



Scottish Information
Commissioner

Decision 014/2007 Mr DH Telford (on behalf of VB Contracts Ltd) and East Lothian Council
<i>Request for restricted information relating to rescue package documentation</i>

Applicant: Mr DH Telford
Authority: East Lothian Council
Case No: 200601169
Decision Date: 29 January 2007

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Decision 014/2007 Mr DH Telford and East Lothian Council

Request for restricted information following application of section 12(1) – failure to respond to request for review under section 21(1) – section 14(1) vexatious requests applied – section 14(2) repeated requests – request for review considered not vexatious or repeated

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 14(1) (Vexatious requests); 14(2) (Repeated requests); 20 (Requirement for review of refusal etc.); 21 (Review by Scottish public authority)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Telford requested information relating to a specified rescue package. The Council responded to this request and supplied certain information. Mr Telford was dissatisfied with this response and requested a review. The Council failed to respond to the request for review. The Council subsequently advised the Commissioner that it considered Mr Telford's request to be vexatious and repeated.

Following an investigation the Commissioner found that Mr Telford's request for review was not vexatious or repeated.

The Commissioner found that the Council had failed to respond to the request for review within 20 working days as required by section 21(1).

Background

1. On 15 February 2005 Mr Telford on behalf of VB Contracts Ltd, requested the following information from the Council pertaining to the East Lothian Schools and Leisure PPP Project:



- All information in respect of the rescue package between East Lothian Council and Innovate East Lothian Ltd following the bankruptcy of Ballast PLC
2. The Council advised that supply of this information to Mr Telford would exceed the prescribed limit of £600 and it was therefore not required to provide the information under section 12(1) of FOISA. Following an investigation, the Council's position was upheld by the Commissioner in *Decision 28/2006*.
 3. As a result, on 8 March 2006 Mr Telford wrote to the Council indicating that he would be willing to restrict the scope of his original request for information. Mr Telford advised that he did not require any information pertaining to how Balfour Beatty's Contract value was calculated. That is, he did not require information on Specifications, Bill of Quantities, Drawings. Mr Telford requested sufficient summary information in respect of Balfour Beatty's contract value to make sense of the rescue package information as a whole.
 4. The Council responded to this request on 4 April 2006. The Council explained that it had not been privy to Balfour Beatty's costs for carrying out the construction work, that being a matter between Balfour Beatty, Innovate (the Special Purpose Vehicle) and Lloyds TSB. However, the Council supplied certain documents which, it advised, showed the scope of Balfour Beatty's contract with Innovate East Lothian Ltd. The Council indicated that the three documents could be found in the "East Lothian Schools Rescue – Bible of Documentation" which included 84 documents. A copy of the list of these documents was also supplied to Mr Telford. The Council advised that none of the documents contained information in respect of Balfour Beatty's costs.
 5. Mr Telford was dissatisfied with this response and on 29 May 2006 wrote again to the Council. Mr Telford indicated that he considered the information to be wholly inadequate and incomplete. He indicated that the information supplied did not contain information pertinent to the various meetings that took place to discuss the rescue plan nor did it provide any information in respect of how the various decisions that were taken were reached. Mr Telford further challenged the accuracy of some of the information supplied.
 6. Mr Telford requested that the Council now supply all information requested and comply with the statutory timescale.
 7. The Council did not respond to Mr Telford's letter of 29 May 2006.



8. Mr Telford was dissatisfied with this failure to respond and on 6 July 2006 made an application to the Scottish Information Commissioner for a decision as to whether the Council had dealt with his request for information in terms of FOISA. The case was allocated to an investigating officer and the application validated by establishing that Mr Telford had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to his request.

