

Decision Notice



Decision 169/2013 Mr Martin Whittle and the City of Edinburgh Council

Minutes/notes taken during six month review of late aunt's care

Reference No: 201300769

Decision Date: 9 August 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 25 June 2012, Mr Whittle asked the City of Edinburgh Council (the Council) for the notes/minutes of the six month review of his late aunt's care. The Council responded by explaining that, as disclosure of the information would constitute an actionable breach of confidence, it was withholding the information from Mr Whittle. During the investigation, the Council informed the Commissioner that it did not hold any information relevant to Mr Whittle's request. Following the investigation, the Commissioner accepted that the Council did not hold the information, while also finding that Mr Whittle should have been notified of this when the Council dealt with his request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 25 June 2012, Mr Whittle wrote to the Council asking for the notes/minutes of the six month review of his late aunt's care, which he believed to have taken place on 29 August 2011.
2. The Council responded on 18 July 2012, explaining that it believed disclosure of the requested information would constitute an actionable breach of confidence and that it was therefore withholding the information under section 36(2) (Confidentiality) of FOISA.
3. On 16 August 2012, Mr Whittle wrote to the Council requesting a review of its decision, providing various reasons why he did not accept the Council's position.
4. The Council notified Mr Whittle of the outcome of its review on 25 September 2012. The Council explained that, in addition to the exemption in section 36(2) of FOISA, it was also withholding the information under section 26(a) of FOISA. It argued that release of the information was prohibited by the Human Rights Act 1998.



5. On 24 March 2013, Mr Whittle 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.
6. The application was validated by establishing that Mr Whittle made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 7 May 2013, the Council was notified in writing that an application had been received from Mr Whittle and was asked to provide the Commissioner with the information withheld from him. In response, the Council informed the Commissioner that it did not in fact hold the information requested by Mr Whittle.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was asked for background information on the review process, and to explain the searches and other enquiries carried out to determine whether it held relevant information. Finally, it was asked to explain why, in response to Mr Whittle's request and requirement for review, it had applied exemptions in FOISA in relation to information it did not hold.
9. Further submissions were obtained from the Council and Mr Whittle during the investigation.

Commissioner's analysis and findings

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

Section 17 – Information not held

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to qualifications which are not relevant here, that held at the time the request is received.
12. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.



Submissions from Mr Whittle

13. Mr Whittle expressed surprise that the Council was arguing that it did not hold any relevant information, since this was a departure from its previous responses to him where it explained that “all reviews are recorded on the electronic file and minutes then recorded during the review and stored again electronically”. Mr Whittle considered this to clearly indicate that the review was routinely minuted, and that the Council kept copies of such minutes.
14. Mr Whittle also commented that, since the Council gave reasons, in responding to his request and requirement for review, as to why it was withholding the requested information, this would clearly indicate that it did hold the information.

Submissions from the Council

15. The Council explained that, prior to responding to Mr Whittle’s request, it had interrogated its Social Care Recording System, “Swift”, and this showed that a review was due to be undertaken around 29 August 2011, as stated by Mr Whittle. The Council therefore assumed that this review had been carried out. At that stage, the Council did not request a copy of the assessment from the Residential Review Team (the team responsible for Mr Whittle’s late aunt’s care, which would hold the assessment), as it considered any information held would be absolutely exempt from disclosure.
16. It only became apparent that the relevant six month review had not been carried out when the Commissioner’s office asked for the information for the purposes of this investigation. The Council explained that changes to the reviewing system meant that the six month review Mr Whittle’s late aunt should have had in August 2011 was reset to an annual review. This annual review was not due to take place until six months later.
17. The Council provided the Commissioner with a copy of the Residential Review Team’s review procedure for adult care services, in place from October 2010. This makes it clear that, following the initial review of the care plan or the start of the service for the individual concerned, a further review should take place after six months. Following this, the procedure states that reviews should be undertaken annually.
18. Evidence was provided to the Commissioner of changes made to the review system in October 2011, which led to a change in the way six month reviews were undertaken.
19. The Council explained that, in preparation for the changes being made to the review system, a few months before October 2011 a data cleanse of “Swift” was undertaken. This led to six month reviews which were due or overdue at that time, being cancelled and dates for all reviews being reset.
20. The Council admits that, if it had carried out a six month review of Mr Whittle’s late aunt’s care, it would have a legal duty to hold the notes/minutes relating to this. As it did not carry out the review, it held no such notes/minutes.



21. Having considered the submissions from the Council, the Commissioner accepts that no recorded information is (or was, at the time of receiving Mr Whittle's request) held by the Council which would fulfil Mr Whittle's request (the review referred to by Mr Whittle not having been carried out). Consequently, she finds that the Council failed to give Mr Whittle notice in terms of section 17(1) of FOISA that it did not hold the information. She also finds that there is no purpose to be served in such a notice being served now.
22. Nevertheless, the Commissioner is concerned that the Council purported to withhold information under exemptions in responding to Mr Whittle's request and requirement for review, by implication confirming that it held the information in question. Even where the authority is certain that any information which would be caught by a request would be certain to be exempt under an absolute exemption in FOISA, it must first of all establish whether it holds any such information – if no such information is held, the requirements of section 1(1) are not engaged and a notice must be served under section 17(1), unless the provisions in section 18 apply.

DECISION

The Commissioner finds that the City of Edinburgh 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 Mr Whittle.

The Commissioner finds that, by failing to give notice that it did not hold the requested information, the Council failed to comply with the requirements of section 17(1) of FOISA. As the Commissioner also finds that the relevant information was not held by the Council, she does not require the Council to take any action in respect of this failure, in response to Mr Whittle's application.

Appeal

Should either Mr Whittle or the City of Edinburgh Council wish to appeal against this decision, there is an 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
9 August 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.

...

- (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.

...

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.

...