

Decision Notice

Decision 177/2017: Mr X and the Scottish Further and Higher Education Funding Council

Administration of grant funding for Edinburgh College

Reference No: 201701217

Decision Date: 20 October 2017



Scottish Information
Commissioner

Summary

The SFC was asked about the split between capital and revenue grant funding in respect of Edinburgh College. At review, the SFC supplied some information and during the Commissioner's investigation located and supplied more information to the requester.

The Commissioner accepts that, by the end of the investigation, the SFC had identified and disclosed all the information it held falling within the terms of the request. She did not require the SFC to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (4) (General entitlement) and 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 14 March 2017, Mr X made a request for information to the Scottish Further and Higher Education Funding Council (the SFC). He referred to FOISA and made the following information request (reproduced as submitted by Mr X):
 - All correspondence, between the SFC, their auditors and Edinburgh College 1 October 2016 until present date including the said letter you mention from Edinburgh College... Please provide all correspondence including but not limited to exchange of letters emails/minutes of meetings/telephone records etc. regarding this split between capital and revenue grant aid funding. [request 1]
 - The specific detail and wording of any SFC [sic] that allows the SFC including yourself and outcome managers that allow for this "change" in the conditions in grant. [request 2]
 - Please also advise if you yourself were aware of this request from Edinburgh College, as they appear to be making rather a lot of requests to the SFC of late that fall outwith the scope of our guidelines. [request 3]
 - ...Additionally it is my understanding the Edinburgh College signed off their outcome agreement, what this proviso included at the time. [request 4]
2. Having not received a response from the SFC, other than an acknowledgement on 14 March 2017, Mr X wrote to the SFC on 30 April 2017 requiring a review of its decision in respect of the SFC's failure to respond. (This failure has already been the subject of a decision¹ by the Commissioner.)

¹ <http://www.itspubliknowledge.info/ApplicationsandDecisions/Decisions/2017/201701071.aspx>

3. The SFC notified Mr X of the outcome of its review on 28 June 2017. The SFC supplied two emails which fell within the scope of his first request. For request 2, the SFC stated that it did not hold any information, and explained that the SFC has not communicated any change of conditions of the grant. For request 3, the SFC said that it was aware of the request from Edinburgh College and, in respect of this awareness, referred to an email supplied for request 1. For request 4, the SFC simply stated that “the matter of eligibility of capital funding was not included in the last OA [Outcome Agreement] published in April 2016”.
4. On 29 June 2017, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X believed more information should have been provided to him. He highlighted what he considered to be inconsistencies in the response from the SFC.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
6. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SFC 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.
7. On 4 September 2017, the SFC disclosed more information that fell within the first request.
8. Mr X then, through a series of emails to the SFC, asked (with reference to the guidance provided by the SFC) which section specifically stated that the additional capital funding provided to Edinburgh College could be used for capitalised items. The SFC provided explanation and an extract from the consolidated budgeting guidance 2017 to 2018 issued by HM Treasury. In essence, the SFC re-iterated its position that, when it makes capital funds available to colleges, it does not stipulate whether those funds should be used for capital maintenance/revenue items or items that would be capitalised by the college. The SFC provides a grant allocation. The College (in this case, Edinburgh College) would then write back to the SFC saying how much of the allocation they would be capitalising and how much they would be using for maintenance/revenue purposes.
9. One of Mr X’s concerns was that the additional funding to Edinburgh College was intended for capital maintenance funding, not for capitalised items, but that the SFC had asked the College to split the funding so that it could be used for both capitalised assets and capital maintenance. He believed this was not permitted under the conditions of the grant, and wanted to understand the authority for doing so.
10. The SFC explained that its guidance made clear the distinction colleges should follow when accounting for the use of SFC funds. All colleges were expected to consider how much of SFC funding allocations should be capital and how much revenue/maintenance; colleges would do this in consultation with their auditors and in light of their own capitalisation policy. Edinburgh College had informed the SFC of its split between capital and revenue, which met the SFC’s requirements. The SFC took the view that there was nothing wrong, or contrary to its rules, in how Edinburgh College had used its funding.
11. On 21 September 2017, the SFC supplied to Mr X an extract from the consolidated budgeting guidance 2017 to 2018 issued by HM Treasury. The SFC explained that it is this guidance that instructs spending departments that they may not switch provision from capital

budgets to resource - or revenue. The SFC highlighted, however, that this is a separate issue from colleges informing the SFC of their intended split in the use of their capital maintenance grant between capitalised items and revenue items. The SFC provided a link² to the guidance for the financial year 2016/17.

