

Decision Notice 067/2022

P3 and P4 Maths and English – subjects taught in specified school

Applicant: the Applicant

Public authority: South Lanarkshire Council

Case Ref: 202001399



Scottish Information
Commissioner

Summary

The Council was asked about English and Maths teaching at a specified primary school. The Council said it did not hold the information, and explained why.

The Commissioner investigated. He did not accept the Council's approach to establishing what information, if any, it held, or the premise underlying its conclusion that it could hold no information falling within the scope of the request: he required the Council to undertake searches and issue a fresh review outcome to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 3(2)(a)(i) and (b) (Scottish public authorities); 17(1) (Notice that information is not held); 21(1) and (4) (Review by Scottish public authority)

Pupils' Educational Records (Scotland) Regulations 2003 (SSI 2003 No. 581) regulation 3 (Meaning of educational record)

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. It may be helpful to explain that, having previously been in touch with one of South Lanarkshire Council's (the Council's) primary schools about their child's education, the Applicant wrote to the Acting Head, other teachers at the School and other relevant officers within the Council under a complaints process. The correspondence in question included an information request.
2. On 4 August 2020, the Applicant made a request for information to the Council. The information requested was:
... details of what subjects were taught [in the P3/4 composite class] regarding the plans/outcomes/targets set for English and Maths this year up to the lockdown, as well as last year and what the children in the straight P4 class were being taught during the same time period e.g. Time – on the hour and half past/convertng from 12 to 24 clock.
3. The Council responded to the Applicant on 27 August 2020, but solely under its complaints process, with advice on how to contact the Scottish Public Services Ombudsman (SPSO) if the Applicant wished to take matters further.
4. On 11 September 2020, the Applicant wrote to the Council, requesting a review as she remained unhappy that her request had not been handled under FOISA and that the information sought had not been provided within 20 working days.
5. The Council informed the Applicant of the outcome of its FOISA review on 9 November 2020, notifying the Applicant in terms of section 17(1) of FOISA that it did not hold the information requested.
6. On 24 November 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant did not accept that the Council did not hold the information in question, and was not satisfied with the handling of the request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
8. On 24 November 2020, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 9 February 2021, the Council was invited to comment on this application and to answer specific questions. The Council was asked to explain how it established that it did not hold any information covered by the Applicant's request and to describe the searches it conducted, with particular reference to the terms of the request.
10. The Council responded on 10 March 2021, providing its submissions.
11. Further correspondence ensued to clarify aspects of the Council's submissions and, on 15 September 2021, the Commissioner advised the Council of his concerns regarding the scope and adequacy of any searches it had undertaken and how it had assessed what information, if any, it could be deemed to hold for the purposes of FOISA. The Commissioner therefore invited the Council to conduct adequate searches and furnish the Commissioner with any information it located, by 30 September 2021.
12. On 16 September 2021, the Council emailed the investigating officer advising of discussions which would be needed with trade unions and asking the Commissioner to explain in more detail why he did not accept the various specific matters raised by the Council in relation to the submissions the Council had already provided to him.
13. On 17 September 2021, the Council was informed that the Commissioner had nothing to add at that stage to the concerns already set out in the existing correspondence with the Council. The Commissioner made the Council aware that he would leave it open for the Council to respond with the outcome of the searches as required, or alternatively with any final representations the Council might have, by 30 September 2021.
14. The Council provided final representations to the Commissioner on 30 September 2021. The Council commented on the Commissioner's interpretation of the factual position regarding any relevant information created and those teaching the classes in question. The Council set out its rationale for stating why it did not consider that information (referring to the "personal notes" of the teachers concerned) to held by or on behalf of the Council. It confirmed it had not undertaken the searches requested by the Commissioner at this time.

Commissioner's analysis and findings

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

16. In their application, the Applicant expressed dissatisfaction with the Council's responses, believing that an answer had still to be provided as to whether any relevant information was in fact held by the Council.
17. 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.
18. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). Section 3(2) of FOISA defines the circumstances in which information can be considered held by a Scottish public authority (see Appendix 1 – there has been no suggestion that section 3(2)(a)(ii) is relevant in this case).
19. If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
20. The Council notified the Applicant in its review (above), under the terms of section 17(1), to the effect that it did not hold the information requested.
21. The standard of proof to determine whether a Scottish public authority holds information (assuming it can be considered held in terms of section 3(2)) is the civil standard of the balance of probabilities. In determining where the balance 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. 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) actually held by the public authority.

