

Decision Notice



Decision 159/2011 Ms N and East Dunbartonshire Council

Complaints about Planning

Reference No: 201100333

Decision Date: 12 August 2011

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
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Summary

Ms N requested from East Dunbartonshire Council (the Council) information relating to complaints about its Planning and related departments. The Council responded by releasing some information, but refused to release the remainder of the information it held on the grounds that the cost of complying with the request in full would exceed the sum of £600 prescribed for the purpose of section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Ms N remained dissatisfied with the information provided and the time taken to provide responses and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had acted in accordance with Part 1 of FOISA, being justified in refusing to comply with the request under section 12(1) on the grounds of excessive costs. He also found that the Council had met its duty to provide advice and assistance in relation to the request under section 15 of FOISA.

The Commissioner also identified technical failures in that the Council failed to respond to Ms N's request for information and request for review within the requisite timescales. Given that these issues were in any event being addressed with the Council as part of an ongoing practice assessment, the Commissioner did not require the Council to take any action in this particular case.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1)(a) (Time for compliance); 12(1) and (4) (Excessive cost of compliance); 15 (Duty to provide advice and assistance) and 21(1) (Review by Scottish public authority)

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 October 2010, Ms N wrote to the Council requesting detailed information, for each year from 2004 to date, of all complaints received about the Planning and related departments, including a breakdown of the cause for complaint; which staff members were involved; the outcome of each complaint; what action was taken; and what percentage of planning applications resulted in complaints.
2. Ms N emailed the Council on 24 November 2010, complaining that no response had been provided to her request and seeking a review.
3. Ms N did not receive a substantive response to her request for review and, on 29 December 2011, applied to the Commissioner for a decision on that failure in terms of section 47(1) of FOISA. The application was validated and an investigation commenced, following which the Council carried out a review. It notified Ms N of the outcome on 9 February 2011, providing some information, but advising that the cost of complying with request in full would exceed the upper limit of £600 prescribed for the purposes of section 12(1) of FOISA and therefore they were not obliged to comply with the request. The Council also stated that it considered certain of the requested information to be exempt under section 38(1)(b) of FOISA.
4. On 17 February 2011, Ms N 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.
5. The application was validated by establishing that Ms N 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

6. On 24 February 2011, the Council was notified in writing that an application had been received from Ms N, as required by section 49(3)(a) of FOISA. The case was then allocated to an investigating officer.
7. 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 also asking it to respond to specific questions. In particular, the Council was asked to provide a detailed explanation of the costs it considered to be involved in locating, retrieving and providing the information. It was also asked to describe the advice given to Ms N as to what information could be provided within the cost limit, in line with the duty to advise and assist under section 15 of FOISA.



8. The Council responded and clarification of certain points was obtained in the course of the investigation. The relevant submissions obtained from Ms N and the Council 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 Ms N and the Council and is satisfied that no matter of relevance has been overlooked.

Section 12 – Excessive costs of compliance

10. In arguing that section 12(1) of FOISA applied to the request, the Council focused on that part of the request relating to the outcome of each complaint and the action taken. It submitted that compliance with this part would exceed the prescribed limit for the purposes of section 12(1), and consequently it was therefore not obliged to comply.
11. 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.
12. 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. In this case, having considered the terms of Ms N's request, he is satisfied that it can only reasonable be interpreted as a single request for information, rather than a series of separate requests. Therefore, should he find that the cost of complying with any part would exceed the £600 limit he must find that section 12(1) applies to the whole request.
13. The projected costs the 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, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public 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.
14. The Council advised the Commissioner that in order to provide the information to Ms N, it had to undertake a four-step process. This involved the location of the complaint and associated correspondence, the location of the relevant planning application file or enquiry (some of which may be archived and could take a day or more to retrieve), analysis of the complaint and application files to ascertain the outcome of the complaint (which may relate to multiple issues and thus be in several parts) and, finally, redaction (as appropriate) prior to disclosure.



