Decision 062/2005 Macroberts and the Scottish Executive

Information requests refused on the ground that the requests were vexatious

Applicant: Macroberts
Authority: The Scottish Executive
Case No: 200501348
Decision Date: 29 November 2005

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

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Applicant made 720 requests to a Scottish public authority – public authority refused to respond to the requests on the basis that the requests were vexatious under section 14(1) of the Freedom of Information (Scotland) Act 2002 – Commissioner upheld the decision of the public authority

Facts

Macroberts, a firm of solicitors, made 720 requests for information to the Scottish Executive (the Executive) on 24 February 2005. The requests all concerned information held by the Executive in relation to Caledonian MacBrayne Limited (Caledonian MacBrayne). (Macroberts made a similar number of requests to Caledonian MacBrayne on the same day. Those requests are dealt with in decision number 063/2005.)

The Executive replied to Macroberts, initially by saying that it would not be able to respond to the requests within the 20 working days allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and subsequently by refusing to deal with the requests on the basis that they were vexatious in terms of section 14(1) of FOISA.

Macroberts made an application to the Commissioner for a decision as to whether the Executive was correct to decide that the requests were vexatious.

Outcome

The Commissioner found that the Executive had applied section 14(1) of FOISA correctly by refusing to deal with the information requests by Macroberts on the basis that the requests were vexatious.

Appeal

Should either Macroberts or the Executive wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 24 February 2005, Macroberts emailed 720 requests for information to the Executive under section 1(1) of FOISA. These requests related to information held by the Executive in relation to Caledonian MacBrayne.

2. Each request was made in a separate email. The requests asked for information about various routes run by Caledonian MacBrayne, such as the running costs of vessels, details of the vessels used on the routes, details of total staff costs for each vessel (per annum and on a month by month basis) and details of total on-board crew.

3. The Executive wrote to Macroberts on 10 March 2005 to acknowledge receipt of these requests and to advise Macroberts that, although it would attempt to respond within the terms of FOISA, it would not be able to respond to the requests within the 20 working days set down by FOISA. The Executive also advised Macroberts that it would aim to reply by 26 April 2005 and asked Macroberts to seek their client's comments on this proposal.

4. Macroberts considered this letter to be a formal refusal under FOISA and so wrote to the Executive on 14 March 2005 to ask it to review its decision not to respond within the 20 working days allowed by FOISA.

5. The Executive then wrote to Macroberts on 30 March 2005, stating that its letter of 10 March 2005 did not purport to be and was not a refusal notice under section 16 of FOISA and that Macroberts' request for review had been premature. However, the letter of 30 March 2005 from the Executive was a refusal notice under section 16 of FOISA and the Executive advised Macroberts that, reluctantly, it had decided that the requests fell to be treated collectively as vexatious.

6. On 5 April 2005, Macroberts applied to me for a decision as to whether the Executive had been correct to refuse to respond to their requests on the basis that the requests were vexatious.

7. I am permitted to investigate a matter under section 47(1) of FOISA only when the application to me is valid. To be valid, an information request must have been made to a Scottish public authority and the applicant must have made a request for review to an authority under section 20 of FOISA. For a request for review to be valid, the request must be made outwith the 20 working days allowed for a public authority to respond to a request for information, unless the public authority has issued a refusal notice (or notice that the information is not held) in the meantime.

8. It was clear that there was a disagreement between Macroberts and the Executive as to whether the Executive's letter of 10 March 2005 constituted a valid refusal letter. If it did, then the application to me was valid. However, if the letter was not a valid refusal letter, then the application to me was premature.

9. There is nothing in FOISA which prevents a public authority from entering into correspondence with an applicant prior to issuing a refusal notice. Indeed, given the duty on public authorities to advise and assist applicants set out in section 15 of FOISA, in many cases it will be good practice for this to happen.

10. In this particular case, the initial response from the Executive was issued well within the 20 working day period allowed for issuing a refusal notice. The letter posed questions which, while not comprising a request for clarification under section 1(3) of FOISA, did indicate that a response was being sought before a formal notice would be issued. I therefore considered that the Executive's letter of 10 March 2005 was not a formal refusal notice under section 16 of FOISA and that the application to me for a decision was therefore premature.

11. Macroberts subsequently asked the Executive to review its decision on 21 April 2005 and the outcome of the review was issued to Macroberts on 19 May 2005. The review upheld the previous decision by the Executive.

12. Macroberts then applied to me for a decision on 24 May 2005 and the case was allocated to an Investigating Officer within my Office.

Investigation

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13. The Investigating Officer wrote to the Executive on 1 June 2005 to advise that a valid application had been received from Macroberts and to ask for comments from the Executive in terms of section 49(3) of FOISA.

