

Decision Notice



Decision 020/2010 Mr Michael Peterson and Shetland Islands Council

Means of providing information

Reference No: 200900994

Decision Date: 5 February 2010

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Peterson requested from Shetland Islands Council (the Council) information held in relation to a number of topics, and to be allowed to inspect certain information. The Council responded by providing some information, indicating that other information was not held and proposing arrangements for inspection. Following a review, Mr Peterson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Peterson's requests for information in accordance with Part 1 of FOISA. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 11(1), (2) and (3) (Means of providing information) and 17(1) (Notice that information is not held)

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 1 April 2008, Mr Peterson wrote to the Council requesting information under 13 different headings, related to various subjects. The full text of Mr Peterson's requests is contained in the Appendix to this decision.
2. The Council responded on 2 May 2008. It provided information in response to requests 2, 7, 8 and 10, together with part of the information requested in requests 9 and 12. The Council indicated that the remainder of the information covered by request 12 was withheld in terms of section 38(1)(b) of FOISA, in that it constituted personal information the release of which would breach the first principle of the Data Protection Act 1998. In relation to requests 1, 5, 6, 9 (part) and 11, the Council responded to the effect that the information requested was not held.



3. In relation to request 13, the Council indicated that the request had failed to specify the report Mr Peterson was seeking. It confirmed, however, that no external solicitors were so instructed and therefore no legal costs were incurred.
4. In response to requests 3 and 4, which were requests to make information available for inspection, the Council advised Mr Peterson of the proposed arrangements for inspecting files held by the Economic Development Unit, with contact details for taking these up. With the exception of one file falling within the scope of request 3, which it provided, it advised Mr Peterson that no relevant information was held by the Chief Executive's Office.
5. On 26 June 2008, Mr Peterson wrote to the Council requesting a review of its decision. In relation to requests 3 and 4, he did not consider the location proposed for inspection as suitable and requested that another venue be considered. He also disputed the Council's assertion that no information covered by request 4 was held by the Chief Executives Office.
6. In relation to request 5, Mr Peterson again disputed the Council's assertion that no information was held and advised that the second part of this request had not been answered. Mr Peterson informed the Council that he was broadening the line of his enquiry and made an additional request to inspect, at a neutral venue, "full Council and Development Trust documentation relating to Shetland Seafish Ltd". Again challenging the assertion that the information was not held, he submitted similar new requests in relation to the information covered by requests 6 and 11.
7. Whilst he did not challenge directly the Council's response that it held no information falling within the scope of request 8, Mr Peterson made a new request that the Council provide this information for inspection at a neutral venue, specifying particular files on this occasion.
8. In relation to request 9, Mr Peterson pointed out that the Council had failed to provide him with the names of the two individuals seconded to Viking Energy and asked that the decision on this request be reviewed.
9. In relation to request 13, Mr Peterson made a new request, for a summary of the full legal costs incurred by the Council relating to a complaint by a "Mr C" in respect of the conduct of the Chief Executive, "which was sent to the Scottish Public Services Ombudsman (case number 200401727)".
10. Mr Peterson did not request a review in relation to requests 1, 2, 7, 10 or 12 and therefore these will not be considered further in this decision.
11. On 27 August 2008, Mr Peterson wrote to the Council, complaining that he had not received a response to his request for review and seeking reviews in respect of the requests he had submitted on 26 June 2008. Mr Peterson subsequently wrote to the Commissioner regarding the Council's failure to respond and this ultimately resulted in the Commissioner issuing Decision Notice 158/2008 requiring the Council to respond to Mr Peterson's request for review.



12. On 28 November 2008, the Council responded to Mr Peterson and apologised for the delays and failures Mr Peterson had identified.
13. The Council further informed Mr Peterson that it could bring the various records he had requested into a single location at a specified Council office. He was informed that he would be provided with full access, without charge, subject to the records in question being held, any applicable exemptions and the application of the public interest test. Council staff would be in attendance, to supervise the access and provide assistance (potentially including the identification of further relevant records he might wish access to). It offered a number of potential dates for a meeting.
14. In relation to request 9, the Council confirmed that only one person had been seconded and that the name of that individual was being withheld. The individual's name was, however, subsequently released to Mr Peterson.
15. In relation to his request as outlined at paragraph 9 above, Mr Peterson was informed of the full legal costs pertaining to his request and provided with an explanation regarding the reasons for which they were paid.
16. On 16 May 2009, Mr Peterson wrote to the Council, indicating that he did not agree to the Council staff identified in the letter of 28 November 2008 being present at any meeting, intimating in addition that he did not wish to see certain other Council employees during his visit. He accepted the proposed venue, however, and added that he envisaged his examination taking several weeks. Mr Peterson suggested that he would make contact with the receptionist at the venue, who could arrange for the information he wished to inspect to be made available. He asked that he be allowed to enlist the services of other person(s) to assist him, and also about any charges which might be imposed for photocopying documents.
17. The Council responded to Mr Peterson's suggestion on 22 May 2009, confirming that the author would set aside one day to allow Mr Peterson to inspect the information requested. Beyond those arrangements, additional access would be subject to a fees notice. The Council also confirmed that charges would be made for photocopying.
18. The Council also suggested that Mr Peterson's letter of 16 May 2009 could have been taken as a rejection of the offer outlined in its letter of 28 November 2009, but advised that the offer remained open. It explained that he could not be allowed open access to the information he sought: Council staff would require to identify what could be made available to him and could also explain the reasons for withholding information when exemptions applied. It restated who would be involved in providing access, making it clear that it did not consider this to be a matter for negotiation. Finally, the Council stated that while the attendance of others was not intended it could not guarantee the absence from the premises of the other individuals mentioned in his letter.
19. On 26 May 2009 Mr Peterson 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.



