

Decision Notice



Decision 058/2012 Mr Rami Okasha and City of Edinburgh Council

Information concerning the Edinburgh Trams Project

Reference No: 201102121
Decision Date: 30 March 2012

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Scottish Information Commissioner

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Summary

Mr Rami Okasha requested from the City of Edinburgh Council (the Council) information relating to the removal of Transport Scotland officials from the Board of the Edinburgh Trams Project. The Council responded by notifying Mr Okasha in terms of section 17 of the Freedom of Information Scotland Act 2002 (FOISA) that it did not hold any relevant information. The Council upheld that decision following an internal review. However, soon after, the Council recognised that it had made a mistake, and wrote again to Mr Okasha, explaining that it did in fact hold relevant information. Having reconsidered the request, it notified him in terms of section 12 of FOISA that it was not obliged to provide the information, because the cost of complying with the request would exceed £600. Mr Okasha remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner concluded that the cost of complying with Mr Okasha's request would exceed £600, and so the Council was entitled to refuse the request in terms of section 12 of FOISA. However, she also concluded that the Council had erroneously notified Mr Okasha in terms of section 17 of FOISA that the requested information was not held.

The Commissioner also concluded that the Council had failed to comply fully with the duty to provide advice and assistance to Mr Okasha provided in section 15 of FOISA. She required the Council to provide advice and assistance on how he might narrow the terms of his information request to avoid the application of section 12(1).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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.

All references in this decision to “the Commissioner” are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



Background

1. On 2 September 2011, Mr Okasha wrote to the Council asking for all information held by it, however so recorded and by whatever means, about the decision on the removal/withdrawal of Transport Scotland officials from the management board of the Edinburgh Trams project in 2007. Mr Okasha indicated that this should include, but not be limited to, the following:
 - a. The date this decision was (a) suggested and (b) made.
 - b. Who proposed this decision, and who authorised it.
 - c. Why this decision was taken.
 - d. The view of the City of Edinburgh Council about this decision.
 - e. What impact assessments were taken before the decision about possible risks and ramifications.
 - f. Whether this decision has been reviewed since, and if so, when and by whom.
 - g. Correspondence to and from civil servants, ministers, special advisers, journalists, councillors and officials at tie [Transport Initiatives Edinburgh Ltd, the company established (and owned) by the Council to deliver the tram project], Lothian Buses and any contractors or organisations involved in the management or delivery of the trams project.
 - h. The number of times Transport Scotland officials met with persons involved in the delivery of the tram project before this decision was made, and also afterwards.
 - i. Who those persons were and who they met.
2. The Council responded on 6 October 2011, notifying Mr Okasha in line with section 17(1) of FOISA, that it no longer held the requested information.
3. On the same day, Mr Okasha wrote to the Council, requesting a review of its decision, stating that he found it inexplicable that the Council held no information relating to any of the areas of his request. He asked that, if the Council had destroyed the information, it advise him of the date of its destruction.
4. The Council notified Mr Okasha of the outcome of its review on 7 November 2011. It upheld its initial decision that the information was not held, and provided further background information to explain why it believed this to be the case. In particular, it stated that correspondence to and from the Chief Executive's office and the Directorate office is only retained for one year, and so the information covered by Mr Okasha's request was no longer held by the Council. It also stated that diaries from 2007 and 2008 were no longer held.
5. However, on 10 November 2011, the Council wrote again to Mr Okasha, indicating that the letter of 7 November 2011 had contained factual errors regarding the retention of diaries and correspondence, and that it did, in fact, hold relevant information. Having reconsidered the request, the Council indicated that it was refusing the request in terms of section 12(1) of FOISA, on the basis that the cost of compliance would exceed the £600 limit prescribed for the purposes of that section.



6. The Council also advised Mr Okasha that certain exemptions would have been likely to apply to any information that had been identified as potentially disclosable. However, the Council enclosed a letter it had obtained from Transport Scotland, stating that it hoped this would be of assistance to Mr Okasha.
7. On 11 November 2011, Mr Okasha wrote to the Commissioner, stating that he 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.
8. The application was validated by establishing that Mr Okasha 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

9. The Council was notified in writing on 21 November 2011 that an application had been received from Mr Okasha and that an investigation into the matter would commence. The case was then allocated to an investigating officer.
10. 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 for detailed submissions on the application of section 12(1) of FOISA. The Council was also invited to respond to comments made by Mr Okasha about its original finding that the requested information was not held.
11. The Council responded on 22 December 2011 with its submissions. The relevant submissions received from both the Council and Mr Okasha will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered the submissions made to her by both Mr Okasha and the Council and is satisfied that no matter of relevance has been overlooked.

