resources requested.
5. On 7 April 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome of the Authority’s review because she believed that it did hold the information requested. Specifically, the Applicant submitted that the information requested was held by two named teachers and explained why.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 11 April 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. These related to how it established that it did not hold the information requested.

Commissioner’s analysis and findings

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

Section 17(1) of FOISA – Notice that information is not held

10. 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 public 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.
11. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the

public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.

12. 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.
13. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) held by the public authority.

The Applicant's submissions

14. The Applicant explained that the information requested was material that had been shown to school children at Kirkwall Grammar School and that she was particularly interested in material delivered since 2022. The Applicant believed that the Authority and/or Kirkwall Grammar School held the information requested.
15. Specifically, the Applicant considered that the information requested was held by two named teachers at Kirkwall Grammar School. The Applicant submitted that some of the information requested was certainly held on a laptop accessed by one of the teachers. The Applicant stated that she believed that the other teacher must also hold the information requested as they had allowed the external providers access to Kirkwall Grammar School and its equipment in order to present the information requested.
16. The Applicant submitted that her request was reasonable and referred the Scottish Schools (Parental Involvement) Act 2006, which she considered meant the Authority's Education Department and Kirkwall Grammar School had "a duty to hold this information and share it accordingly". The Applicant considered that the Authority's Education Department and Kirkwall Grammar School should "get copies" of the information requested so that it could be shared appropriately.

The Authority's submissions

17. The Authority confirmed that the information requested comprised presentations, with each different lesson topic having a separate PowerPoint. The Authority submitted that the information requested belonged to ORSAS and/or RCS. While the Authority previously held information relevant to the request for the "limited purpose" of providing these lessons, it said that it had deleted that information from its systems after the lessons were delivered.
18. The Authority explained that information relevant to the request was subsequently held by three named staff members in October 2024 in order to fulfil an enquiry (made outwith FOISA) from the Applicant to view the lesson materials. The information was obtained from ORSAS, which had made a link available to allow two of the named staff members (who subsequently shared it with a third staff member) to view and discuss the materials with the Applicant.
19. However, the Authority confirmed that it had subsequently deleted that information. The Authority said that this meant that it did not hold any information relevant to the Applicant's request at the time she submitted her information request in January 2025.

20. The Authority provided detailed evidence of the searches it had carried out in response to the request, including screen shots of the search terms involved to evidence how the searches were conducted and demonstrate the outcome. The Authority also provided evidence of the locations searched (which included email accounts and personal computers, which covered local and cloud-based files) and the staff members required to undertake searches (and why those staff members were considered best placed to do so).
21. The Authority confirmed that these searches identified no information relevant to the Applicant's request and that its position remained that it did not hold the information requested.
22. The Authority submitted that there was no expectation for Kirkwall Grammar School to hold copies of the lesson materials provided by every external provider, nor for the Authority's Education Service to hold copies of such lesson materials.

The Commissioner's view

23. The Commissioner has taken account of all of the relevant submissions provided by both the Applicant and the Authority.
24. As stated above, the information to be given is that held by the Authority at the time the request is received, as defined by section 1(4) of FOISA. The relevant question for the Commissioner is therefore not whether the information requested was previously held by the Authority, but whether it was held at the time of the Applicant's request.
25. Given the explanations and submissions provided, the Commissioner considers that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.
26. The Commissioner is also satisfied that neither ORSAS nor RCS hold the information requested on behalf of the Authority by virtue of section 3(2)(b) of FOISA. He accepts that the information belongs to ORSAS and/or RCS, the information was created by ORSAS and or/RCS for their own purposes and, while the Authority previously held information relevant to the request, it had deleted that information (which it has no ongoing control over or access to) prior to receiving the Applicant's request.
27. While the Applicant believed and expected the information requested to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
28. The Commissioner considered the Applicant's suggestion that the Authority should "get copies" of the information requested. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, FOISA does not require a public authority to create recorded information to respond to a request, or to obtain and provide information which it does not itself hold in recorded form. The Commissioner therefore accepts that the Authority was not obliged to ask ORSAS and/or RCS to provide it with the information requested.
29. In all the circumstances, the Commissioner concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

Decision

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

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.

Cal Richardson
Deputy Head of Enforcement

27 June 2025