20. The application was validated by establishing that Mr Peterson 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. The case was then allocated to an investigating officer.

Investigation

21. In his application to the Commissioner, Mr Peterson stated that he did not believe he had been given a reasonable opportunity to inspect the records he was seeking, in accordance with section 11 of FOISA. While wishing to carry out the inspection at a “neutral” venue, he had agreed to do so at the offices identified in the Council’s offer, with the proviso that he did not meet certain specified members of Council staff there. However, he complained that the Council continued to insist upon conditions that he found impossible to consider. The investigation, therefore, will consider whether the Council complied with the requirements of section 11 of FOISA.
22. The Commissioner has noted Mr Peterson’s dissatisfaction at points in his dealings with the Council as to whether certain information should be held by the Council. Given the terms of his requests in their final form and of his application to the Commissioner, together with the Council’s responses to these, the Commissioner does not consider it necessary to address this matter in his decision. He will, however, note that he is satisfied from the submissions he has received from the Council that the Shetland Charitable Trust and its associated company SLAP (Shetland Leasing and Property Services) are separate legal entities which can be expected to hold information in their own right. Where the Council does physically hold information for the purposes of these other bodies, it does so on behalf of the other bodies by virtue of its provision of services to them under service level agreements. Therefore, any information held by or on behalf of these bodies would not be held by the Council for the purposes of FOISA. Neither body would appear itself to be a Scottish public authority for the purposes of section 3(1) of FOISA. Finally, it would appear that same conclusions can also be drawn in respect of the Shetland Development Trust, although the Commissioner notes that (while this is not a matter falling within his remit) the Council appears willing to facilitate access to records held by that Trust.
23. On 20 July 2009, the Council was notified in writing that an application had been received from Mr Peterson and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). It was asked to respond to certain specific questions, particularly in relation to the inspection arrangements it had offered Mr Peterson.
24. The Council failed to respond to the letter of 20 July 2009 within the timescale specified, which resulted in a formal Information Notice being served on the Council requiring it to respond. The Council eventually responded on 16 December 2009. Its submissions, together with those made by Mr Peterson, will be considered further in the Commissioner’s analysis and findings below.



Commissioner's analysis and findings

25. 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 Mr Peterson and the Council and is satisfied that no matter of relevance has been overlooked.

Section 11 of FOISA (Means of providing information)

26. Under section 11 of FOISA, an authority is required, so far as it is reasonably practicable, to give effect to the preferences of a person as to the means by which information is to be provided, where that person expresses a preference for receiving the information in the form of (a) a copy in permanent form or another form acceptable to the applicant; (b) a digest or summary of the information, or (c) a reasonable opportunity to inspect a record containing the information.
27. In this case, Mr Peterson asked that he be given a reasonable opportunity to inspect records containing the information and therefore expressed a preference as outlined at (c) above.
28. In considering what is reasonably practical, section 11(3) states that an authority may have regard to all the circumstances, including cost, and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.
29. In this case, the Council determined that it was reasonably practicable to give effect to Mr Peterson's preference of having an opportunity to inspect the records in question, subject to certain conditions. Mr Peterson, however, considers the conditions attached to the Council's offer of inspection to be unreasonable.

Submissions by Mr Peterson

30. Mr Peterson stated that in accordance with section 11 of FOISA, he requested that he be given a reasonable opportunity to inspect records containing a wide range of information at a neutral venue such as Lerwick Library. However, given the Council's assertion that this was not reasonably practicable, he had agreed to view the information at a specified Council office.
31. Mr Peterson also stated he found the conditions laid down by the Council impossible to consider. He believed that the Council (i) wished to circumscribe his wish to view the totality of each subject matter, preferring instead to give access in a piecemeal fashion, and (ii) insisted that he meet with a Council employee prior to accessing the information to discuss the arrangements for gaining access. He cited certain personal reasons for not wishing to have certain Council officials involved in his inspection of the information.