Mr Okasha's reasons for dissatisfaction

13. Mr Okasha has expressed dissatisfaction with a number of aspects of the Council's handling of his request, and the Commissioner will consider these in turn in what follows.



- (a) He asked for the Commissioner's thoughts regarding the Council's original approach to his request, in which it wrongly concluded that it no longer held any relevant information.
- (b) He disputed the Council's later assertion that it would cost in excess of £600 to comply with his request.
- (c) He questioned the Council's approach of disclosing one letter to him, arguing that by releasing some information, the Council was conceding that the information sought by him was in fact liable for release, and questioning whether the Council had the right to pick and choose which information it wished to release.
- (d) He expressed concern about the Council's references to exemptions "which may also likely have applied to any information identified as potentially disclosable". He noted that the Council did not appear to have determined whether or not such exemptions applied, and that any exemptions should be assessed against the facts of the case, rather than waved casually as potential or likely obstacles which had not been properly considered.

The Council's original response that the information was not held

- 14. As noted above, the Council's initial response to Mr Okasha's information request, which was upheld following an internal review, was that the requested information was not held.
- 15. Mr Okasha was notified of the outcome of the Council's review on 7 November 2011. However, the Council clearly recognised that this response was incorrect soon after, as it wrote to Mr Okasha on 10 November 2011, indicating that its conclusions were wrong, and setting out its revised position on the case. Nonetheless, the notice of review given on 7 November 2011 remains the one that is relevant for the purposes of the Commissioner's decision.
- 16. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that it does not hold the information. The Commissioner finds that when the Council issued such a notice to Mr Okasha on 6 October 2011, and upheld that decision following a review, it did so erroneously, as it is now clear that the Council did (and does) in fact hold information relevant to his request.
- 17. The Commissioner therefore finds that the Council breached Part 1 of FOISA by erroneously giving Mr Okasha notification in terms of section 17 of FOISA that the requested information was no longer held.
- 18. In its submissions to the Commissioner, the Council explained that this error was a product of human error, based on an incorrect understanding of its records retention policies. It acknowledged that the effect was that its response was misleading, but indicated that this was unintentional.
- 19. The Commissioner is disappointed to note that this error occurred, and that the Council's review process did not identify it sooner, particularly after Mr Okasha expressed such surprise that the Council no longer held relevant information in his request for review. This gives the Commissioner cause for concern about the thoroughness of the Council's review process.



20. However, the Commissioner also acknowledges that the Council promptly took steps to rectify its error once it was recognised, and explained the position and apologised to Mr Okasha in its letter of 10 November 2011. While the Commissioner would recommend that the Council consider what lessons might be learned from the mistakes that were made in this case, she does not require any further action to be taken in response to this finding.

Section 12(1) – excessive cost of compliance

21. Once it recognised that it did hold the requested information, the Council maintained that it was not obliged to comply with the request because section 12(1) of FOISA applied.
22. 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 regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to the relevant request exceeds this amount.
23. The costs that a public authority can take into account in relation to compliance with a request for information are the projected costs defined in regulation 3 of the Fees Regulations. These are the total costs, whether direct or indirect, which the public authority reasonably estimates 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.
24. In his application to the Commissioner, Mr Okasha pointed out that the Council's letter of 10 November 2011 had not given any breakdown of how the Council reached its conclusion that it would cost in excess of £600 to comply with his request. In the absence of such calculations, he commented that it was inconceivable that it would take more than 40 hours (the time allowed using the maximum £15 hourly rate) to locate the information he had requested. He maintained that his request was very specific, not wide-ranging, and had identified nine helpful sources of where such information might be found. Mr Okasha also highlighted that the Council had stated that it was unable to calculate the exact cost of compliance, but also it was of the view that it would be well in excess of the threshold. He suggested that it was not possible to simultaneously hold these two positions.
25. During the investigation, the Council was asked to provide a detailed explanation of the costs involved in locating, retrieving and providing the information requested by Mr Okasha, and the grade of staff required to carry out the task along with the hourly rate paid.