14. Comments were subsequently received from the Executive on 20 June 2005.

Submissions from Macroberts

15. In correspondence with my Office, Macroberts provided reasons why they considered that the requests which they had made were not vexatious. These can be summarised as follows:

    - The number of requests cannot be regarded as excessive in this instance. FOISA does not provide for any maximum threshold for requests and does not absolve a public authority from its fundamental obligation set out in section 1(1) of FOISA on the basis that a large number of requests have been submitted and require to be processed.

- In this particular instance, each request was a valid and legitimate request for information. Each request was framed in a separate and individual manner in order to provide the Executive with clear, focused enquiries which would allow for the most appropriate and efficient dissemination of the requests throughout the relevant departments of the Executive. Essentially, by making the requests in "bite sized" chunks, the Executive had the flexibility to deal with the requests in the way which best suited its internal processes.

16. Macroberts also commented on the fact that the Executive had offered to respond to the requests by 26 April 2005, i.e. outwith the 20 working day period allowed for by FOISA and had offered to prioritise certain requests. Macroberts stated that the approach offered by the Executive was not practicable as no one request was any more or any less important than any other. The information which was requested covered various aspects of Caledonian MacBrayne's business operations, all of which was required to provide a global picture of Caledonian MacBrayne's activities.

Submissions from the Executive

17. The Executive provided reasons both in its refusal notice of 19 May 2005 and in a letter to my Office of 20 June 2005 as to why it considered that the 720 requests made by Macroberts were vexatious. The Executive took the view that, given the 20 working day timescale for replies to be issued under FOISA, such a demand would, on the face of it, appear to be unreasonable and therefore potentially vexatious due to:

- The sheer volume of the requests.
- The nature of the request, i.e. that all 720 cases be handled individually.
- The size of the team which would have to respond to the requests and human resources available to handle the requests.
- The nature of the subject matter, in this case, Caledonian MacBrayne. The Executive argued that issues regarding Caledonian MacBrayne may be "commercially confidential" and this would potentially restrict the number of people qualified in knowledge terms to deal with the requests.

18. The Executive also referred to the fact that it had originally offered to deal with the requests outwith the 20 working day period set down by FOISA and that it had asked Macroberts to ask their clients to comment on any requests which should be given priority. The Executive took the view that the lack of willingness to accept or in any way accommodate an alternative proposal was also vexatious on the basis that the requests could not otherwise be handled without undue disruption being caused to the work of the Division of the Executive which would have to respond to the requests. Here, the Executive referred to guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code). The Section 60 Code is considered below.

19. In response to the comment by Macroberts that the number of requests cannot be regarded as excessive, the Executive acknowledged that FOISA does not provide an upper limit on the numbers of requests that may be submitted by any one enquirer and that a large number of requests does not absolve the Executive from its duty to deal with requests under the 20 day time limit. However, the Executive commented that it is disingenuous to suggest that any public authority – even one as large as the Executive – has capacity to answer thoroughly over 700 detailed requests on one specific policy area within 20 working days. The Executive also commented that Macroberts would be fully cognizant of the complexities of the subject matter, much of which may be "commercially confidential." Handling all of these requests simultaneously would cause real disruption to the work of the relevant branch, which, according to the Executive, comprises 5.5 full time equivalent (FTE) staff. The branch has responsibility for a wide range of issues other than the sponsorship of Caledonian MacBrayne. According to the Executive, given the specialised nature of the requests made, just 2.5 FTE of the staff have the necessary expertise in the policy area to work on the requests.

20. In response to the comment by Macroberts that it would not be possible for Macroberts to prioritise the requests, the Executive commented that it considers it highly improbable, given the amount of information that was requested, that anyone receiving and interpreting that information would have been able to do so without some degree of initial selectivity. That Macroberts refused to negotiate a compromise and were unable to gain access to some of the information requested raises doubts, according to the Executive, on Macroberts' argument about the importance of the information.

21. In response to the comment by Macroberts that the method of submitting the requests was for the benefit of the Executive (and so would, according to Macroberts, allow for the most appropriate and efficient dissemination of the requests throughout the relevant departments of the Executive) the Executive commented that as the requests all concern one specific policy area, the requests would have to be handled by the appropriate policy team in the Transport Department.

22. Finally, the Executive commented that the submission of separate emails as opposed to a list of requests was indicative of the vexatious nature of the requests and that, although the Executive, having refused the requests on the grounds of being vexatious, was under no obligation to offer to review its decision, it did so.

The Commissioner's analysis and findings

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23. Section 1(1) of FOISA sets out the general right to access information and states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. However, that right is not absolute. A public authority may refuse to provide information if the information is exempt under one of the exemptions contained in Part II of FOISA. A public authority may also refuse to provide information on other grounds, for example if the request is vexatious, repeated or if the cost of dealing with the request is excessive.