The investigation

9. The investigating officer formally contacted the Council on 24 July 2006 in terms of section 49(3)(a) of FOISA, asking it to comment on the application as a whole, with particular reference to its apparent failure to respond to Mr Telford's request for review.
10. The Council responded on 7 August 2006. The Council accepted that there had been a procedural breach of FOISA in not responding to Mr Telford's letter of 29 May 2006. The Council apologised for this oversight.
11. The Council indicated that it considered Mr Telford's request of 29 May 2006 to be both vexatious and repeated. The Council cited sections 14(1) and 14(2) of FOISA which state that authorities are not obliged to comply with a request in these circumstances. The Council referred to the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (Section 60 Code of Practice) and its guidance on what should be taken into account when judging whether a request is vexatious.
12. The Council also referred to guidance on vexatious requests from the Office of the Information Commissioner based in Wilmslow while acknowledging the Scottish Information Commissioner might take a different view.
13. The Council further argued that the request was repeated. The Council advised that it had already provided information about the rescue plan to Mr Telford and therefore considered that it had previously complied with the requests made in Mr Telford's letter of 29 May 2006.



14. The Council indicated that these enquiries were putting a significant burden on the resources of the PPP team given that there was only one member of staff who had the required knowledge to deal with these requests. The Council accepted that enquiries should not be refused simply because of the amount of work involved. However, repeatedly being required to respond to requests for the same or similar information would not, in the Council's opinion, be regarded by a reasonable person as the best use of resources in such a small section.
15. The Council indicated that it had shown its willingness to provide information by allocating substantial time over the past 18 months and advised that the decision to classify this request as vexatious and repeated had not been taken likely or without significant discussion and research into Mr Telford's previous enquiries.
16. In support of its submissions the Council enclosed a chronological summary of the correspondence between the Council and Mr Telford and between the Council and the Commissioner. The Council advised that all information in the Council's possession that was relevant to Mr Telford's requests had already been supplied to him.
17. Mr Telford was informed of the Council's submissions in respect of his request for information and the Council's view that the request was vexatious and repeated. Mr Telford referred to previous correspondence on this matter. He indicated, however, that once again the Council had failed to abide by the statutory timescales set down in FOISA.

Commissioner's analysis and findings

18. The Council has submitted that Mr Telford's request of 29 May 2006 was both vexatious and repeated. In his letter of 29 May 2006 Mr Telford expresses dissatisfaction with the information supplied to him by the Council in response to his letter of 8 March 2006 and asks again that the information be supplied to him. It also appears that Mr Telford is expanding his original request and I will address this issue below. However, given that he is expressing dissatisfaction with the information supplied to him I am satisfied that Mr Telford's letter of 29 May 2006 is a request for review. This is significant in that different rules apply where the request is a request for review.



Application of section 14(2) – repeated request

19. Section 14(2) provides that where a Scottish public authority has complied with a request from a person for information it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.
20. While it is clear that an authority can rely on section 14(2) in relation to a request for information made under section 1(1) of FOISA, I need to consider whether an authority can cite section 14(2) for the first time in relation to a requirement for review. In my view, there is no provision for this in FOISA and it is not something which FOISA permits. Section 21(8) sets out all the circumstances in which a Scottish public authority is entitled to decline to comply with an applicant's requirement for review: if none of these apply, the authority is obliged to comply with the requirement and carry out a review. Section 21(8)(b) states that a Scottish public authority is not obliged to comply with a requirement for review if the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply. It is also notable that while section 21(8)(a) provides that the authority is not obliged to comply with a requirement for review which is itself vexatious, there is no equivalent provision in relation to a "repeated" requirement.
21. It should also be noted that section 20(1) of FOISA gives the applicant a clear and unambiguous right to require the authority to carry out a review, a requirement with which the authority must comply unless one of the circumstances envisaged by section 21(8) applies. The review is an essential part of the statutory process for securing access to information held by Scottish public authorities and must meet certain specific statutory requirements. In my view, it is perfectly acceptable (and at least in some cases necessary) for a requirement for review to contain elements of repetition of the original request. Provided it contains the prerequisites of a valid request for review specified in section 20(3) of FOISA, it will still be a requirement for review rather than simply a repeated request for information. As I have indicated above, I am satisfied that Mr Telford's letter of 29 May 2006 met all of the requirements for a valid request for review.
22. In this particular case, therefore, I do not consider that the Council can claim that Mr Telford's request for review of 29 May was itself a repeated request for the purposes of section 14 of FOISA. The Council could only claim that the original request was repeated.