26. In response, the Council submitted that the volume of material it held concerning the trams project was substantial and distributed across a number of its departments, and would require retrieval from Legal Services, the Chief Executive's Office, the Development Department and the Finance Department. The Council also highlighted that it had recently taken control of all the records that had been previously retained by tie Ltd (tie) which ran to around fifty thousand emails and a thousand boxes of hard copy data. The Council asserted that all of these documents would require to be checked to identify any information pertinent to Mr Okasha's request.
27. It was the Council's view that locating and retrieving information from the tie emails alone (before taking account of the tie hard copy data) would take around 833 hours of staff time, assuming one minute spent on each email. The Council explained that a relatively senior member of staff would be required to conduct the work as the information was complicated and voluminous (i.e. a grade 9 staff member at a rate of £20 per hour); however, even with the rate of staff time capped at £15 per hour, the Council stated it would still cost around £12,500.
28. In considering the submissions put forward by the Council as to the cost of providing the information to Mr Okasha, the Commissioner has borne in mind that Mr Okasha made a single request in his letter of 2 September 2011. This sought all information held by the Council, however so recorded and by whatever means, about the decision on the removal/withdrawal of Transport Scotland officials from the management board of the Edinburgh Trams project in 2007. Although Mr Okasha identified nine types of information that he expected to be included, he also made clear that his request should not have been treated as being limited to these categories.
29. The Commissioner also notes that, while the request for information refers to a particular event in 2007, it does not limit the scope of any information requested to the period immediately around that time. She recognises that information about the relevant decision might have been created both before and after it was taken (anticipating it or discussing its implications or effects). Given that the Council now holds records that were previously held by tie, relevant information could be held in both the Council's directly generated records, or those previously held by tie.
30. Looking to the particular types of information mentioned in Mr Okasha's request, the Commissioner considers that points h and i alone (regarding all meetings between Transport Scotland Officials and those responsible for delivering the tram project, both before and after the relevant decision) would appear to be particularly onerous to address, given the lack of any specific timescale, and the number of departments and individuals potentially involved. Given the scope of this particular subset of the information of interest to Mr Okasha, and the range of locations where it might be recorded, the Commissioner considers it reasonable that the Council believes it would have to trawl through all of its information for the whole timeline of the Trams Project to identify the information requested by Mr Okasha.



31. The Commissioner considers that certain parts of the Council's cost estimates might be challenged, for example by probing further into whether a lower rate of staff pay might be used as the basis of calculations, or whether the number of hours required to check records would indeed be so great as it suggests. However, she recognises that, even if the estimated time and rate of pay were reduced, the costs involved would still be significant and well in excess of the £600 prescribed limit. She accepts that, on a reasonable estimate made in line with the Fees Regulations, it would cost more than £600 to provide Mr Okasha with the information he asks for in his request. She finds that section 12(1) was engaged, and so the Council was not obliged to comply with Mr Okasha's information request.

Section 15 - the duty to advise and assist, and the disclosure of a letter

32. Having reached this conclusion, the Commissioner's normal practice is to consider whether the public authority concerned has provided appropriate advice and assistance in relation to the request under consideration.
33. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA (the Section 60 Code) include, in cases where section 12(1) applies, "consider[ing] what information could be provided below the cost limit, and suggest[ing] how the applicant may wish to narrow the scope of their request accordingly."¹
34. In response to the questions by the investigating officer, the Council stated that it had provided a copy of the letter referred to in paragraph 6 above by way of assistance Mr Okasha. It explained that it was aware that Transport Scotland had decided to disclose that letter in response to another information request, and that it had requested a copy from Transport Scotland to allow it to provide that information to Mr Okasha as it contained relevant background information. The Council did not specify whether further information could be supplied within the cost threshold.
35. As noted above, Mr Okasha has submitted that the Council's decision to disclose the letter suggested that it was possible to disclose some information in response to his request, and it should not pick and choose which information to disclose.
36. However, having considered the circumstances (and having seen a copy of the email in which Transport Scotland provided a copy of the relevant letter to the Council), the Commissioner accepts that the letter was requested and received by the Council for the purpose of disclosing it to Mr Okasha. Taking this step went beyond what the Council was required to do in response to Mr Okasha's information request, since the application of section 12 of FOISA removed the obligation to disclose the requested information. The Commissioner recognises that the Council disclosed the letter in an effort to meet its obligations under the duty to provide advice and assistance to Mr Okasha. Such disclosure does not oblige the Council to release further information to Mr Okasha.

