

Decision Notice



Decision 037/2013 Mr James Hornall and North Lanarkshire Council

Tender documents

Reference No: 201200790
Decision Date: 6 March 2013

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Rosemary Agnew
Scottish Information Commissioner

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



Summary

Mr Hornall, the Managing Director of Lightways (Contractors) Ltd, asked North Lanarkshire Council (the Council) for files from the CD submitted by the successful tenderer for a contract. The Council refused to provide the information, on the basis that FOISA provides a right to information and not to documents. Following an investigation, the Commissioner found that the Council was not required to comply with the request on the basis that it was repeated.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(2) (Vexatious or repeated requests); 16(5) (Refusal of request)

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. Following correspondence with the Council on the subject of the Festive Lights Tender 2010/2011, about which he had received information from the Council, Mr Hornall wrote to the Council on 31 January 2012, requesting the following information.
Will you please forward these 4 files direct from the DVD [Mr Hornall's emphasis] shown to us as your screenshot submitted by AMEY. After we have these files we can visit to finally check the actual DVD. Simple to do. Insert AMEY DVD, Right click Sent to email [Mr Hornall's email address].
Mr Hornall explained that his intention was to verify the authenticity of certain information held by the Council (from the successful tender). Mr Hornall identified the four files he sought.
2. There followed correspondence between the Council and Mr Hornall about the possibility of Mr Hornall attending the Council's offices to view the disk of the successful tender. Mr Hornall also supplied CDs to the Council asking to have the requested information copied onto them and returned to him, but the Council declined to do this. His requests for the specified information were reiterated.



3. The Council responded to Mr Hornall's request on 29 February 2012, stating that it understood he was seeking a total of six files (another two had been specified in a further request, not covered by this decision) relative to the tender received from the successful tenderer and that he was seeking source files. It referred to the Court of Session decision in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73¹ (the *Glasgow City Council* case), stating that FOISA provides a right to information and not documents. The Council offered to assist if Mr Hornall could clarify precisely the information he wished to receive from the files.
4. On 5 March 2012, Mr Hornall wrote to the Council requesting a review of its decision of 29 February 2012, which he interpreted as a refusal notice. Mr Hornall set out his dissatisfaction with reference to previous correspondence with the Council.
5. The Council notified Mr Hornall of the outcome of its review on 29 March 2012. It listed a number of information requests made by Mr Hornall in respect of the tender and the information it had already supplied in response to these requests. The Council decided that it had met its obligations in terms of FOISA and again referred Mr Hornall to the above Court of Session decision. It explained that while FOISA "confers entitlement to information held by a public authority in Scotland ... it does not confer a right of access to a copy of, or extract(s) from, metadata contained in duplicate electronic source files where hard copy information has been provided."
6. On 18 April 2012, Mr Hornall 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.
7. The application was validated by establishing that Mr Hornall made a request 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 that request. The case was then allocated to an investigating officer.

Investigation

8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. Mr Hornall made several requests to the Council on the subject of the Festive Lights Tender. In this decision, the Commissioner can only consider whether the Council dealt with the request of 31 January 2012, which was the subject of a request for review and subsequent application to the Commissioner, in accordance with Part 1 of FOISA.

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



10. The relevant submissions received from both the Council and Mr Hornall will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 1(1) – General entitlement

12. Section 1(1) of FOISA creates a general entitlement to access information held by a Scottish public authority, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1.
13. Mr Hornall's application to the Commissioner of 18 April 2012 indicated that he believed he was entitled to receive a copy of "the four original files in electronic form." He indicated that the files were available on the Public Contracts Scotland website, but that what he wished to view was the metadata of those files (which he believed would show when they were created). He stressed that he did not seek any commercially sensitive information.
14. While Mr Hornall's purpose may be as stated above, he did not request the metadata. The request was for the files in electronic form, and therefore the Commissioner can only consider whether the Council was required to provide them in that form.
15. In an earlier request to the Council, of 11 January 2012, Mr Hornall attached screenshots to illustrate the information he was seeking. These screenshots were examples of the "Document Properties" of files, showing when the document was created and modified, the application, the file size, etc. In response, the Council supplied screenshots to Mr Hornall, as requested, but in hardcopy form. This was done by letter of 23 January 2012 to Mr Hornall's solicitors, acknowledged by Mr Hornall on 23 January 2012.
16. The Commissioner is of the view that metadata may fall within the definition of "information" for the purposes of FOISA. The UK Information Commissioner (the ICO) has issued guidance in respect of the Freedom of Information Act 2000 (FOIA), *Determining whether information is held*², which considers metadata. This states (at paragraphs 42 - 44):

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http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/~/_media/documents/library/Freedom_of_Information/Practical_application/determining_whether_information_is_held_foi_eir.ashx



When an electronic document is created and subsequently worked on, information about its properties is automatically generated and stored. This information records details such as the author, dates, editing history, size, file paths, security settings and any email routing history. It is commonly known as metadata ... For the purposes of FOIA and the EIR this information is held by public authorities.