The Council's submissions

22. The Council was asked how it established what information, if any, it held which was capable of addressing in full the terms of the Applicant's request.
23. In its first submission (10 March 2021), the Council outlined its general position, in the context of the issues raised by the Applicant. It also explained what information it had previously furnished to the Applicant under a separate route of access. This was information pertaining to the progress of the Applicant's own child, provided under the Pupils' Educational Records (Scotland) Regulations 2003 or "PER(S)Rs".
24. By way of background, the Council explained that:

A Head teacher has responsibility for and is accountable to the Director of Education for Developing the curriculum and ensuring high quality learning and teaching. To do this, the Head Teacher ensures that all teaching staff use and follow a series of national guidance documents as well as a wide range of resources (commercial and teacher-created) to support all children in their learning. In addition, the Head Teacher is responsible for ensuring appropriate support, challenge and interventions (where required) are put in place by teaching staff.
25. The Council further submitted that:

Consequently, it is incorrect to consider that teaching of a particular field such as literacy or mathematics is like the more traditional model of a teacher addressing a class. Certainly, there is an element of this that still occurs. For the purposes of Curriculum for Excellence, all children and young people should experience personalisation and choice within their curriculum, including identifying and planning for opportunities for personal achievement in a range of different contexts.

In delivering the curriculum, the Council noted that teachers would use their professional judgement and a range of evidence to evaluate progress and discuss with learners the next steps most appropriate for them. It believed the teachers' records created by them to provide the relevant aspects of the curriculum to be what the Applicant was seeking.

26. The Council also indicated that its Review Panel, in carrying out the review in this case, referred to the PER(S)Rs by way of giving an example of where access to information rights do not extend to teachers' own notes. The Council referred the Commissioner specifically to regulation 3(1) of the PER(S)Rs, which specifically refers to the PER(S)Rs not applying to information kept and intended to be kept by a teacher or by an employee of the responsible body solely for their own use. The Council stated it was of the view that the right to access information about a pupil was restricted in relation to these notes because of the recognition of "the unique position of a teacher." This is something the Commissioner will examine in detail later in this decision.

Searches

27. In its initial submission of 10 March 2021, the Council confirmed that it had not undertaken any search of its systems to locate the relevant information, as it would never have held the requested information. The information, if held, would be held by the individual teachers concerned as their own records, compiled for the discharge of their professional responsibilities. This was a different situation from where it might physically hold relevant information but that FOISA did not extend to that information because it was held on behalf of someone else (in which case, searches might be expected in the first instance). In this case, the Council would never hold the teacher's personal notes and would have no locus in asking to see them unless there was an employment issue arising from them (such as inappropriate subject matter being taught – which would not extend to assessing a teacher's professional actions, as it would in the present case).
28. Having been asked to carry out appropriate searches on 5 May 2021, the Council responded (20 May 2021), stressing that the apparent lack of searches was down to "significant factors that led to it [the Council] being unable to undertake the searches required by the Commissioner." The Council explained that the most likely location for information regarding the teaching of the specified subjects would be within any notes relating to the forward planning for the delivery of education within the school, rather than any pertaining to the teaching already carried out. It explained that this forward planning took place within the context of documents already provided to the Commissioner, supported by discussions between the relevant teacher and the Head Teacher of the school and the teacher's own notes. It clarified that "it would be incorrect to believe that the discussions between the Head Teacher and the teacher are of a level of detail that sets out exactly what would be taught". Any relevant records would be outcome-based and would not include what was taught and how it was to be delivered, which would be matters for the teacher's own discretion.
29. The Council confirmed that the Head Teacher had searched notes relating to forward planning, but had failed to locate any information pertinent to the Applicant's request. In the circumstances, it considered the only remaining location for relevant information would be

within notes prepared by the individual teachers in connection with the delivery of education to the pupils concerned. It considered it beyond its powers to access such notes, submitting that teachers were afforded a special professional status, given that (in terms of national guidance) responsibility for determining the provision of education to a class and the pupils in it rested with the teachers concerned. Thus, in the Council's view, any forward planning notes held by teachers would be personal to the teachers concerned rather than being held by the Council.

