

Decision Notice



Decision 042/2010 Miss Mary E. Mackenzie and Glasgow City Council

Common Good assets

Reference No: 200900776
Decision Date: 12 March 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Miss Mackenzie requested from Glasgow City Council (the Council) a complete list of Glasgow's common good assets. The Council responded by releasing some information with an explanation of relevant record keeping practices for accounting purposes. Following a review, Miss Mackenzie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Miss Mackenzie's request for information partly in accordance with Part 1 of FOISA. He found that with regard to any remaining information held by the Council and falling within the scope of her request, the projected cost of compliance would exceed the limit of £600 set for the purposes of section 12(1) of FOISA and therefore the Council was not obliged to comply with the request.

However, the Commissioner also found that the Council failed to comply fully with section 15(1) of FOISA in explaining what information it held and the projected costs of provision, but in the circumstances did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance) and 15 (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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

Background

1. On 18 August 2008, Miss Mackenzie wrote to the Council requesting a complete list of Glasgow's Common Good assets, heritable and moveable. In relation to heritable assets she cited examples listed in Mr Andy Wightman and Mr James Penman's "Common Good Land in Scotland", while suggesting that the moveable assets should include the regalia of the City and included burghs, various other artefacts, collections (including the Burrell Collection) and investments specifically related to the Common Good.



2. The Council responded on 18 September 2008, confirming it held some of the information she had requested and releasing three documents containing the information it believed to be relevant. It further explained the classification of moveable assets within the Common Good relative to existing accounting practices and the way in which information on these assets was recorded in the Council's accounts.
3. On 8 October 2008, Miss Mackenzie wrote to the Council requesting a review of its decision. In particular, Miss Mackenzie stated that she was still awaiting a list or register of all Common Good assets and asked the Council to confirm directly whether it held one. She submitted that such a list should exist, to fulfil the Council's legal obligations in respect of the Common Good.
4. The Council notified Miss Mackenzie of the outcome of its review on 4 November 2008, concluding that she had been provided with all the information held by the Council relative to the subject of her request.
5. On 27 April 2009 Miss Mackenzie wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Miss Mackenzie 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 that request.

Investigation

7. On 18 May 2009, the Council was notified in writing that an application had been received from Miss Mackenzie and was asked to provide the Commissioner with any information withheld from her. The Council responded to the effect that no information had been withheld from her and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, and to explain the steps it had taken to identify and locate that information. Further clarification of these steps was sought during the investigation. The Council's submissions, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Miss Mackenzie and the Council and is satisfied that no matter of relevance has been overlooked.
10. Firstly, it may be helpful to comment on the term "Common Good".

Common Good

11. The Chartered Institute of Public Finance and Accountancy (CIPFA) provides information on Common Good on its website at http://www.cipfa.org.uk/scotland/technical/technical_faq_show.cfm?news_id=27154: in summary, CIPFA explains that the early Burghs of Scotland largely met expenses from the revenues of their properties, that is from rents and feu-duties on the lands given to the Burgh by the Crown in medieval times. The Common Good (as these revenues were termed) was subsequently reserved for purposes which promoted the general good of the inhabitants or dignity of the Burgh. The term came to denote all property of a Burgh not acquired under statutory powers or held under special trusts. In terms of an order made under section 15 of the Local Government etc. (Scotland) Act 1994, the Common Good of a particular former Burgh is now held and administered by the current local authority in whose area that Burgh was situated. In administering any Common Good property for which it is responsible, section 15 provides that the Council is to have regard to the interests of all the inhabitants of its area.
12. The Commissioner believes it appropriate to point out at this stage that his role in this case extends only to considering whether the Council dealt with Miss Mackenzie's request for information in accordance with Part 1 of FOISA. It is not within the Commissioner's remit, for example, to comment on whether the Council has identified as Common Good all the property it should be administering as such, how it is classifying them as part of the Common Good or whether it is carrying out its duties of administering the Common Good in accordance with any relevant legal obligations.



Miss Mackenzie's Request

13. Miss Mackenzie's request related to all assets held as part of the Common Good, both heritable and moveable. While the Council confirmed that it held some of the information requested, the only list of such property provided to Miss Mackenzie was of those heritable assets comprising the Net Capital Assets shown in the Council's Common Good balance sheet (i.e. those given a substantive valuation). It was clear, however, from other information provided by the Council that it held other Common Good assets which had been assigned only a nominal value of £1 and therefore did not appear on the balance sheet. These were assets the Council described as "community assets", which it stated it intended to hold in perpetuity for the benefit of its citizens. Although Miss Mackenzie is unhappy with this description, as stated above (see paragraph 12), it is not the Commissioner's function to comment on whether the designation is appropriate or not: all he requires to note for the purposes of this decision is the fact that such assets are considered to be part of the Common Good.
14. During the investigation, the investigating officer asked the Council to identify all records it held of its Common Good assets, rather than simply those assigned a substantive value for accounting purposes. The investigating officer also asked the Council to explain whether the information Miss Mackenzie had requested could be extracted from any of these records, with reasons if it could not, and to identify any provisions of FOISA it considered relevant should it not be possible to provide any information held.
15. The Council explained the various categories it used to classify its assets for accounting purposes. While "community assets" was one of those categories, not all community assets were necessarily Common Good property: there were groups of assets, such as those held in the City Chambers (a list of which had been provided to Miss Mackenzie), which it intended to hold in perpetuity but which were not specifically classified as Common Good. It confirmed that it did not classify assets as "Common Good" and was not aware of any obligation to do so. It acknowledged that the Council minutes (which were available to the public on its website) could be interrogated using the term "Common Good".
16. One of Miss Mackenzie's particular concerns appears to have been the absence of any inventories of the Council's collections of artworks and other artefacts. The Council explained that it maintained lists of these solely for the use of curatorial staff when checking the location of each work of art. The lists, therefore, were indicative of location rather than the account on which each work was held (which would not necessarily be Common Good). In response to another point raised by Miss Mackenzie, the Council also confirmed that its insurance certificates made no specific reference to Common Good assets.