In addition, when an electronic document is produced information on its formatting such as the fonts used, headings and other style settings is also automatically recorded. Such information can be viewed in the relevant format menus of the software program. As with metadata, this information is held for the purposes of FOIA and the EIR.

If an applicant specifically requests information on the properties of an electronic document, public authorities will be obliged to provide it, subject to other provisions in the relevant legislation. However, if it is not requested there is no expectation that public authorities will provide it."

17. As noted in that Guidance, *if it [the metadata] is not requested there is no expectation that public authorities will provide it.* While this statement relates to the duties of a public authority under FOIA, the Commissioner sees no reason why it (along with the remaining paragraphs of the guidance on metadata, set out in paragraph 16 above) should not apply with equal force in relation to FOISA.
18. During the investigation, the investigating officer explored with the Council the extent to which the relevant metadata were accessible and could be provided, and whether the requests were for the metadata in electronic format. The Council acknowledged that there was no reason, in principle, not to share with the applicant the metadata information relating to the electronic file "properties", subject to redaction of personal data, but it was also of the view that the metadata were not what was requested by Mr Hornall. As indicated above, the Commissioner must agree with the Council on this point, while accepting that Mr Hornall was seeking the information in an electronic format for the sole purpose of examining metadata.
19. The question is whether Mr Hornall should be given the files requested in electronic format: these may include the metadata, but the request cannot be interpreted as being specifically for the metadata.

The Glasgow City Council case

20. The Council submitted that Mr Hornall was not entitled, in terms of FOISA, to any original information. On this point, it relied on the Court of Session decision in the *Glasgow City Council* case. In that case, Lord Reed explained (at paragraph [47]):
... the analytical framework of [FOISA] is based on a distinction between information and records. Since "information" means information recorded in any form (section 73), and the information requested can be provided in different forms (section 11(2)(a)), it is clear that the concept of "information" is independent of the particular form or forms in which information may be recorded. An electronic file, for example, is not different "information" from a hard copy of the file: each of them records the same information, in a different form.



21. Lord Reed continued (at paragraph [48]):

It is of course true that some records containing a given item of information may be more valuable for certain purposes than others. An original of a deed, for example, is often preferable for forensic purposes to a photocopy. It can even be said, in a certain sense, that the original deed is a source of information which cannot be found in the copy: information, for example, that the signature and the body of the deed originally formed part of a single document (whereas a photocopy might have been created by bringing together a signature and a deed which had originated in separate documents). Information of that nature is not however "recorded" in the original deed, but may rather be inferred from its physical characteristics. It is not, therefore, "information" within the meaning of [FOISA]. The difference between the original and the copy, in other words, does not consist in any difference between the information recorded in each document: that information, if the copy is complete and accurate, will be identical.

22. Much of what Lord Reed states in the preceding paragraph may be applicable to an electronic record. Indeed, the issue here is that, to Mr Hornall, the original is “preferable for forensic purposes” to a copy.
23. Having studied the Court of Session decision in the *Glasgow City Council* case, the Commissioner accepts the Council’s submission that Mr Hornall is not entitled to the original record. He may be, rather, entitled to the information which, according to the comments by Lord Reed, “is independent of the particular form or forms in which information may be recorded”. Therefore, in terms of section 1(1) of FOISA – subject to the application of any exemptions in Part 2 of FOISA, and any other relevant provision in Part 1 – Mr Hornall is entitled to the information, independent of the particular form or forms in which that may be recorded.
24. Mr Hornall’s communications refer to “original” files, discs and so on. The use of the word “original” can refer to the actual physical disc that was submitted to the Council. It could also be taken mean that Mr Hornall is seeking the information in the form submitted in that disc, i.e. with the metadata unchanged.
25. The correspondence the Commissioner has seen between the Council and Mr Hornall involves Mr Hornall trying to ascertain through questions what copies of the information are held. In the circumstances, while the Commissioner accepts the decision in the *Glasgow City Council* case as relevant to the issue, she also accepts that Mr Hornall is seeking to ensure that he can access the information in such a form that it is identical in its attributes to the physical electronic record.
26. In considering the form in which the Council might be required to provide the information, the Commissioner considers section 11 of FOISA, referred to in the *Glasgow City Council* case, to be of relevance. The Council also submitted that section 14(2) was applicable and the Commissioner will consider this first.



Section 14(2) - repeated requests

27. The Council's submission to the Commissioner of 26 June 2012 formally relied on section 14(2) of FOISA. That is, the Council submitted that the information had already been provided to Mr Hornall in hardcopy and offered in CD (redacted in terms of FOISA). It re-iterated this in a clarification of 2 August 2012, explaining in addition that Mr Hornall did seek a review of this decision and that the review outcome was issued on 28 December 2011.
28. Section 14(2) of FOISA provides:
- Where a Scottish public authority has complied with a request for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.*
29. It must be noted that, where section 14(2) applies, section 1(1) of FOISA would be disapplied. If section 14(2) is applicable to a request, the applicant, in this case Mr Hornall, is not entitled to be given the information. Section 11, which concerns the means by which the information is provided to the applicant, would not, therefore, fall to be considered.
30. When considering section 14(2) of FOISA, the following points needs to be considered:
- whether Mr Hornall's request was identical or substantially similar his previous request(s);
 - whether the Council complied with Mr Hornall's previous request(s) and, if so
 - whether there was a reasonable period of time between the making of the first request and the making of the subsequent request.