32. Mr Peterson also believed that his request to have a “reasonable opportunity” under section 11 to view the data requested and to be able to “forensically inspect” twenty sets of files was being denied, or at least being made conditional upon the levying of an as yet undetermined fees notice, as the Council was only prepared to set aside a day for access to the information. He believed allowing such a limited period for inspection to be inimical to openness and transparency and therefore perverse, suggesting that several weeks were required. With a view to reducing this period, he had suggested enlisting the help of other persons to sift through the files: this had been rejected by the Council, he believed unreasonably.
33. Mr Peterson also found the Council’s proposal that he be presented with each case file in piecemeal fashion rather than in totality to be obstructive and inimical to expeditious and forensic examination. Given that he did not require his examination to be monitored, he had proposed that a room be made available to him and that the receptionist at the office in question set out whatever files he wished to examine.
34. Mr Peterson also believed that the Council’s proposal to levy a fees notice was calculated to postpone or delay his access to the requested documentation, and seemed to run counter to the Council’s duty to provide advice and assistance under section 15 FOISA.

Submissions by the Council

35. The Council, in turn, argued that Mr Peterson was placing unreasonable demands on his access to the information. It believed the offer it had made him to be reasonable and to have discharged its responsibility to him under section 11 of FOISA.
36. The Council contended that FOISA did not expect that members of the public should be allowed a “roving commission” through files held by public authorities, although it believed its offer to Mr Peterson fell not much short of that. It pointed out that it required to consider the application of any necessary exemption under FOISA and (where necessary) the pursuit of consent in relation to personal data, prior to allowing Mr Peterson to inspect the information. In this connection, however, it pointed to its general willingness to make information freely available and suggested that the occasions where an exemption would be required would be relatively limited. It wished to be accommodating in relation to his requests, subject to requirements of proportionality in relation to the public purse, with a view to allowing him to understand the information held and satisfying him that material was not being hidden from him.
37. The Council was not satisfied that there was any reason for Mr Peterson involving other persons in dealing with a request that was personal to him. On the other hand, it submitted that the attendance of Council staff with the requisite knowledge and experience was necessary in view of the need to consider exemptions, and was also envisaged as a means of providing advice and assistance.



38. The Council stated that Mr Peterson was mistaken in his belief that there was a need for a preliminary meeting and outlined that the intention from the moment of his arrival was to begin to show him the detail from the files in whatever order he wished to peruse them. A staff member, with responsibility for FOISA and Data Protection, would skim through the detail to identify if exemptions applied, but on the principle of maximising open access it was anticipated that the majority of information would be available. The aim would be to make information available at the time, although further meetings might be required if additional information was identified which could not practicably be produced then.
39. The Council believed that the request could be met within its existing resources without the need for a fees notice. It pointed out that it also had to be efficient and economical in the use of its resources, although in the spirit of openness it intended to proceed on the basis previously outlined to Mr Peterson as what it considered to be a reasonable use of public resources.
40. In considering this matter, the Commissioner has to decide whether (i) it is reasonably practicable for the Council to give effect to the preference expressed by Mr Peterson and (ii) the opportunity to inspect offered by the Council is reasonable in the circumstances. In practice, the Commissioner finds these two questions to be interlinked. On the first point, the Commissioner notes that Mr Peterson may have legitimate reasons for wishing to regulate his contact with the Council and its officers. It does not necessarily follow, however, that it would be reasonably practicable for the Council to meet his expressed requirements. An offer of inspection which did not meet them, or did not do so fully, might still be reasonable in the circumstances.
41. Firstly, the Commissioner accepts the legitimacy of the Council considering any exemptions which may be applicable to the information Mr Peterson has requested. There is nothing in FOISA which would permit him to conclude that it would be reasonable for an applicant to expect otherwise.
42. Given the breadth, complexity and background of his requests, it also appears reasonable to the Commissioner that officers of the Council should attend and work through the files with Mr Peterson, with a view to identifying the information he actually requires. In addition, it would appear reasonable that any applicable exemptions should be addressed at this time, rather than in the abstract in relation to information which may not in fact be required. The Commissioner accepts that this work would require staff with a good working knowledge of FOISA.
43. The Commissioner also recognises, as section 11(3) makes clear, that the Council is entitled to take account of the costs involved in determining whether and to what extent it is reasonable to give effect to Mr Peterson's preference. He also recognises as relevant the fact that the Council is one of Scotland's smallest local authorities, with relatively limited resources at its disposal to deal with specialised tasks such as this.