12. Mr X expressed dissatisfaction with the responses and explanations from the SFC and asked the Commissioner to issue a decision for his application.
13. The SFC commented that a large part of Mr X's application to the Commissioner related to his concern over whether Edinburgh College complied with a condition of grant and whether the SFC had reacted appropriately. The SFC suggested that Mr X may wish to make a complaint to the SFC using its published complaints procedure. Were he to do that and still be dissatisfied, he could apply to have the issue investigated by the Scottish Public Services Ombudsman.
14. The Commissioner agrees that Mr X's application for a decision contains many concerns which fall outside his remit. The Commissioner's remit extends only to the consideration of whether the SFC held the information requested by Mr X and whether it complied with Part 1 of FOISA in responding to his request. The Commissioner cannot consider whether Edinburgh College or the SFC has complied with any guidance or conditions relating to grant funding. Whilst such questions are entirely legitimate, they extend beyond the remit of the Commissioner.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both Mr X and the SFC. He is satisfied that no matter of relevance has been overlooked.

Section 1(1) of FOISA – General entitlement

16. 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.
17. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. about a person's opinions). The definition excludes unrecorded information.
18. Mr X believes that the SFC holds more information covered by his request than it has provided. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in some cases, more information) is not held.

2

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/601846/consolidated_budgetin_g_guidance_2017-2018.pdf

Request 1

19. Mr X's first request was for:

"all correspondence, between the SFC, their auditors and Edinburgh College 1 October 2016 until present date including the said letter you mention from Edinburgh College, to be clear please provide all correspondence including but not limited to exchange of letters emails/minutes of meetings/telephone records etc. regarding this split between capital and revenue grant aid funding."

20. The SFC identified and provided two emails which fell within this part of his request. During the Commissioner's investigation, the SFC searched again and located another short email exchange between Edinburgh College and the SFC, which it provided to Mr X. The SFC apologised that this was not disclosed earlier.
21. The SFC was asked to explain how it had interpreted Mr X's request. The SFC replied that Mr X's request for information was made in the context of an email exchange with the SFC's Interim Chief Executive, which began on 7 March 2017, about the use of the announced additional capital funding. The SFC regarded the request to be for any recorded information held by the SFC in relation to the use of the additional funding by Edinburgh College and the SFC's announcement of that additional funding on 30 September 2016.
22. The SFC was asked how it had established what information fell within this request. The SFC said its records were mostly held electronically in its Electronic Document and Records Management System (EDRM). For Mr X's request, the relevant folders in the EDRM system were searched, together with relevant email folders. The searches were undertaken by staff in the SFC's Outcome Agreement team who have responsibility for Edinburgh College. (The SFC explained that Outcome Agreement managers act in an analogous way to "Account Managers" as they look after a portfolio of colleges or universities and manage the relationship between SFC and the relevant college or university.) In addition, the email accounts of other staff in the SFC's Finance Directorate, who might have communicated with the College, were also searched.
23. The SFC was also asked if it had a copy of the letter from Edinburgh College to which Mr X had referred. The SFC replied that an email from the SFC's Interim Chief Executive to Mr X of 13 March 2017 explained that Edinburgh College wrote to the SFC in October 2016 regarding the split between capital and revenue funding. The communication from the College was in the form of a short email exchange on 21 October 2016. This email exchange was provided to Mr X on 28 June 2017. The SFC said that there was no other letter from Edinburgh College.
24. The SFC explained that the "budgeting rules" referred to in the email are the rules contained in the UK Government's Consolidated Budget Guidance³. The SFC submitted that the Consolidated Budget Guidance did not fall within the scope of Mr X's request. Its purpose is to provide a framework for how public sector bodies, including incorporated colleges, budget and account overall for their use of public funding, and the guidance is not relevant to the specific conditions of grant attached to the additional capital funding allocated by SFC in September 2016.
25. Having considered all the relevant submissions, the Commissioner accepts that the SFC has taken adequate and proportionate steps to establish whether it held information that fell

³ <https://www.gov.uk/government/publications/consolidated-budgeting-guidance-2016-to-2017>

within the scope of the first part of Mr X's request. In reaching this conclusion, the Commissioner has taken into account that the information falling within the request is likely to be straightforward to identify and locate, being recent correspondence. The actual searches undertaken by the SFC were reasonable and proportionate and likely to identify relevant information. The SFC staff involved in searching for the information had experience and knowledge of the subject, which would reduce the likelihood of searches being faulty or relevant information being overlooked.

Request 2

26. This request was for:

"The specific detail and wording of any SFC [sic] that allows the SFC including yourself and outcome managers that allow for this "change" in the conditions in grant."

27. In its review response, the SFC gave Mr X notice that it did not hold any information covered by this part of his request, and explained that the SFC had not communicated any change of conditions of the grant. Mr X believed more information was held by the SFC and said:

"It is my understanding that any agreement or change to the condition of grant must be agreed in writing with the SFC, if this not recorded then this would constitute a serious lack of governance on the part of the Accountable Officer in allowing such practice. The conditions or provisions for grant make this perfectly clear."

28. Again, the SFC was asked how it had interpreted this part of Mr X's request and how it had established that it did not hold any relevant information.

29. The SFC interpreted request 2 as asking for information showing that the SFC had changed, or had agreed to a change to, the condition of the grant relating to the use of the additional capital funding for Edinburgh College.

