



Scottish Information
Commissioner

**Decision 121/2007 Mr L and Dumfries & Galloway
Council**

Request for case records

**Applicant: Mr L
Authority: Dumfries & Galloway Council
Case No: 200601760
Decision Date: 26 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 121/2007 Mr L and Dumfries & Galloway Council

Request for case files – dissatisfaction with handling of request – section 10(1) time of compliance – section 21(1) Review by Scottish public authority

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 15 (Duty to provide advice and assistance); 16(1) and (2) (Refusal of request); 20(1) – (6) (Requirement for review of refusal etc); 21(1) (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 L requested the case files relating to his children from Dumfries & Galloway Council (the Council). The Council responded by refusing this information, citing a series of exemptions in support of this decision. Mr L was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and, as a result, notified Mr L that the original decision had been upheld. Mr L remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially dealt with Mr L's request for information in accordance with Part 1 of FOISA. He found that the Council had failed to respond within 20 working days to Mr L's original request for information as required by section 10(1) of FOISA.

He did not require the Council to take any action.



Background

1. On 9 August 2006, Mr L made an information request to the Council for his children's case records.
2. On 1 September 2006, the Council wrote to Mr L advising that it had 20 working days to respond to his request, but that it hoped a response would be sent prior to the time limit.
3. On 8 September 2006 the Council wrote again to Mr L. The Council referred to its obligation to respond within 20 working days. The Council advised, however, that having commenced researching the information it had become clear that this was a particularly complex request and that advice had been required from both Legal Services and the Senior Information Officer. The Council advised that it would be in a position to respond in a detailed manner the following week.
4. Mr L wrote to the Council on 9 September 2006 querying why the matter was "particularly complex" and complaining about the delay that had occurred.
5. The Council responded substantively to Mr L's request for information on 14 September 2006. The Council indicated that it was refusing Mr L's request for information. The Council advised that a number of different exemptions applied to the information as a whole and in respect of particular pieces of information. The Council provided information about the exemptions that applied, namely, section 34(1)(b), section 39(1), section 36(2)(a) and (b) and section 38(1)(a) and section 38(1)(b). The Council provided a schedule that referred to each item of information and the exemptions that applied.
6. Mr L wrote to the Council on 19 September 2006 asking why it had not addressed his query about the delay as set out in his letter of 9 September 2006.
7. The Council addressed Mr L's concerns about the delay in a letter of 20 September 2006. The Council advised that it had sent out a response four working days outwith the 20 working days. The Council advised that the matter had taken longer than anticipated. The Council apologised for not meeting the timescales set down in FOISA.
8. On 21 September 2006, Mr L wrote to the Council. He raised a number of specific requests about the way in which the Council had handled his request and asked for further information about the application of certain exemptions to the information withheld and why they applied. He also asked about the delay in the response.



9. On 28 September 2006 the Council acknowledged Mr L's request for review. The Council advised that the Compliance Review Panel would convene on 3 October 2006 and review his case. He would then be contacted with the Panel's findings.
10. Mr L wrote to the Council on 2 October 2006 indicating that he wished to make written representation to the Compliance Review Panel and also requested an invitation to attend. To this end, Mr L asked for the review to be postponed in order that he could take advice and prepare his presentation. There followed an email exchange between the Senior Freedom of Information Officer at the Council and Mr L. This culminated in an email from the Senior Freedom of Information Officer indicating that he would raise Mr L's comments with the Review Panel.
11. On 4 October 2006 the Council wrote again to Mr L. The Council advised that the Panel had noted his request that the review be postponed to a later date and his application to attend the Review Panel to make his submissions. The Council advised that having considered these requests the Review Panel had concluded that there was no requirement for Mr L to attend the Review Panel. The Council had therefore proceeded to carry out the review.
12. The Council found that it had not complied with the timescales set out in section 10(1) of FOISA. The Council advised that the request had taken longer than anticipated. The Panel noted that the Senior Information Officer had written apologising for this delay. The Council upheld its original decision in respect of the information requested.
13. There was further correspondence between the applicant and the Chair of the Panel on the review process. Mr L was keen to stress that his key request was to send in a written submission and that he had understood that it was unlikely that he would be able to attend the actual meeting. Mr L asked for confirmation that this request had been correctly communicated. The Council responded to this correspondence.
14. On 6 November 2006, Mr L wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
15. The application was validated by establishing that Mr L had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.