44. Whilst Mr Peterson may have genuine reasons for the additional requirements he has specified, the Commissioner finds in the circumstances of this case that the Council has done what is reasonably practicable to give effect to Mr Peterson's preference that he be provided with a reasonable opportunity to inspect the records containing the information he has requested. In the circumstances, he considers the opportunity to inspect offered by the Council to be reasonable. Consequently, the Commissioner finds that the Council complied with section 11(1) of FOISA in dealing with Mr Peterson's requests. He notes that this offer by the Council has not been withdrawn and can still be accepted by Mr Peterson.
45. Whilst the Commissioner is content that the Council dealt with Mr Peterson's request for information in accordance part 1 of FOISA by responding correctly in terms of section 11(1) of FOISA, he is concerned that having been served with an Information Notice in terms of section 50(1)(a) of FOISA the Council failed to respond to that Notice within the time specified: having been required to respond by 29 October 2009, the Council did not respond until 16 December 2009. Although this is not a matter the Commissioner can take further in this decision notice, it may be taken into account for the purposes of future action under the Commissioner's Enforcement Strategy.

DECISION

The Commissioner finds that Shetland Islands Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Peterson. The Commissioner does not require Shetland Islands Council to take any action.

Appeal

Should either Mr Peterson or Shetland Islands 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
5 February 2010



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.

...

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.
- (2) The means are-
 - (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
 - (b) such provision to the applicant of a digest or summary of the information; and
 - (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.
- (3) In determining, for the purposes of subsection (1), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.

...



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.



Mr Peterson's information request

1 Regulation of Investigatory Powers Act (RIPA)

Please provide me with details of all applications made by the Council to conduct surveillance under RIPA rules since the Act came into effect.

2 Audit and Scrutiny Committee, 23 January 2008

Minute 06/08 records that in a discussion on a report on the Remit of the Audit and Scrutiny Committee, *'The Chairperson said that, she felt that the Committee should focus on the future instead of looking at the past...'*, before she confirmed the need to examine the Capital Programme for the past five years. However, the Minute contains no reference to a motion to this effect. Is it your understanding therefore that the Committee has resolved not to include in its remit matters relating to past Shetland Development Trust decisions, although this was touched upon in the text of the report? Please provide me with a copy of the Committee remit which would have been produced for members subsequent to this meeting.

3 Hoove Salmon Ltd

Please make available the Chief Executive's and the Economic Development Unit's files relating to this now defunct company for inspection by me at a venue such as the Shetland Library.

4 Johnson Seafarms Ltd

Please make available for inspection the Chief Executive's and the Economic Development Unit's files relating to this company.

5 Shetland Seafish Ltd

Please provide me with (1) information relating to the losses incurred by the Council, Shetland Development Trust and SLAP/SLAP Trading in this venture, and (2) full details of the arrangements surrounding the acquisition of Whalsay Fish Ltd, L Williamson (Shetland) Ltd, Sheltie Seafoods Ltd and Ronas Fisheries Ltd and the subsequent disposal of these assets.

6 Shetland Offshore Environmental Services Ltd

Please provide me with information relation to the losses incurred-by the Council, Shetland Development Trust and SLAP/SLAP Trading in this venture.

7 Shetland Towage

Please provide me with the costs associated with the Council's acquisition of the above company, and its subsequent restructuring.



8 Economic Development Unit: Financial assistance

Unlike Shetland Enterprise, the Council's Economic Development Unit fails to publicise assistance which it has made to industry. Please supply me with details of the financial assistance (grant, loan, equity etc) made to businesses, individuals and organisations for the three financial years 2005- 06, 2006-07 and 2007-08, as well as the costs to date of developing and implementing the Shetland Brand.

9 Viking Energy Ltd

Please provide me with a copy of the Council's Code of Conduct for employees pertinent to those Council staff members who have been temporarily transferred to the Viking Energy project, as well as the names of those to whom the Code applies.

10 Works Licences

Please supply me with a copy of the Council's Works Licence policy.

11 Scatsta Airport Redevelopment

Please provide me with a copy of the report dealing with SLAP's proposed £8 million redevelopment of Scatsta Airport, which was discussed and agreed in March or April 2007, together with a copy of the Minute of the said meeting.

12 80 Commercial Street, Lerwick: Repair and Improvement Grants

Please supply me with copies of all applications for Repair and/or Improvement Grants for this multi-occupancy property, together with details of any grants offered and paid.

13 Legal Expenses: SPSO report

Please supply me with a summary of the full legal costs incurred by the Council in its attempt to forestall publication of the Scottish Public Services Ombudsman's report on maladministration in 2007.