

Decision Notice

Decision 044/2015: Mr Ronald Soutar and Dundee City Council

Ombudsman, tribunal and court decisions and employee information

Reference No: 201402847

Decision Date: 31 March 2015



Scottish Information
Commissioner

Summary

On 9 September 2013, Mr Soutar asked Dundee City Council (the Council) for information on several topics, including the outcome of ombudsman, tribunal and court cases, and consequent action taken in relation to employee discipline.

The Council disclosed some information to Mr Soutar, but withheld other information on the basis that it was otherwise available and therefore exempt from disclosure in terms of section 25(1) of FOISA. It also informed Mr Soutar in terms of section 12(1) of FOISA that it would prove too costly to answer parts of his request. Mr Soutar remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mr Soutar's request for information in accordance with Part 1 of FOISA, by failing to provide him with adequate advice and assistance in locating the information otherwise available. She did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 12(1) (Excessive Cost of Compliance); 15(1) (Duty to provide advice and assistance); 25(1) (Information otherwise accessible)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 and 5

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 9 September 2013, Mr Soutar wrote to the Council requesting information on several topics. The communication was in six parts, each broken down into a number of questions.
2. The Council responded on 22 October 2013, applying section 12(1) of FOISA. It stated it was not obliged to comply with Mr Soutar's request, as it estimated the cost of doing so would exceed the £600 limit prescribed for the purposes of section 12.
3. On 24 October 2013, Mr Soutar wrote to the Council requesting a review of its decision. He stated that he had asked a number of individual questions, which the Council should address individually.
4. Following a review, on 12 November 2013 the Council informed Mr Soutar that it upheld its original decision to apply section 12(1), without modification. It made some reference to Mr Soutar's individual questions, but still appeared to treat them as a single request.

5. On 14 November 2013, Mr Soutar wrote to the Commissioner, applying for a decision. The Commissioner subsequently issued *Decision 143/2014 RJ Soutar and Dundee City Council*¹ finding that the Council had breached Part 1 of FOISA and, in respect of some of Mr Soutar's questions, the EIRs. She required the Council to provide Mr Soutar with a revised review outcome, responding on the basis that Mr Soutar made more than one request.
6. On 7 August 2014, the Council provided Mr Soutar with a revised review outcome. In responding to the six requests in part 1 of his original communication, detailed in Appendix 2, the Council applied section 25(1) of FOISA to request 1. It informed him that this information was otherwise available. For requests 2 to 6, it continued to apply section 12(1) of FOISA. The Council also provided responses to the remaining requests.
7. On 15 December 2014, following further communications with the Council, Mr Soutar wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Soutar stated he was dissatisfied with the outcome of the Council's revised review because:
 - (i) for request 1, he was unable to locate the information requested through the website link provided by the Council, and
 - (ii) for requests 2 to 6, he believed the Council would hold the information in a manner from which it could be readily identified and retrieved.

Although he raised other points in his application, subsequent communications confirmed that these were the matters with which he was dissatisfied.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Soutar made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. The case was allocated to an investigating officer. On 11 February 2015, the Council was notified in writing that Mr Soutar had made a valid application.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions.
11. In relation to the application of section 25(1) (for request 1), the Council was asked to justify its reliance on this exemption, with an overview of how and where the information could reasonably be obtained.
12. In relation to its reliance on section 12(1), the Council was asked to explain what information falling within the scope of Mr Soutar's request was held and where it was held, and to provide detailed calculations estimating the cost of responding.
13. The Council responded to the investigating officer on 25 February 2015. It provided submissions as requested.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201302703.aspx>

Commissioner's analysis and findings

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

Information held – request 1

16. In his application to the Commissioner, Mr Soutar maintained that the Council should hold a database of cases considered by the Scottish Public Services Ombudsman (SPSO), from which it could extract the number of cases in which it was found to have acted wrongly.
17. The Council explained to the Commissioner that it did not centrally record or collate information pertaining to SPSO decisions relating to it, but information was publicly available on the SPSO website. It explained that specific decisions from 2011 onwards were published there, together with statistical information for the remainder of the period covered by the request. The Council provided the Commissioner with the relevant hyperlinks, along with explanations on how to search for and locate the information specific to the Council.

