

Decision Notice



Decision 232/2013 Mr N and East Lothian Council

Senior officer redundancies

Reference No: 201300353

Decision Date: 22 October 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

Mr N asked East Lothian Council (the Council) for information about redundancy payments to certain senior officers and related matters. The Council responded by providing certain information, but withholding other information under various provisions of FOISA.

Following an investigation, the Commissioner accepted that the Council had been correct to withhold certain information as legally privileged communications. She also found that the Council had been correct in refusing one of Mr N's requests under the excessive cost provisions in FOISA. However, she did not consider the Council had discharged its duty to provide advice and assistance under section 15 of FOISA and required it to take further action in this connection.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance) and 36(1) (Confidentiality)

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 12 April 2012, following previous correspondence in relation to redundancy payments to certain senior officers, Mr N wrote to the Council making a number of information requests. These included a request for the following (request 1):

... a copy of the correspondence referred to in the press sent to you [the Council's Chief Executive] by the Head of Finance and Head of Law and Licensing concerning the proposed restructure together with a copy of your reply and any correspondence or notes of any meetings you had to discuss the matter either with them or with any other individual within East Lothian Council.



2. Following a request for clarification from the Council (24 April 2012), Mr N specified the press article he was referring to in his request, in a letter of 10 May 2012. The Council responded on 7 June 2012, refusing the request under various provisions of FOISA.
3. Mr N wrote to the Council again on 25 June 2012. He challenged the Council's reasons for refusing to provide the information sought in request 1 and asked the Council to review its decision. He also made additional information requests, including the following (request 2):
Please send me copies of any external legal advice and/or advice from COSLA that you took when making full redundancy payments for both these posts.
4. The Council notified Mr N of the outcome of its review on 18 July 2012, upholding its decision in respect of request 1 without modification.
5. The Council responded to request 2 on 25 July 2012. It withheld the information under section 36(1) of FOISA, explaining that it held only external legal advice as COSLA was not asked to provide any advice on the matter. Mr N requested a review of this decision, which the Council then upheld without modification.
6. On 18 January 2013, Mr N wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr N made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to those requests.

Investigation

8. On 2 May 2013, the Council was notified in writing that an application had been received from Mr N and was asked to provide the Commissioner with any information withheld from him. The Council responded with certain information and the case was then allocated to an investigating officer.
9. 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. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. The Council provided submissions and, during the investigation, disclosed certain information to Mr N.



11. Mr N's application expressed dissatisfaction with the way in which the Council dealt with requests 1 and 2. He also referred to the Council's failure to respond to an additional request in relation to the monitoring officer, made on 19 August 2013: the Commissioner is not satisfied that this request has ever been the subject of a requirement for review and therefore cannot consider the matter further.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr N and the Council. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner considers it most straightforward in the circumstances to look at request 2 first.

Request 2 – section 36(1) of FOISA

14. The Council located a single email that fell within the terms of this request. This was external legal advice in relation to redundancy matters, which the Council submitted should be withheld in terms of section 36(1) of FOISA.
15. Section 36(1) exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication in this category are those subject to legal professional privilege, one aspect of which is legal advice privilege. The Council considered legal advice privilege to apply to the information caught by request 2.
16. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply to information, certain conditions must be fulfilled. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of that adviser's professional relationship with his/her client.
17. Having read the information to which the Council has applied this exemption, the Commissioner is satisfied that it is a communication between a professional legal adviser and client, in circumstances where legal advice privilege could apply. In this case, therefore, the Commissioner is satisfied that the withheld information is information to which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA.



18. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

19. In respect of the public interest, the Council submitted that it was not in the public interest to release this legal advice. The advice concerned redundancies and a restructure of the senior officers of the Council, something the Council considered might well happen again in the future, when the advice could be of further relevance. The Council emphasised the public benefit inherent in its officers being able to obtain legal advice in confidence, submitting that its legal advisers would not be able to give open and honest assessments of the Council's legal position if advice were made public. In this connection, the Council referred to a previous decision of the Commissioner (*Decision 023/2005 Mr David Emslie and Communities Scotland*), also referred to in the Commissioner's Guidance on section 36¹.
20. As the Commissioner has noted in many previous decisions, including *Decision 023/2005*, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*², and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. Consequently, while each case will be considered on its merits, the Commissioner is likely to order the release of such communications in highly compelling cases only.
21. In his instance, the Commissioner accepts the Council's argument that there is a greater public interest in maintaining confidentiality of communications. While noting the general arguments in favour of transparency and accountability put to her by Mr N, she is not persuaded that these can overcome this strong public interest (or, for that matter, that they would be contributed to significantly by disclosure of the information).
22. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, the Commissioner accepts that the Council was entitled to withhold the information caught by request 2 under the exemption in section 36(1) of FOISA.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx>