The procedures for dealing with vexatious requests

24. Section 14(1) of FOISA states that section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

25. If a public authority decides that a request is vexatious, the public authority must issue a refusal notice under section 16(5) of FOISA advising the applicant it considers the request to be vexatious unless it has already given the applicant such a notice or it would be unreasonable to expect the public authority to serve a further notice. I note the comment from the Executive that it did not have to offer to review its decision. In this case, however, the Executive was under a duty to offer to review the case, given that it had not previously issued a notice to Macroberts to say that it had decided that the requests submitted by Macroberts were vexatious.

26. The refusal notice issued under section 16(5) must contain details of the applicant's right to ask the public authority to review the decision and to apply to me for a decision.

27. If an applicant does ask for the decision to be reviewed, the authority does not have to carry out a review if the original request (or the request for review itself) is vexatious. (In this respect, the Executive was correct that it did not have to carry out a review.)

28. If the public authority does not carry out a review, it must issue a notice to the applicant stating why it is not carrying out a review. That notice must contain details about the right to apply to the Commissioner for a decision and of the right to appeal to the Court of Session.

29. Applicants can then apply to me for a decision as to whether the public authority has dealt with the application correctly and whether the information request is in fact vexatious.

The Section 60 Code

30. There is no definition of "vexatious" contained in FOISA. However, paragraphs 23 and 24 of the Section 60 Code provide some guidance to public authorities on what the term means.

31. The Section 60 Code makes it clear that irritation or nuisance caused by the applicant or by receipt of the request should play no part in an authority's consideration of whether an application is vexatious. However, the Section 60 Code goes on to state that factors which an authority might take into account could include:

- Whether the request has already been rejected on appeal to the Commissioner and the applicant knows this.
- Whether there has been unreasonable refusal or failure to identify sufficiently clearly the information required.
- Whether there has been unreasonable refusal or failure to accept documented evidence that the information is not held.
- Whether the request can be shown to be clearly intended to disrupt the authority's work rather than for the purpose of obtaining information.

32. As mentioned earlier, the Executive has argued that responding to the requests from Macroberts would disrupt the Executive's work, and has at least suggested that this was the intention of the requests rather than the obtaining of the information.

33. The Section 60 Code also makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious and that the power to refuse to respond to a request on the grounds contained in section 14(1) of FOISA should be used sparingly and should not be abused simply to avoid dealing with a request for information.

Further definition of vexatious

34. Although the guidance contained in the Section 60 Code offers some assistance to public authorities and to applicants, I would like to offer some additional guidance on matters I will take into account in considering whether a request is vexatious.

35. In offering this guidance, I have considered the need to avoid damage to the credibility or reputation of FOISA. As a result, while the provisions in section 14(1) should never be used lightly by Scottish public authorities, I am likely to be sympathetic to public authorities which refuse a request if responding to that request would impose a significant burden on the public authority and would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate. Neither FOISA nor the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) limit the number of requests which can be made in one day. (Although there is provision in FOISA whereby costs for dealing with separate information requests can be aggregated, thereby limiting the number of requests which could be submitted at any one time, this provision has not been introduced by Parliament.) However, this cannot and does not mean that applicants should be able to make an unlimited number of information requests to a public authority at any one time.

36. In considering what is manifestly unreasonable or manifestly disproportionate, it will sometimes be necessary to consider the effect of dealing with the request on a public authority. I have always made it clear that public authorities wishing to rely on the provision contained in section 14(1) must be able to show that the request – and not the person making the request – is vexatious. Even if an applicant does not intend a request to be vexatious, it is possible that dealing with that request will impose a significant burden on a public authority and will be considered to be manifestly unreasonable or manifestly disproportionate. The nature and effect of the request, rather than the intentions of the applicant, must therefore be taken into account.

37. In this particular case, I am not considering a single request, but a large volume of requests. Macroberts submitted 720 separate requests for information to one public authority on the same day on the same subject matter. While it is clear that each of these requests on its own would not be considered vexatious, I am satisfied that requests from the same applicant can be considered collectively in deciding whether each of those requests is vexatious. I must therefore now consider whether the 720 requests submitted by Macroberts would impose a significant burden on the Executive and are manifestly unreasonable.

38. It is true that the Executive is one of the larger public authorities covered by FOISA and, accordingly, this means that it will have the resources available to it to respond to a large number of requests within the timescales set down by FOISA. However, I note that the Executive has commented that in fact there are only 2.5 FTE staff who are qualified to respond to the requests.

39. In many cases, particularly where responding to information requests is simply a matter of collating information, there will be a wide range of employees whom a public authority can call on to deal with the requests. However, given that the routes operated by Caledonian MacBrayne are about to go out to tender (this was well known at the time the requests were made), responding to these requests will not simply be a matter of collating information.