16. There was correspondence between my office and Mr L regarding the aspects of his request that he would like me to investigate. Mr L was advised that, given he was seeking information relating to his children, the best route might be to pursue this matter under the Data Protection Act 1998 (DPA). Following this correspondence, it was agreed that Mr L's application would be confined to examining the way in which the Council had handled his request for information and would focus on the following:
 - a) The refusal of the Senior Information Officer to answer any of Mr L's questions about the Officer's assessment or to make any attempt to clarify the issues Mr L had asked the Officer to clarify.
 - b) Mr L's exclusion from being allowed to put forward his views to the compliance panel.
 - c) The unexplained change from the Council telling him that the process was almost completed and would be done on time, to it being so complex that it was significantly delayed, beyond the prescribed time period.
17. The case was then allocated to an investigating officer.

The Investigation

18. On 23 January 2007, the Council was notified in writing that an application had been received from Mr L. The Council was asked to provide my office with its comments on the application and the specific matters raised by Mr L.
19. The Council responded to this request on 7 February 2007. It provided detailed submissions in respect of the points raised by Mr L.
20. Both Mr L and the Council have made submissions in this application. While I have taken into account all submissions in considering this matter, I have summarised only the key submissions in my analysis and findings below.

The Commissioner's Analysis and Findings

21. Mr L has raised a number of concerns about the way in which his request for information was handled by the Council. I will address each matter in turn.

a) Failure to clarify Mr L's questions



22. Mr L has complained that the Council refused to answer his questions about the assessment it had made or to make any attempt to clarify the aspects Mr L had raised with the Council.
23. In his letter of 21 September 2006 Mr L raised a number of points about the application of the exemptions that had been cited by the Council and asked for the Council's views on these issues.
24. In its submissions to my office, the Council addressed each of the 4 points that Mr L had raised in his request for review. I have not set out these detailed submissions in this decision notice nor have I included Mr L's points of clarification. This is because, firstly, the information relates directly to Mr L's personal circumstances and, secondly, the explanation would, in itself, potentially reveal exempt information.
25. As a general comment, the Council advised that it considered that Mr L was essentially asking opinions in respect of his own situation rather than seeking clarification of the application of exemptions under FOISA.
26. Section 16 of FOISA sets out the information that should be contained in a refusal notice issued to an applicant. Section 16(1)(d) of FOISA requires an authority not only to state the exemption(s) that apply but also to state why they apply (if it is not otherwise apparent). However, section 16(3) goes on to provide that an authority is not obliged to comply with section 16(1)(d) if the statement would disclose information which would itself be exemption information.
27. I have carefully considered Mr L's concerns, the Council's original responses and the Council's submissions to my office. It seems to me that an applicant's queries in respect of their own situation could legitimately amount to a request for clarification about the application of exemptions under FOISA; the two are not necessarily mutually exclusive. However, I understand that where those queries relate directly to the content of the information held that an authority might find it difficult to respond without revealing what it considers to be exempt information.
28. In this case, in its original response to Mr L's request, the Council set out the exemptions that applied and provided general reasons as to why it considered they applied. I recognise that if the Council had addressed the points that Mr L raised in his request for review then the Council could have potentially disclosed information it considered exempt.