¹ See paragraph 1.9 in Part 2 of the Code at <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



37. While the Commissioner welcomes the Council's decision to disclose the letter to Mr Okasha in pursuit of its duties under section 15(1) of FOISA, he considers that it could have provided further advice and assistance in the way of guidance to Mr Okasha as to what information could be provided within the £600 limit if he were to reduce the scope of his request. Since Mr Okasha had identified particular types of information of interest to him, the Commissioner considers that it would have been reasonable to explain how relevant records were arranged, and so which might be located and retrieved more easily, incurring less cost, than others. The Council might also have indicated whether the cost of dealing with the request could be reduced if Mr Okasha narrowed the scope of his request to seek information relating to a particular time period.
38. In conclusion, the Commissioner considers it would have been a relatively simple matter for the Council to provide Mr Okasha with appropriate advice and/or assistance to assist him in narrowing his request to the point where section 12(1) of FOISA would not be applicable. In failing to do so, the Commissioner finds that the Council failed to discharge fully its duty under section 15(1) of FOISA.
39. In light of this, the Commissioner now requires the Council to provide advice to Mr Okasha on how he might narrow the terms of his information request to avoid the application of section 12(1) if he chooses to make a further request for related information to the Council.

The Council's reference to the application of exemptions

40. The final matter raised by Mr Okasha relates to the comments in the Council's letter to him of 10 November 2011 (confirming that relevant information was held, but section 12 of FOISA was considered to apply), in which, the Council commented that the exemptions at sections 25, 30, 33 and 36 of FOISA "may also likely have applied to any information identified as potentially disclosable".
41. Mr Okasha has expressed concern about the Council's references to exemptions, noting that it did not appear to have determined whether or not such exemptions applied. He commented that any exemptions should be assessed against the facts of the case, rather than waved casually as potential or likely obstacles which had not been properly considered.
42. Given the wording of the Council's letter, it is clear that the Council was not formally claiming that these exemptions were applicable, and it appears that the comments were made without consideration of the actual information that had been requested (since the Council had indicated that the cost of locating this information meant it was not required to do so).
43. The Commissioner has some sympathy with Mr Okasha's concern that such comments suggest that there are barriers to disclosure without a full examination of the information concerned having been undertaken in all the circumstances of the case. Such comments are open to criticism or the perception that the authority is trying to discourage an applicant from making a further, narrower request.



44. On the other hand, the Council's comments could be seen as offering further advice and assistance to Mr Okasha, by highlighting that, even if the information could be located and retrieved, the Council would be likely to consider some or all of it to be exempt. The Council has provided comments to the Commissioner explaining that, given the history of legal dispute over the tram project, it was more than likely that it would conclude that some of the information requested by Mr Okasha would fall within the scope of the exemptions mentioned. From this perspective, the comments from the Council could be seen as trying to help by managing Mr Okasha's expectations of the outcome of any further request.
45. The Council's decision to mention these exemptions was not in breach of any requirement in Part 1 of FOISA, but it is clear that its decision to do so could be seen as either helpful or unhelpful to Mr Okasha, depending on the point of view taken. While the Commissioner would not wish to criticise the Council for this approach, it clearly risks criticism of the type made by Mr Okasha in this case.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Okasha, to the extent that it was not obliged to comply with the request by virtue of section 12(1) of FOISA.

However, the Commissioner also finds that the Council failed to deal with Mr Okasha's request in accordance with Part 1 of FOISA by providing an incorrect notification that information was not held in terms of section 17 of FOISA, and by failing to provide reasonable advice and assistance under section 15 of FOISA

The Commissioner requires the Council to advise Mr Okasha on how he might narrow the terms of his information request to avoid the application of section 12(1) should he choose to make a further request for related information to the Council, by 18 May 2012



Appeal

Should either Mr Okasha or the City of Edinburgh 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
Acting Scottish Information Commissioner
30 March 2012



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).

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or



- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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.