40. As mentioned above, the information requests relate to matters such as the running costs of vessels, details of the vessels used on the routes, details of total staff costs for each vessel and details of total on-board crew. All of this information will be of interest to a third party interested in tendering for the any of the routes. As a result, only an employee with knowledge of the current status of the tendering processes involving Caledonian MacBrayne is likely to be qualified to respond to the information requests, particularly given the technical exemptions which are likely to be relied on in considering the release of information in response to the requests.

41. Even if every member of the relevant team in the Executive were to assist in responding to the requests, this still means that 5.5 FTE staff would have had to respond to 720 requests within 20 working days. Clearly, this would impose a significant burden on the relevant team in the Executive.

The Commissioner's findings

42. This case turns on the question of whether 720 requests made to a single public authority by the same applicant on the same day on the same subject can be considered to be vexatious in terms of section 14(1) of FOISA.

43. In coming to this decision I have looked to the practice of other freedom of information Commissioners worldwide. In New Zealand, an information request may be refused if it is frivolous or vexatious. Guidance issued by the New Zealand Commissioner states that in order for a request to be vexatious, the requester must be believed to be patently abusing the rights granted by the legislation rather than exercising those rights in a bona fide manner.

44. In both Western Australia and Queensland, an information request does not have to be dealt with if dealing with that request would divert a substantial and unreasonable portion of the body's resources away from its other operations or its functions. Both the Western Australia and Queensland Commissioners have issued a relatively small number of decisions on this matter. In a Western Australia case, *Kean and the Department of Environmental Protection* (10 March 2000), the Commissioner considered, amongst other things, the number of documents involved, the resources available to the Department to deal with the application and the limited number of staff with the necessary knowledge to make an informed judgement about the granting of access to the information (in the Kean case the information dealt with complex technical issues relating the business and commercial interests of third parties) and agreed that responding to the requests would divert a substantial and unreasonable portion of the Department's resources away from its other operations.

45. Closer to home, I have considered guidance published by the Information Commissioner under the Freedom of Information Act 2000. Although the Information Commissioner has not yet published any decisions on this matter, guidance published by him (*Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests*) supports my view that public authorities are entitled to consider the effect of dealing with information requests, not just the intention. According to the Information Commissioner, "Even though it may not have been the explicit intention of the applicant to cause inconvenience or expense, if a reasonable person would conclude that the main effect of the request would be disproportionate inconvenience or expense, then it will be appropriate to treat the request as being vexatious."

46. Having considered the practice in other jurisdictions and the arguments advanced by both Macroberts and the Executive, I have come to the conclusion that the 720 requests would impose a significant burden on the Executive and would be considered by a reasonable person to be manifestly unreasonable. I am also satisfied that Macroberts could not have been unaware that the volume of requests made by them would impose a significant burden on the Executive. As such, I consider the requests collectively to be vexatious.

47. Macroberts and the Executive both have conflicting views as to whether the manner in which the requests were made (i.e. 720 separate requests) was designed to help or hinder the Executive. Whereas Macroberts have stated that making separate requests allowed the Executive to disseminate the requests in a way which would make it easier for the Executive to deal with the requests, the Executive believed that making separate requests merely underlined that the requests were vexatious. What is clear is that if the requests had all been dealt with as one, the cost of dealing with the requests would very quickly have exceeded the limit set down by the Fees Regulations. Macroberts will have known that this was the case, hence the wish that the requests be dealt with separately.

48. I wish to impress on public authorities that, although I am willing to consider the effect on public authorities of dealing with information requests when deciding whether a particular request is or requests are vexatious, I will only consider the effect on a public authority where the effect of dealing with the requests is manifestly unreasonable. From time to time it is possible that public authorities will receive a number of information requests which stretch their resources. While I am likely to be sympathetic where the volume of requests from an applicant is overwhelming, I will not be sympathetic to public authorities which have simply failed to prepare for freedom of information or which have failed to make reasonably adequate provision for the handling of information requests.

Technical aspects of FOISA

49. The Executive issued a formal refusal notice to Macroberts more than 20 working days after it received the information requests from Macroberts in breach of section 10(1) of FOISA. However, given the circumstances in which the delay occurred, I do not intend to order the Executive to take any remedial steps in response to this short delay.

Decision

I uphold the determination by the Scottish Executive (the Executive) that the 720 information requests submitted by Macroberts were vexatious. Consequently, I find that the Executive did not breach Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to respond to the requests made by Macroberts on the basis that the requests were vexatious under section 14(1) of FOISA.

I find that the Scottish Executive breached Part 1 of FOISA in responding to these requests in that it issued a refusal notice more than 20 working days after the requests were received by it. As mentioned above, I do not require the Executive to take any remedial steps in connection with this.

Kevin Dunion
Scottish Information Commissioner
29 November 2005