Section 25(1) of FOISA – Information otherwise accessible

18. Under section 25(1) of FOISA, information which an applicant can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest set out in section 2(1)(b) of FOISA. The Council confirmed that it was applying section 25(1) to the information caught by request 1.
19. In its revised review outcome, the Council informed Mr Soutar that it was relying upon section 25(1) of FOISA, on the basis that the information was readily accessible to him via the SPSO website. The Council provided Mr Soutar with a hyperlink to the information <http://www.spsso.org.uk/decision-reports>.
20. In his submissions to the Commissioner, Mr Soutar explained that he had been unable to locate the information he was seeking on the SPSO website from the link provided. He believed that the Council should hold a database of SPSO cases, from which it would be able to identify the figures he had requested and provide him with that information.
21. The Council submitted that the link provided to Mr Soutar led to a search screen on the SPSO website. By entering "Dundee City Council" into the "organisation" field, all SPSO decisions involving the Council from 2011 onwards would be made available, and therefore were readily accessible. As the full text of these decisions was made available in this way, the Council argued that this provided Mr Soutar with a more thorough response: in any event, it believed the link met his request. The investigating officer verified these submissions.

22. In its submissions to the Commissioner, the Council provided a further hyperlink to the SPSO website where statistical information from 2004-05 onwards (i.e. covering the remainder of the period of the request) was available <http://www.spsso.org.uk/statistics>. It explained that by following this link, and selecting a year, a wealth of information was publicly available, including the types of complaints, subject matter, whether upheld or not, etc. A sample search undertaken by the investigating officer confirmed that annual data showing the number and outcome of complaints determined for each local authority was readily accessible. This hyperlink was provided to Mr Soutar during the investigation, with an explanation of how to locate the information requested.
23. In all the circumstances, therefore, the Commissioner is satisfied that the information sought by Mr Soutar in request 1 was reasonably obtainable by him, other than by making a request for it under section 1(1) of FOISA. Therefore, the Council was entitled to apply section 25(1) of FOISA to this part of Mr Soutar's request.

Section 15 of FOISA – Duty to provide advice and assistance

24. It is essential to any requester pursuing a right to information that (where the public authority is not simply providing the information, but rather is directing the requester to a place where it may be obtained), the requester knows enough about where to look for it to be able to pursue that right effectively. To this end, the authority's duty to provide advice and assistance can be vital.
25. Section 15 of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
26. Mr Soutar expressed dissatisfaction that he was unable to locate the information from the link provided by the Council in its revised review response. During the investigation, the Council identified that this link only gave access to SPSO decisions from 2011 onwards and, as such, did not cover the full period of Mr Soutar's request. However, it identified the statistical information covering the whole period of the request, considered above.
27. While the Commissioner accepts that the Council provided Mr Soutar with a link to some information falling within the scope of his request, it is apparent that the Council did not provide him with any accompanying guidance on locating this information. Furthermore, as the link originally provided was not sufficient to allow Mr Soutar to fully access all of the information he was looking for, the Commissioner is not satisfied that the Council provided Mr Soutar with the required advice and assistance to meet its duty fully under section 15(1) of FOISA, in the context of the information being considered reasonably obtainable in terms of section 25(1). As Mr Soutar now has a further link giving access to the information he requested, with relative explanations, the Commissioner does not require the Council to take any steps in response to this failure.

Information held – requests 2 to 6

28. In his application to the Commissioner, Mr Soutar maintained that the Council should hold a database of cases considered by the SPSO, tribunals and courts, won or lost, from which it could identify employees responsible for wrong action. He found it inconceivable that it would not keep such records.
29. The Council explained to the Commissioner that it did not hold information pertaining to tribunal and court decisions (requests 3 and 5) centrally, but that the information would be contained within litigation files held across its legal and finance sections, and in its archives.

30. The Council further explained that although it kept a central record of the number of employees disciplined, each disciplinary record for the relevant period would need to be examined to identify those resulting from SPSO, tribunal and court decisions (requests 2, 4 and 6).