15. The Council indicated that it had undertaken a test based on one complaint, without redaction, which took 1 hour 20 minutes. There being 322 complaints covered by the request, the estimated total time required for dealing with the relevant part of the request was 429 hours 20 minutes, or over 60 days. As indicated, this did not include redaction time, which the Council estimated as amounting to a further 161 hours (based on 30 minutes per complaint).
16. The Council provided details of the grades of staff required to carry out the above process, at hourly costs of between £7 and £15 per hour. Even if all costs were calculated at £7 per hour (which the Commissioner accepts would not be realistic in the circumstances), this provided a total cost of £3,005.31 (not allowing for redaction). The Council added to this photocopying costs for 1500 pages @ 10p per page, adding £150.00 and giving a total estimated minimum cost of £3,155.31.
17. Having considered the means by which the information in question could be provided, together with the relative estimated costs identified by the Council, the Commissioner is satisfied that the cost of fulfilling Ms N's request for information would exceed £600. While not necessarily accepting every element of the estimated cost as entirely reasonable in the circumstances, it is clear to the Commissioner that the cost of compliance would exceed the £600 limit considerably. Consequently, he accepts that the Council was entitled to refuse to comply with the request in terms of section 12(1) of FOISA.

Section 15 – Duty to provide advice and assistance

18. 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.
19. The Council submitted that, in providing information in response to parts of Ms N's request, without charge, it had done what could reasonably be expected within the £600 limit.
20. During the investigation, the Council was asked by the investigating officer if it was possible to extract only the outcomes of complaints. The Council confirmed that it would be possible to extract the outcomes of any complaint, but that this would involve similar tasks to those described above, requiring each complaint file to be accessed and analysed, for which tasks it estimated approximately one hour per complaint. The Commissioner is satisfied that the scale of the task in respect of the outcomes information (for 322 complaints files) would remain considerable, given that there would be no means of compiling the information other than by a manual sifting process. In the circumstances, in the light of the staff and other costs outlined in paragraph 16 above, he accepts that the cost of providing only the outcomes would still exceed the £600 limit considerably.



21. Given the Council's approach as outlined above, and while noting that certain information was withheld as exempt, it is clear that the Council gave consideration to the different parts of Ms N's request and what it could supply in respect of each of them. The Council provided an explanation of why it would not provide certain information relating to individual members of staff, considering that information to be exempt under section 38(1)(b) of FOISA: while the Commissioner cannot consider the application of that exemption to the information (given that he has accepted the application of section 12(1) of FOISA to the entire request), he notes that in identifying the information as exempt the Council provided Ms N with all of the information it would have been required to provide in a refusal notice under section 16 of FOISA. He also notes that, in relation to information on the outcome of each complaint and the action taken, the Council provided an indication of the cost providing the information.
22. In all the circumstances of this case, therefore, the Commissioner accepts that the response eventually provided to Ms N in relation to her request represented such advice and assistance in respect of the request as it was reasonable to expect. Consequently, the Commissioner is satisfied that the Council complied with its duties in terms of section 15(1) of FOISA.

Failure to comply with timescales in FOISA

23. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case. Section 21(1) gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case. It will be evident from the timescales set out in the "Background" paragraphs above that these requirements were not met by the Council in this case, with the result that the Council failed to comply with Part 1 of FOISA in these respects.
24. Since Ms N made her application to the Commissioner, the Council's practice in dealing with information requests has been the subject of an assessment by the Commissioner. Given that the Council's corporate arrangements for adhering to the relevant timescales are receiving attention as a consequence of that assessment, the Commissioner does not require any action to be taken in respect of these particular breaches in response to Ms N's application.

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and East Dunbartonshire Council



The Commissioner finds that East Dunbartonshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Ms N, being justified in refusing to comply with the request in terms of section 12(1).

The Commissioner was also satisfied that the advice provided to Ms N met the duty under section 15 of FOISA to provide advice and assistance. However, the Commissioner also finds that the Council failed to respond to Ms N's request and requirement for review within the respective timescales laid down in sections 10(1) and 21(1) of FOISA. In the circumstances, he does not require the Council to take any action in respect of these failures in response to Ms N's application.

Appeal

Should either Ms N or East Dunbartonshire 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 August 2011



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.

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

...

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.

...

- (4) The regulations may make provision as to-

- (a) the costs to be estimated; and
(b) the manner in which those costs are to be estimated.

...



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).

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.

...

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.