30. The Council went on to submit that it would be contrary to agreed practice to ask teachers about their teaching records in any way, as this would overreach into the personal autonomy of the teacher or teachers concerned. For this reason, it was reticent to contact the teachers concerned to ascertain whether they held any information. To do so, it claimed, would fly against the agreed position regarding the "special" status of such records and would be likely to raise issues with trade unions.
31. Given the above statements from the Council, the Commissioner left it open to the Council to conduct searches or provide final representations by 30 September 2021. The Council provided its final representation (30 September 2021), confirming it had not conducted searches and submitting that the Commissioner has adopted too narrow and rigid an interpretation of the factual position. It reiterated its view that it did not hold the personal notes of the teachers concerned in relation to their teaching of their pupils.
32. The Council asked the Commissioner to consider whether, based on the facts provided, an "appropriate connection" as described by the Upper Tribunal in England in its [decision](#)¹ of *University of Newcastle v Information Commissioner [2011] UKUT 185 (AAC)* (expressly approved by the Inner House of the Court of Session in *Graham v Scottish Information Commissioner [2019] CSIH 57*²) could be said to exist between the Council and the teachers concerned. The Council did not accept there was such a connection here, for the following reasons:
 - (i) The Council had no responsibility or involvement with or awareness of the preparation and retention of the personal notes: such notes might or might not be prepared by a teacher, as this was a matter for the teacher's professional judgement;
 - (ii) At no time did the notes come into the council's physical possession and, importantly, for the reasons provided to the Commissioner previously, it had no contractual or statutory powers to compel a teacher to disclose their personal notes to it;
 - (iii) The Council did not require any of the information in teachers' notes for its own purposes, such as performance monitoring, accounting and/or tax purposes: it had its own records for these purposes and the notes in question were for the exclusive use of the teachers.

The Commissioner's view

33. The Council has explained to the Commissioner what materials it *expects* schools (and the teachers and Head Teacher) to be using, with reasoning. The Commissioner accepts that this may be understood to be the position but, equally, he cannot accept that what is actually held can be established to anyone's reasonable satisfaction without relevant, adequate and

¹ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3263>

² [2019csih57.pdf \(scotcourts.gov.uk\)](#)

proportionate searches being carried out. Only then should it be possible to establish whether any material identified falls within the definition of information held by the Council for the purposes of section 3(2) of FOISA. It does not appear wholly unreasonable to accept the possibility that relevant information may be held in formats other than the teachers' notes described by the Council.

Status of teachers

34. Turning to the teachers' notes, the Commissioner has given careful consideration to Council's rationale for concluding that the information in these cannot be regarded as held by the Council for the purposes of FOISA. He does not find these arguments persuasive. As the education authority, the Council's argument appears to be twofold:
- (i) firstly, that the status of teachers is such that records created in the performance of their professional functions are purely personal; and
 - (ii) secondly, that there is no appropriate connection between the employer education authority and this information.
35. In the Commissioner's view, even if it is accepted (as the Council contends) that teachers do have a "special status" giving them a greater degree of professional autonomy than many other employees, and the Commissioner is not persuaded that this has been evidenced by the Council, it does not follow that information created in the performance of work they have been employed by education authority to carry out will, by definition, not be held by the employing authority for the purposes of FOISA. He is aware of no legal principle which means that records created by teachers in the performance of their professional functions must be regarded as purely personal for freedom of information purposes. Some such records may be purely personal, but whether they are to be so regarded, in the Commissioner's view, will fall to be determined by applying the ordinary tests under section 3 of FOISA.
36. The Commissioner also considers that policy factors such as any special status or autonomy of teachers are not relevant to the question of whether information is held for the purposes of FOISA. There are well recognised reasons of policy permitting certain information not to be disclosed, set out in the various exemptions in Part 2 of FOISA. Factors of the nature put forward by the Council in this case do not fall within any of these. Neither does the Commissioner consider the Council's reliance on such policy factors to be consistent with the need, identified frequently in case law (for example, the *Graham* decision, cited above), to give "hold" its plain meaning as an ordinary English word.
37. In considering whether information is held by the Council in these circumstances, it is necessary to ask whether there is an "appropriate connection" between the employer and the information.

Is there an "appropriate connection"?

38. The Council does not accept there is any "connection" between it and the teachers' notes. As indicated above, it has submitted that (i) it has no responsibility for, involvement in or knowledge of material prepared by an individual teacher; (ii) the material has never been in its possession, and (iii) it does not require the material for its own statutory purposes. It does, however, acknowledge that it might have a locus to request sight of such material in an employment context.
39. In the Commissioner's view, it will not be possible to determine whether there is a connection in the abstract, but only by reference to specific information. Specifically, it does not appear

possible to reach conclusions in the abstract on an absence of responsibility for material, or the education authority's lack of need for the material.