Section 12(1) of FOISA – Excessive cost of compliance

31. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for that information would exceed this sum.
32. The projected costs a Scottish public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) it reasonably estimates it will incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 per hour. The authority may not charge for the cost of determining (i) whether it actually holds the information, or (ii) whether or not it should provide the information.
33. The Council submitted that section 12(1) applied to each of requests 2 to 6 inclusive. It confirmed that it held information falling within the scope of each request, but argued that the cost of locating, retrieving and providing that information would, in each case, exceed the £600 cost limit.
34. In its submissions, the Council stated that to respond to requests 2, 4 and 6 would involve examining each disciplinary record for the period in question individually, to identify those reprimanded as a result of SPSO, tribunal and court decisions. It explained that the time required to examine each record would vary, depending on the length and complexity of the file.
35. In order to respond to requests 3 and 5, the Council submitted, it would need to examine all litigation files held across the relevant departments to identify those which involved tribunal and court decisions. Once all of the relevant cases had been identified, it explained, each judgement (all of which varied in length) would need to be read to identify those where the Council was found to have acted wrongly.
36. The Council provided the Commissioner with indicative costings. It explained the basis upon which it had arrived at the estimated figures, with the hourly rates of the members of staff who would be required to undertake the tasks. It explained which grades of staff would be required for which tasks.
37. For requests 2, 4 and 6, the Council estimated that the time required to locate and retrieve the information would range between 149 hours and 1,344 hours, submitting that the actual figure would be somewhere in the middle. It explained why this would require a member of staff paid more than the maximum charge of £15 per hour.
38. For requests 3 and 5, the Council explained that an estimated 6,750 litigation files were held in its legal section alone. To identify those pertaining to tribunal and court decisions, the Council estimated that it would take a member of administrative staff (on an hourly rate of £9.01-£10.61) approximately 30 minutes per case.

39. The Council submitted that a solicitor would then be required to read each of the judgements, to ascertain whether the Council was found to have acted wrongly. It provided the results of a sample costing exercise, carried out to evidence the estimated amount of time this would require. Given that this work was in addition to the time it would take to locate the case files, as outlined in paragraph 38 above, the Council submitted that it was evident that the £600 cost threshold would easily be exceeded.
40. The Council further submitted that even if Mr Soutar had narrowed his request down to a one year period, the costs of locating the information and reading through the records would still exceed the £600 cost limit.
41. Taking into account all of the circumstances, the Commissioner is satisfied that the Council has provided a reasonable estimate of the cost of complying with each of requests 2 to 6 inclusive. She considers the tasks and sampling described to be appropriate in the circumstances. Given the nature of the work required, the Commissioner accepts that none of these requests could have been responded to within the £600 cost limit. She does not believe narrowing the scope of the requests would have affected the work required to a sufficient extent to bring it within the limit.
42. Consequently, the Commissioner is satisfied that the Council was entitled to rely on section 12(1) of FOISA in relation to these requests, and was therefore under no obligation to comply with them.

Decision

The Commissioner finds that Dundee City Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr Soutar.

The Commissioner finds that the Council was entitled to apply section 25(1) of FOISA to the information sought by Mr Soutar in request 1, and that it was not obliged to comply with requests 2 to 6 inclusive, given that section 12(1) applied.

However, the Commissioner finds that the Council failed to provide reasonable advice and assistance to Mr Soutar in relation to request 1, and therefore failed to comply with section 15(1) of FOISA.

Given that Mr Soutar now has sufficient information to allow him to access the information sought in request 1, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr Soutar's application.

Appeal

Should either Mr Soutar or Dundee City 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.

Margaret Keyse
Head of Enforcement

31 March 2015

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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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.

Appendix 2: Part 1 of Mr Soutar's request of 9 September 2013

- 1 How many times in the last 5 years has the Ombudsman found the Council had acted wrongly?
- 2 Following these decisions, how many employees have been officially reprimanded?
- 3 How many times in the last 5 years has a Tribunal found that the Council acted wrongly?
- 4 Following these decisions, how many employees have been officially reprimanded?
- 5 How many times in the last 5 years has a Court found against the Council?
- 6 Following these decisions, how many employees have been officially reprimanded?

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info