Was the previous request identical or substantially similar to the first?

31. The Council's submission of 26 June 2012 referred to its review outcome of 29 March 2012, which summarised a number of information requests received from Mr Hornall about the same tender, all of which had resulted in the supply of information to him, with a brief description of the information provided in each case.
32. The Council pointed in particular to an email it sent Mr Hornall on 15 November 2011, which stated:
- I note that you have asked for an electronic copy of the CD by Amey [the successful tenderer] – and I understand that you wish this to be an unadulterated copy of the submitted disc.*
- The email went on to explain why the Council did not consider this could be provided (see below).
33. The 15 November 2011 email was a response to an email from Mr Hornall of 8 November 2011, also copied to the Commissioner, which included the following request:
- We ask anyway will you please supply the electronic copy of AMEY submission. You can simply copy it to another disk without amending any dates.*



34. The Commissioner considers it reasonable to consider the requests of 8 November 2011 and 31 January 2012 to be substantially similar. The latter request seeks to obtain certain files from within the CD submitted by the successful tenderer, in electronic form, while the earlier request seeks all the information in the CD (in the same form).

Was the previous request complied with?

35. The Council responded to the request of 15 November 2011, stating that it could not provide the “unadulterated copy” it understood Mr Hornall to be seeking. It explained the operations it would require to carry out on the disc to enable redaction, referring in particular to the Data Protection Act 1998. It confirmed that it could provide a copy of the disc, redacted in terms of FOISA, although it did not believe this to be what Mr Hornall was looking for
36. Mr Hornall sought a review of this response and the Council responded on 28 December 2011. The Council upheld its original decision, reiterating that a redacted CD could be provided. Mr Hornall does not appear to have pursued this option further.
37. The Commissioner also notes that the Council’s review outcome notified Mr Hornall appropriately of how to challenge its decision if dissatisfied with the response provided. As far as the Commissioner is aware, Mr Hornall did not challenge that decision within the timescales allowed by FOISA.
38. Mr Hornall’s email of 23 January 2012 to the Council seems to acknowledge that he is satisfied with what has been provided (in hard copy form), although within this letter he suggest a further step he wishes to take (i.e. a site visit to inspect the electronic files).
39. In all the circumstances, the Commissioner accepts that the Council complied with Mr Hornall’s previous request for the information, in the process addressing his expressed preference that the information be provided in electronic form. Had he been dissatisfied with the Council’s compliance with that earlier request, he had the option then of asking the Commissioner to consider whether the request had been dealt with in accordance with Part 1 of FOISA. He appears to have chosen not to do so.

Has a reasonable period of time passed?

40. The Commissioner notes that there was a relatively short period between the response to the previous request and the making of the request under consideration here. In fact, only a few weeks passed between the review outcome of 28 December 2011 and the request of 31 January 2012.
41. The Commissioner notes that there is no attempt to define “a reasonable period of time” in the legislation, because that will depend on the circumstances of the case. Consideration should be given to two questions which will help to assess whether a reasonable period of time has elapsed. These are:
- Has the information changed?
 - Have the circumstances changed?



42. The information requested in this and the previous instance relates to the same tender. The Commissioner accepts that neither the information (on the second occasion, a subset of the information requested on the first) nor the circumstances, other than the passage of time, have altered in this case.
43. The Commissioner considers that the simple passage of time between requests may eventually be sufficient to allow the conclusion that a reasonable period of time has passed between two identical or substantially similar requests, irrespective of whether there has been any other change in the circumstances surrounding the request. In this case, however, having taken into account the static nature of the information concerned, the Commissioner does not accept that the period in question is sufficient to find that the passage of time alone means that a reasonable period passed between the two requests.
44. In all the circumstances, the Commissioner finds that the Council was entitled to refuse to comply with Mr Hornall's request on the grounds that section 14(2) applied. Having reached that conclusion, she is not required to consider the relevance of section 11 of FOISA. She must, however, consider one technical aspect of the Council's handling of the case.
45. The Council did not raise section 14(2) in responding to either Mr Hornall's request for information or his requirement for review. Consequently, it did not comply with the requirement to give notice to Mr Hornall in accordance with section 16(5) of FOISA. The provisions of section 16(5) are set out in the Appendix: having considered all of the submissions and supporting information provided by the Council, the Commissioner is not satisfied that this was a case in which the conditions which would have permitted it not to give such notice were applicable.

DECISION

The Commissioner finds that North Lanarkshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Hornall. While she is satisfied that the Council was not obliged to comply with the request in terms of section 14(2) of FOISA, she must also find that it failed to give Mr Hornall notice that it so claimed, as required by section 16(5) of FOISA.

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Mr James Hornall
and North Lanarkshire Council



Appeal

Should either Mr Hornall or North Lanarkshire 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
6 March 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.

14 Vexatious or repeated requests

...

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

16 Refusal of request

...

- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if-
- (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and
 - (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.

...