23. Mr Telford's request for information of 8 March 2006 was a restricted request following *Decision 28/2006* in which I had concluded that the cost of supply of the information would exceed £600. In these circumstances, it is unlikely that I would find that the restricted request to be repeated unless it were put in the same terms as the original request. This was not case here; in his letter of 8 March 2006 Mr Telford indicated clearly the information he was no longer seeking in respect of the rescue package
24. In the circumstances, I find that it was not open to the Council to find the request for review to be repeated. It was only open to the Council to find the original request to be repeated and then uphold this position on review. The Council did not argue this and, in any event, for the reasons described above in paragraph 22 I would not have upheld this position.

Section 14(1) – vexatious request

25. The Council also submitted that Mr Telford's letter of 29 May 2006 was a vexatious request under section 14(1) of FOISA. Section 14(1) provides that an authority is not obliged to comply with a request for information if the request is vexatious. Firstly, I need to consider whether a request for review can be considered vexatious. Section 21(8)(a) of FOISA provides that an authority is not obliged to comply with a requirement for review if the requirement is vexatious.
26. Many freedom of information regimes provide for an exception to the general right of access where the request is vexatious. It is generally recognised that this exception is required to prevent the abuse of the right to know and to avoid damaging the credibility or reputation of the freedom of information framework.
27. The term "vexatious" must be applied to the request and not to the requester. In some cases, a public authority may consider that a single request is vexatious. A public authority may also wish to treat as vexatious the latest in a series of requests which have imposed a significant burden on the public authority, particularly where the request:
 - does not have a serious purpose or value
 - is designed to cause disruption or annoyance to the public authority
 - has the effect of harassing the public authority or
 - otherwise would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate.



28. In this case, the Council supplied information about the correspondence between the Council and Mr Telford. I am aware that Mr Telford is seeking information from the Council for particular reasons in connection with work carried out by his company as a sub-contractor on the Lothian Schools PPP project. Mr Telford has sought a range of information from the Council in this respect. However, it must also be noted that while Mr Telford has made a series of requests for information the Council has not always responded promptly with all information relevant to the request. This has prompted Mr Telford to repeat his requests and to express dissatisfaction with the way in which the Council has handled his requests. In the circumstances, I consider it would be harsh to penalise Mr Telford for the wealth of correspondence between the parties (and with my office) for which the Council must be in part responsible.
29. I am satisfied that in this case there is a purpose to Mr Telford's requests and I am satisfied that they are not designed to cause disruption or annoyance to the public authority.
30. I have noted the Council's submissions in respect of the time taken to respond to Mr Telford's requests and the significant disruption caused to the Council and, in particular, the PPP department. This in itself, however, would not support a finding of vexatiousness.
31. In support of its view that Mr Telford's request was vexatious the Council also pointed to guidance in the Section 60 Code of Practice and its guidance on what should be taken into account when judging whether a request is vexatious. In particular:
- 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 accept documented evidence that the information is not held
32. In *Decision 28/2006* I indicated that although the supply of the information requested by him did exceed the prescribed limit of £600, Mr Telford was entitled to make a restricted request to the Council. Mr Telford did this on 8 March 2006. I assume, however, that the Council's references to the Section 60 Code are made in respect of Mr Telford's request for review of 29 May 2006.