40. The authority's statutory duties will indicate whether or not it has a need for particular material – and, while numerous managerial matters may be delegated to school level, the essential role of the education authority remains. It is the authority's duty (under section 1 of the Education (Scotland) Act 1980) to secure adequate and efficient provision of school education for its area and (under section 7 of the Standards in Scotland's Schools etc. Act 2000) to define and publish standards of performance for its schools.
41. In that statutory context, the Commissioner is not satisfied that it can be said there is no appropriate connection between an education authority and material created by one of the teachers it employs (and there is no dispute that they are so employed) – or, more specifically for the purposes of this case, information about what subjects are being taught in courses in its schools. It may be for the professional judgement of the individual teacher to determine how best to teach a given course, but the Commissioner does not accept that it follows that the education authority has no interest in this: to perform its statutory functions, it needs to know what educational provision is being made in its schools and to what standard, and information relating to these matters is, in the Commissioner's view, appropriately connected with the authority's functions.
42. In addition, the Commissioner cannot ignore the Council's acceptance that it might require to see teachers' notes in an employment context. It follows that it is not an absolute rule that it has no need for the information. There are circumstances in which it may have a material interest in the information, which points to an appropriate connection.
43. Consideration of whether there is an appropriate connection will need to take account of the content of the information (which cannot be done in the abstract) and the circumstances in which it was created. A teacher creating notes or records for the purposes of teaching does so in the course of carrying out his or her duties as an employee of the education authority, within the wider framework of the authority's delivery of its statutory duties with regard to education – whatever "special" character the teachers' professional status may possess, these appear to the Commissioner to be inevitable aspects of that status – and aspects which point towards an appropriate connection.
44. All of the above factors, in the Commissioner's view, clearly point towards there being an appropriate connection between material produced by a teacher, in the course of employment by an education authority, and the authority itself. Whether there is such a connection in any given case will depend on all the facts and circumstances – and, in particular, on the substantive content of the information concerned. In other words, the information will require to be identified, located and considered before it can be determined whether or not the authority holds it for the purposes of section 3(2) of FOISA. Unless the information is purely personal and/or its content clearly has nothing to do with the authority, the Commissioner does not believe it possible to say categorically that it will be of a kind which cannot be considered "held" by the authority.

Conclusions

45. Having considered all the relevant submissions provided in this case, the Commissioner cannot accept that the Council has conducted adequate searches for the information sought by the Applicant. Teachers' notes may not be the only relevant source of the information, and the Commissioner is unable to accept the categorical assertion that teachers' notes, by definition, cannot be considered "held" by it in terms of section 3(2) of FOISA. It is for the

Council to identify and locate any information which might be relevant, and to consider whether that specific information can be considered “held”. It has yet to do this, and so – on the available evidence – the Commissioner is unable to conclude that the Council was correct to notify the Applicant, in terms of section 17(1) of FOISA, that the information was not held.

46. In the circumstances, the Commissioner must require the Council to take further steps to identify and locate any relevant information it actually held at the time of asking. Once any potentially relevant material has been identified and located, the Council can (and must) then determine to what extent that information can be considered “held” for the purposes of FOISA, before providing the Applicant with a fresh review outcome.

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 the Applicant

In the absence of adequate searches for the requested information, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA. Given this finding, the Council was not entitled to in notifying the Applicant, under section 17(1) of FOISA, that the information was not held.

The Commissioner therefore requires the Council to conduct adequate searches, meeting the requirements of this Decision Notice, and to issue fresh review outcome to the Applicant, in accordance with section 21(4) of FOISA, by **1 August 2022**.

Appeal

Should either the Applicant or the 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 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.

Daren Fitzhenry
Scottish Information Commissioner

16 June 2022

Appendix 1: 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.

...

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
- ...
- (b) by a person other than the authority, on behalf of the authority.

...

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-

- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached.

...

The Pupils' Educational Records (Scotland) Regulations 2003

3. Meaning of educational record

- (1) In these Regulations "educational records" means any records of information, excluding information contained in a Record of Needs or a co ordinated support plan, which–
 - (a) are processed by or on behalf of the responsible body;
 - (b) relate to any person who is or has been a pupil at the school;
 - (c) relate to the school education of that person; and
 - (d) originated from or was supplied by any of the persons specified in paragraph (2) below,other than information which is kept and intended to be kept by a teacher or by an employee of the responsible body solely for their own use.
- (2) The persons referred to in paragraph (1)(d) are–
 - (a) a teacher;
 - (b) any other employee of the responsible body;
 - (c) the pupil to whom the information relates; or
 - (d) a parent of that pupil.

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