29. However, I consider that if the Council felt unable to respond to Mr L's specific points, it should have stated this. I have considered the Council's review notice and while it refers to the delay in responding to Mr L's original request, it does not acknowledge the specific points that Mr L had made in his letter of 21 September 2006. FOISA recognises that it might be difficult for an authority to explain why an exemption applies, hence the provision of section 16(3). However, I consider that, wherever possible, an authority should explain why it is unable to respond to specific enquiries made by an applicant where this situation arises.
30. Mr L also asked the Council to advise why there had been a delay in responding to his original request. Given that this overlaps with point c) of his application I have addressed this aspect below.

b) Representation at the Compliance Review Panel

31. Mr L also complained about his exclusion from being allowed to put forward his views to the Compliance Review Panel. It will be recalled that on learning that a review panel was to consider his request for review Mr L asked to make a written submission and to attend the meeting of the review panel.
32. On 4 October 2006 Mr L received notification from the Panel that these requests had been considered but refused. The Panel had therefore proceeded to consider his request for review at that meeting.
33. Mr L was keen to stress that his key request was to send in a written submission and that he had understood that it was unlikely that he would be able to attend the actual meeting. He had asked the Panel for confirmation that this request had been correctly communicated.
34. The Council made a number of submissions to my office regarding this complaint. The Council submitted that there was no requirement under FOISA for attendance of an applicant at a Compliance Review Panel. The Council explained that it used three senior officers drawn from Corporate Services, Legal Services and on occasions the Service which the request referred to on the Panel. As such, reviews were "bunched together" and all heard by Panel members at one sitting, thus ensuring best use of the resources. The Council submitted that to have an applicant to attend the Compliance Review Panel to "have their day" would have serious implications on the time of these senior officers and the management of any reviews.
35. The Council further submitted that the location of the Compliance Review Panel was at Council Offices, Dumfries. To allow an applicant to travel from elsewhere, the Council argued, would involve logistics, expenses and perhaps even cancellation due to illness.



36. The requirements for an internal review and the subsequent notice are set out in section 21 of FOISA. The Council is correct to assert that FOISA does not require attendance by the applicant at any time during this process. However, I have gone on to consider whether an invitation to attend might fall under the authority's responsibilities under section 15(1) of FOISA which requires an authority to provide advice and assistance to an applicant. To this end, I have also considered the *Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002* (Section 60 Code of Practice) which is referred to in section 15(2) of FOISA and expands on the responsibilities of an authority when it receives requests for information. In respect of the duty to provide advice and assistance, the guidance primarily addresses the responsibilities of authorities when they first receive requests for information and in assisting the applicant in identifying the information they are seeking.
37. Paragraph 65 of the Code of Practice provides particular guidance to authorities on the process of review. It states that the review procedure should be fair and impartial and should enable different decisions to be taken if appropriate. The Code of Practice also states that the procedure should be straightforward and capable of producing a determination of the review promptly and, in any event, within 20 working days of receipt of the request for review.
38. I do not consider that the authority's duty to provide advice and assistance is confined to the initial request for information but extends to the consideration of the matter on review. Authorities have developed a range of methods for considering requests for review. In some cases, the matter is considered by a senior officer. In other cases, the authority establishes a specially formed panel. These are matters for the authority on which FOISA is not prescriptive. Indeed the absence of such provisions permits the authority a certain amount of flexibility in considering a request for review. Likewise there may be cases where an authority considers it would be helpful to meet with the applicant to discuss their request further and/or try to reach settlement.
39. I am not persuaded by the Council's arguments that logistical reasons dictate that applicants should not be invited to attend review meetings. However, I can see other reasons why it would not be desirable or appropriate for applicants to attend meetings of a review panel. Firstly, in many cases, the reviewing officer/panel will be considering information the authority considers to be exempt. Secondly, the authority is required to complete the review procedure within 20 working days, a time limit to which the authority may have difficulty in adhering if arrangements need to be made for the participation of the applicant.
40. I accept that the wording of FOISA suggests a predominantly written process, while acknowledging that authorities may consider it desirable to meet with an applicant in particular cases.