33. I do not find Mr Telford's request for review to be particularly clear. In his letter of 8 March Mr Telford sought "summary information about the value of Balfour Beatty's contract to make sense of the rescue package information as a whole." The Council's response focused on information about the contract value which, in the circumstances, seems to me was reasonable. In his letter of 29 May 2006 Mr Telford complained that the information supplied did not include information pertinent to the various meetings that took place to discuss the rescue plan nor did it provide any information in respect of how the various decisions that were taken were reached.
34. On the face of it, Mr Telford's request for review appears to be broader than his original request for information. The information that he indicates he wished to see goes beyond information focussing on the value of Balfour Beatty's contract. It is arguable that Mr Telford's request for review links back to the original request for information discussed in *Decision 28/2006*. Even so, I am reluctant to find that Mr Telford's request for review was vexatious.
35. I consider that there are particular considerations in cases where the authority is claiming that the request for review is vexatious but has not deemed the original request to be as such. A request for review will almost inevitably involve the applicant seeking access to the same information. The applicant will also be expressing dissatisfaction with the information supplied or the fact that information is not being supplied. I have also found that in some cases, in attempt to clarify the information being sought, the applicant expands on the original request. Therefore, it seems to me that there would have to be something over and above these aspects (which are really simply elements of the exercise of the applicant's statutory right to require a review) to make the request vexatious.
36. The applicant may also express their dissatisfaction in strong terms. However, providing the language is not abusive this will not make the request for review vexatious. Mr Telford's comments are not, it seems to me, excessive.
37. I have considered carefully the terms of Mr Telford's letter of 29 May 2006. I accept that he expresses his dissatisfaction in strong terms and that he does seem to be seeking broader information than his original request. However, I do not consider that the request for review to be vexatious. As a result, I do not uphold the application of section 14(1).
38. In such cases, it would have been reasonable for the Council to go back to Mr Telford to clarify the information he had originally sought and if necessary, advise that his request for review included, effectively, a new request for information. Where the Council does not hold the information, it can issue a notice under section 17(1) of FOISA.



Technical breaches of FOISA

39. The Council did not respond to Mr Telford's request for review within 20 working days as required by section 21(1) of FOISA. Even if the Council considered Mr Telford's request to be vexatious it was still required to issue a notice to that effect within 20 working days.
40. Mr Telford has made several applications to my office in respect of this Council. In each case, I have found that the Council has breached FOISA by failing to respond within the time limits set down by FOISA including the most recent related decision of *28/2006*. This is clearly unacceptable. The Council has indicated that these enquiries are putting a significant burden on the resources of the PPP team given that there was only one member of staff who had the required knowledge to deal with these requests.
41. However, the Council is aware that this cannot be used as a ground for failing to respond. The Council must also be aware that its failure to respond within the time limits will inevitably frustrate Mr Telford.
42. In the circumstances, I will be writing separately to the Council's Chief Executive to ask what steps will be taken to ensure that such breaches do not occur again. Mr Telford will receive a copy of this letter.

Decision

I find that East Lothian Council failed to comply with Part 1 of FOISA in dealing with Mr Telford's request for review by failing to respond within 20 working days, as required by section 21(1) of FOISA.

I find that Mr Telford's request for review was not vexatious under section 14(1) of FOISA or repeated under section 14(2) of FOISA.

The Council should now respond to Mr Telford's request for review of 29 May 2006 within 45 days of receipt of this decision notice.



Appeal

Should either the Council or Mr Telford 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.

Kevin Dunion
Scottish Information Commissioner
29 January 2007



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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- (3) If the authority –
 - (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- (6) This section is subject to sections 2, 9, 12 and 14.

14. Vexatious or repeated requests



(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

(2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

20. Requirement for review of refusal etc.

(1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

(2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".

(3) A requirement for review must-

(a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

(b) state the name of the applicant and an address for correspondence; and

(c) specify-

(i) the request for information to which the requirement for review relates; and

(ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

(4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).

(5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-

(a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or



(b) in a case where the authority purports under this Act-

(i) to comply with a request for information; or

(ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,

but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

(6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.

(7) The Scottish Ministers may by regulations provide that subsections (5) and (6) are to have effect as if the reference in subsection (5) to the fortieth working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.

(8) Regulations under subsection (7) may-

(a) prescribe different days in relation to different cases; and

(b) confer a discretion on the Scottish Information Commissioner.

(9) In subsection (1), the reference to "actions" and "decisions" includes inaction and failure to reach a decision.



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.

(2) If-

(a) the authority is the Keeper of the Records of Scotland; and

(b) a different authority is, by virtue of section 22(4), to review a decision to which the requirement relates,

subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.

(3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on 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.

(5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

(6) The Scottish Ministers may by regulations provide that subsections (1) and (5) and section 47(4)(b) are to have effect as if the reference in subsection (1) to the twentieth (or as the case may be the thirtieth) working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.

(7) Regulations under subsection (6) may-

- (a) prescribe different days in relation to different cases; and
- (b) confer a discretion on the Scottish Information Commissioner.

(8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-

- (a) the requirement is vexatious; or
- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.

(9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.