30. The SFC explained that the condition of grant for the use of the additional funding was set out in its announcement of Outcome Agreement⁴ funding for colleges, which was published on 9 May 2016. It had not agreed to, or communicated, a change in the condition of grant and believed that Edinburgh College had acted in accordance with the published conditions of grant. The information requested by Mr X – that is, any notice of a change to the condition of grant – was therefore not held by the SFC. The SFC said that it did not regard searching for the information as necessary in this particular case as it was aware that it had not made or agreed to a change in the condition of grant for Edinburgh College.

31. Having considered all the relevant submissions, the Commissioner accepts that the SFC interpreted the request reasonably and has taken adequate and proportionate steps to establish whether it held information that fell within the scope of Mr X's request.

32. The SFC has stated that it has not made or agreed to a change in the condition of grant for Edinburgh College. The Commissioner has no reason to doubt this and, accordingly, accepts that the SFC does not hold information covered by request 2, and that it gave notice of this, as required by section 17(1) of FOISA.

Request 3

4

http://www.sfc.ac.uk/web/FILES/Announcements_SFCAN072016_Outcomeagreementfundingforcollegesfinal/Annex_B_-_College_Conditions_of_Grant.pdf

33. In his third request, which was addressed directly to the Interim Chief Executive of the SFC, Mr X asked:
- “Please also advise if you yourself were aware of this request from Edinburgh College, as they appear to be making rather a lot of requests to the SFC of late that fall outwith the scope of our guidelines.”
34. In its review response, the SFC stated that, corporately, it was aware of the request from Edinburgh College. In support of this statement, it referred Mr X to an email supplied for request 1.
35. The SFC explained to the Commissioner that it had understood Mr X was asking whether the Interim Chief Executive of the SFC was aware that Edinburgh College had asked whether there would be an opportunity to revise its proposed split between capital and maintenance funding.
36. Mr X was asked to explain why he was dissatisfied with the response to this request. He replied that he believed more information was held by the SFC that fell within his request: if the Interim Chief Executive was the accountable officer for the SFC, and if he was not aware of any such request, that would (in Mr X’s view) constitute a serious failure of governance.
37. The Commissioner accepts the SFC interpreted the request reasonably. The College has supplied the information that relates to correspondence with Edinburgh College, in relation to request 1. Establishing whether the Interim Chief Executive was aware of a request from Edinburgh College is something which may be difficult to establish from recorded information. However, it seems likely that any relevant recorded information would be likely to form part of the information covered by request 1. The Commissioner therefore accepts that the SFC does not hold any more information in relation to request 3. As noted above, the SFC has taken adequate and proportionate steps to establish whether it held recorded information falling within the scope of Mr X’s request.

Request 4

38. In the fourth part of his request, Mr X asked:
- “Additionally it is my understanding the Edinburgh College signed off their outcome agreement, what this proviso included at the time.”
39. In his application to the Commissioner, Mr X provided some context to clarify his request:
- “If Edinburgh College have not entered into a recorded communication in terms contract, they may have tacitly and unwittingly broken the conditions of their outcome agreement at the hand of the SFC.”
40. In its review response to Mr X, the SFC explained that the matter of eligibility of capital funding was not included in the last Outcome Agreement published in April 2016.
41. The SFC said that it interpreted request 4 as a question about whether the use of capital funding and, in particular, the opportunity to revise the split between capital and maintenance funding, had been included in Edinburgh College’s Outcome Agreement. This issue was not

included in the College's Outcome Agreement for 2015-16, which was published in April 2016 and was available on the SFC's website⁵.

42. There is some ambiguity about the wording of request 4, and what "this proviso" applies to. However, the Commissioner accepts that the SFC was able to make a reasonable interpretation of the request, based on its previous correspondence with Mr X. The Commissioner has accepted that "this proviso" was a reference to the opportunity to revise the split between capital and maintenance funding.
43. The SFC responded to request 4 by telling Mr X that the matter of eligibility of capital funding was not included in the last Outcome Agreement, published on its website. By this, the SFC appears to imply that it did not hold any recorded information covered by the request, although this is not stated in specific terms.
44. The Commissioner accepts that the published Outcome Agreement shows that request 4 was based on a misunderstanding, and that the SFC does not hold any information covered by request 4. However, it would have been helpful for the SFC to cover this point in more detail in its response, and to provide Mr X with a link to the Outcome Agreement for Edinburgh College which was published on its website.

Decision

The Commissioner finds that the Scottish Further and Higher Education Funding Council (SFC) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X. The SFC failed to locate all the information covered by Mr X's request, and in this respect failed to comply with section 1(1) of FOISA when responding.

Given that the SFC has now identified and supplied the information covered by Mr X's request, the Commissioner does not require the SFC to take any action in respect of this failure in response to Mr X's application.

Appeal

⁵ http://www.sfc.ac.uk/web/FILES/Funding_Outcome_Agreements_2015-16/Edinburgh_College_Outcome_Agreement_2015-16.pdf

Should either Mr X or the SFC 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

20 October 2017

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.

...

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