41. In conclusion, therefore, I do not consider that there is any requirement under FOISA, explicitly or implicitly, to require an authority to invite an applicant to attend a meeting of the review panel, where this exists. The authority may consider it appropriate to meet with the applicant within or outwith the review process but this is a matter for the authority to decide having regard to the particular circumstances of the case.
42. I consider, however, that Mr L's request for representation at the review was not confined to a request to attend the review panel; Mr L also requested to make a written representation. In a further letter of 24 October 2006 the Council indicated that the Panel were aware of Mr L's request to make written submission and that this had been considered by the Panel in reaching its conclusion in relation to the review considered on 3 October 2006. In assessing whether the Council's approach in connection with this matter was reasonable, I have considered the terms of FOISA and the correspondence between the Council and Mr L.
43. Section 20(3) of FOISA states that a requirement for review should specify the request for information to which the requirement for review relates; and the matter to which gives rise to the applicant's dissatisfaction. Therefore the request for review is the opportunity for the applicant should set out why they are dissatisfied with the way in which their request for information was handled and should be used as such.
44. I note that in its letter of 14 September 2006 the Council advised Mr L that "if you require further clarification, please do not hesitate to contact me. However, if you are not satisfied with the way in which your request has been dealt with, you may write requesting a review of this decision." When Mr L wrote to the Council on 21 September 2006 he ended his letter by stating "I would appreciate your prompt response to above questions and requests for clarification". I accept, therefore, that Mr L might have intended to frame a request for clarification rather than for review.
45. Mr L's letter of 21 September 2006 queries the application of the exemptions that had been applied and he is clearly dissatisfied with the way in which his request has been handled. In the circumstances and given the tenor of the letter, it seems to me it was reasonable for the Council to treat this letter as a request for review.



46. I accept that there will be cases where an authority may seek further clarification from an applicant following a request for review, particularly if it is not clear from the applicant's request the precise points he or she is challenging. In this case, it is possible that Mr L wished to have specific points clarified before taking the matter further. On learning that the review panel was to consider the matter, he wished to make further representations. It seems to me that where an applicant expresses a wish to make further representations it will be good practice for an authority to give due consideration to such a request while emphasising the time limits set down in FOISA. I accept, however, that there will be cases where an authority considers that further representations from the applicant would not have an impact on its decision and that to accede to an applicant's request could be misleading. The Council's response in this case implies that further submissions from Mr L would not have altered its final decision.
47. It seems to me that there may have been some confusion as to the purpose of Mr L's letter of 21 September 2006. I consider that the Council should have addressed Mr L's request to provide a written submission in more detail in its notice of review of 4 October 2006.

c) The delay in responding to the initial response

48. Mr L also asked me to address the change from the Council telling him that the process was almost completed and would be done on time, to it being so complex that it was significantly delayed, beyond the prescribed time period.
49. In its submissions to my office, the Council advised that the initial assessment of the contents of relevant file Mr L had requested were "thin". However, when the file was finally passed to the relevant members of staff to consider it under FOISA, it became obvious that the file contained information which was of a complex nature, sensitive and would require to be thoroughly examined to ensure compliance with FOISA. The Council advised Mr L of this on 8 September 2006. The Council pointed out that an apology was also sent in the letter of 14 September 2005 and that this apology had been reinforced in the letter from the Review Panel of 4 October 2006. The Council advised that it fully accepted that there had been a technical breach in terms of the time delay but that this was solely as a result of the complex nature of the information to be examined.



50. I consider that the Council has addressed this complaint in its correspondence with Mr L. I accept that there may be cases where initially the request is considered to be straightforward and then on further examination proves to be more complex. Ideally, the information will be considered at the outset of the 20 working day period in order that such complexities can be addressed and further advice sought, if necessary. That apparently did not happen in this case. However, I have taken into account that the Council explained this to Mr L, accepted that there had been a breach under FOISA and apologised for this.
51. In conclusion, therefore, while I consider that the Council could have provided further explanation to Mr L in its initial response and in its request for review I do not find that these omissions amounted to breaches of FOISA.

Decision

I find that Dumfries & Galloway Council (Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr L.

However, in failing to respond within 20 working days to Mr L's request the Council failed to comply with section 10(1) of FOISA.

I do not require the Council to take any action in response to this failure.

Appeal

Should either Mr L or the 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
26 July 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 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
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

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).

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

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.

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.