² (2004) UKHL 48



Request 1 – section 12(1) of FOISA

23. Request 1 sought, amongst other items, "... any correspondence or notes of any meetings you [the Chief Executive] had to discuss the matter either with them [the Head of Finance and Head of Law and Licensing] or with any other individual within East Lothian Council".
24. In its response of 7 June 2012, confirmed on review, the Council stated that section 12(1) of FOISA applied to this element of request 1, with the result that it was not obliged to comply.
25. 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. In terms of regulation 5 of the Fees Regulations, this is £600. 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. If section 12(1) applies, there is no provision for taking account of any public interest considerations which may be relevant.
26. While she appreciates that the Council may have been trying to be helpful in addressing parts of request 1 without applying section 12(1), the Commissioner does not consider it reasonable to interpret request 1 other than as a single, interrelated, request for information. Having reached that conclusion, she must consider the request as a whole for the purposes of section 12(1). This means that if she accepts it would cost more than £600 to comply with that part of the request narrated in paragraph 23 above, she cannot require the Council to take any action in respect of the remainder of the request.
27. 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, 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 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.
28. The Council provided the investigating officer with a list of 11 persons who would have to search for the information on meetings referred to in request 1. These included the Chief Executive and others holding senior positions in the Council. The Council also explained that it would have to search the archives of certain former senior officers and councillors. The timeframe for this search would be from January/February 2012 to December 2012.
29. The Council explained that to prepare its response for the Commissioner (in respect of the remainder of request 1), and to be confident that it had not missed anything, an officer spent 2-3 hours looking through an archive and opening and reading the content of individual e-mails. The information in question was in fact located in the first quarter of the emails potentially requiring searched. The Council submitted that it would "be a much bigger exercise to produce all that Mr N requests and would potentially take a full working day, if not more".



30. The Council noted that this was information on a subject which remained highly sensitive. It explained that none of the information was kept in a structured filing system and all of it was stored on individual PCs at the discretion of the individuals involved. Most of the email traffic did not have a heading or was merely headed “confidential” because of the highly confidential and sensitive nature of the content. If not stored in individual email files, the Council explained that such information would have gone randomly into the Council’s general archive system (which was searchable).
31. Because of the sensitivity of the information, the individuals listed would have to conduct the searches themselves. It was not possible to have a more junior member of staff search and read through all the confidential emails kept in the email archive.
32. The Council summarised the searches required. Each of the persons listed would have to search:
 - their current Inbox
 - their ‘deleted’ box
 - their ‘sent’ box
 - their archive inbox
 - their archive ‘sent’ box
 - their personal storage section on the Council server.
33. The Council estimated the cost would involve 11 people, with the highest chargeable salary grade (i.e. £15 per hour), each spending at least a full working day (i.e. approximately seven hours). This gave a total cost of £1155.
34. The Commissioner has considered the Council’s calculations and other submissions as presented to her. She acknowledges that the request relates to a matter of considerable sensitivity. In that context, she accepts as reasonable in the circumstances the processes and calculations described by the Council. It is likely in the circumstances that the search would need to be carried by a member of staff at the highest chargeable salary level, even if it did not need to be done by the member of staff directly concerned. Even reducing the search time from seven hours to five or six hours would still exceed the cost limit.
35. The Commissioner has no reason to question the Council’s assertions as to the way in which the relevant records are stored and the way in which the individual emails are likely to be headed. This may not amount to best electronic records management practice, but it does appear to correspond to reality in many organisations.



36. In all the circumstances, therefore, the Commissioner accepts that the Council was not obliged to comply with request 1, on the basis that to do so would cost more than £600 and therefore section 12(1) of FOISA applied. This means that there are further decisions of the Council, in withholding information covered by request 1 under exemptions, which she cannot consider, but (having considered the request and the Council's submissions along with the provisions of section 12(1) and the Fees Regulations) she does not believe there is any other conclusion she could reach in the circumstances. However, she can consider whether the Council might have done more to mitigate the effects of this outcome for Mr N, in line with its duty to provide advice and assistance under section 15 of FOISA.

Request 1 – section 15 of FOISA

37. Section 15 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 proposes to make, or has made, 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 Scottish public authorities under FOISA³ include, in cases where section 12(1) applies, considering what information could be provided below the cost limit, and suggesting how the applicant may wish to narrow the scope of their request accordingly.
38. The Commissioner notes that the Council did not attempt to do this. In its submission, the Council stated that the problem with helping Mr N narrow the request was that the same number of emails would need to be searched again by the same people, as there was no way of determining who was the recipient of which emails.
39. This may be true. On the other hand, the Council might still have given Mr N the opportunity to consider whether he wanted to restrict the scope of his request to information held by a particular officer of the Council. For example, the Chief Executive, as the common factor in all of the relevant communications and meetings, might have been expected to hold most of the relevant information.
40. Also of concern is that the Council does not appear have considered the impact on the remainder of the request of designating part of it as excessively costly. Although the Council attempted to address the other elements of the request, the Commissioner has been prevented from considering its handling of these elements. If the Council had advised Mr N, at the outset, to submit separate requests in respect of these remaining parts (particularly in relation to the communications with the two specified officers, about which he appears to be most concerned), this situation might have been avoided.
41. In all the circumstances, the Commissioner is not satisfied that the Council complied with its duty under section 15 in respect of request 1 and now requires it to advise Mr N as to how he might modify the request to bring it within the £600 cost limit.

³ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



DECISION

The Commissioner finds that, in respect of the matters specified in the application, the Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Mr N.

The Commissioner finds that the Council failed to comply with its duty under section 15 of FOISA in respect of Mr N's request 1, and now requires it to provide appropriate advice and assistance to enable Mr N to modify the request to bring it within the cost limit specified for the purposes of section 12(1) of FOISA (see examples in paragraphs 39 and 40 of this decision), by 6 December 2013.

Appeal

Should either Mr N or East Lothian 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.

Margaret Keyse
Head of Enforcement
22 October 2013



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.

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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).



36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings 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.