17. In correspondence with the investigating officer, Miss Mackenzie also referred to records held in the Mitchell Library as part of the Council's archives, noting that these contained information in respect of Common Good assets, but did not appear to have been searched in response to her request in relation to Common Good. The Council advised that these records, which were available for inspection by members of the public, were not held in electronic form and therefore any search of them would require to be carried out manually. It submitted that such a search would incur costs in excess of the prescribed amount contained in the Fees Regulations and therefore it would not be obliged to comply with Miss Mackenzie's request by virtue of section 12(1) of FOISA.
18. The Council also advised that its title deeds could be used to inform whether a particular heritable property was Common Good. However, it went on to explain that it held in excess of 25,000 title packets, each packet containing several title deeds. While the register of title deeds held was categorised in various ways, "Common Good" was not one of these categories and for this reason it was of the view that section 12(1) of FOISA was engaged in relation to these records also.

Section 12(1) – Excessive cost of compliance

19. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
20. The projected costs that a Scottish public authority can take into account in relation to a request for information are, in line with regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates (in accordance with that regulation) it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour.
21. In relation to its title deeds, the Council drew the investigating officer's attention to previous advice to its Members that the cost of examining all of its title deeds (as would be required to identify Common Good heritable property and which would require a considerable number of solicitors over a lengthy period) would be in excess of £4 million. It referred to the salary range of the relevant solicitors, which, even at its lower level, would exceed the maximum hourly rate of £15 specified in the Fees Regulations. In respect of searches in the archives at the Mitchell Library, the Council also submitted that staff paid more than the £15 hourly rate would be required, pointing out in addition that each search would take far in excess of 40 hours to complete. Both searches taken together would therefore run into "many millions of pounds".



22. Having taken due account of the submissions made by both Miss Mackenzie and the Council, together with the terms of section 12(1) and the Fees Regulations, the Commissioner is satisfied that the costs identified in this case (although considerable) represent a reasonable estimate of the cost of complying with Miss Mackenzie's request for information. The Commissioner accepts that, insofar as the Council holds information falling within the scope of Miss Mackenzie's request, it holds it in such a form that its extraction to meet the request would require significant manual searches of the kind described by the Council. The Commissioner is content with the underlying premise that the work involved in locating, retrieving and providing the information would be considerable, would require skilled staff and could not be carried out within the £600 cost limit specified for the purposes of the Fees Regulations.
23. Consequently, the Commissioner is satisfied that the Council was entitled to rely on section 12(1) of FOISA in relation to Miss Mackenzie's request and therefore was under no obligation to comply with the request.

Section 15 – Duty to provide advice and assistance

24. Having established that the Council was entitled to rely upon section 12(1) in FOISA to justify its refusal to comply with Miss Mackenzie's request, the Commissioner considers it appropriate in this case to go on and consider whether the Council complied with its duty to advise and assist Miss Mackenzie in dealing with her request, as required by section 15(1) of FOISA, read in conjunction with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code).
25. In correspondence with the Commissioner, Miss Mackenzie has explained the context of her request and her dissatisfaction at being provided with so little information. In particular, she had difficulty understanding how the Council could conclude that she had been provided with all the information the Council held within the scope of her request, when, she said, she was aware of many examples of Common Good assets gifted or left to the Council and its predecessors (but not identified in the information provided).
26. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Section 60 Code in providing advice and assistance in any particular case, it is taken to have complied with this duty.
27. Annex 3, paragraph 14 of the Section 60 Code recommends that although a public authority is under no obligation to comply with a request for information where the cost of doing so would exceed £600, it should consider what information could be released free of charge or below the prescribed amount.



28. The Commissioner notes that, in this case, although the Council released certain information to Miss Mackenzie, it did not fully explain what information it held from which the relevant information might be extracted, or the difficulties inherent in locating, retrieving and providing it. It would have been helpful to direct Miss Mackenzie to the Mitchell library for the relevant historical records and perhaps to explain the work involved in carrying out the necessary searches of these and its title records.
29. For this reason, the Commissioner has concluded that the Council did not comply fully with the requirements of section 15 of FOISA in dealing with Miss Mackenzie's request. Given the extent to which the questions of the information held by the Council and the steps required to extract it are addressed in this decision, however, he does not require the Council to take any action.

DECISION

The Commissioner finds that Glasgow City Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Miss Mackenzie,

The Commissioner finds that by applying section 12(1) of FOISA in response to Miss Mackenzie's request, the Council complied with Part 1

However, the Commissioner also finds that the Council failed to comply fully with section 15(1) of FOISA in explaining what information it held and the difficulties inherent in locating, retrieving and providing it. Given that consideration given to these issues in this decision, however, he does not require the Council to take any action.

Appeal

Should either Miss Mackenzie or Glasgow City Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
12 March 2010



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.