Decision 023/2006 - Millar & Bryce Limited and Dundee City Council

Request for copies of extant notices served under section 108 of the Housing (Scotland) Act 1987

Applicant: Millar & Bryce Limited
Authority: Dundee City Council
Case No: 200500846
Decision Date: 8 February 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 023/2006 – Millar & Bryce Limited and Dundee City Council

Request for extant notices served under section 108 of the Housing (Scotland) Act 1987 – withheld on the basis of section 12(1) – excessive cost of compliance – failure under section 15 – duty to provide advice and assistance

Facts

Macroberts Solicitors (Macroberts), acting on behalf of their clients, Millar and Bryce Limited, requested details of notices which remain extant under or pursuant to section 108 of the Housing (Scotland) Act 1987 from Dundee City Council (the Council). The Council refused, citing section 12(1) of the Freedom of Information (Scotland) Act. The Council claimed that the cost of responding to the information request exceeded the prescribed amount set by the Scottish Ministers.

Outcome

The Commissioner found that the Council acted correctly in refusing to respond to Millar & Bryce's information request under section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the grounds that the estimated cost of complying with the request would exceed the amount prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations).

The Commissioner also found, however, that the Council failed in its duty under section 15 of FOISA, by failing to assist Millar and Bryce in establishing whether relevant information could be provided within the upper cost limit.

Appeal

Should either the Council or Millar & Bryce 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 notice.

Background

1. On 1 January 2005, Macroberts, acting on behalf of their clients, Millar & Bryce Limited, wrote to the Council requesting copies of "*all Notices or Orders made or served prior to 31 December 2004, and which remain extant as at 1 January 2005, under or pursuant to Section 108 of the Housing (Scotland) Act 1987*." Macroberts also requested that, where the information contained personal data, which is exempt under section 38 of FOISA, the information be provided with that data redacted.

2. Section 108 of the Housing (Scotland) Act 1987 (the HSA) provides an authority with the power to serve repair notices, requiring property owners to repair any house which is in a serious state of disrepair.

3. The Council responded on 28 January 2005, informing Macroberts that the information request was being refused. Section 12(1) of FOISA was cited as the reason for refusal. Section 12(1) states that public authorities are not obliged to comply with a request if the authority estimates that the cost of complying would exceed the amount prescribed in the Fees Regulations (currently set at £600).

4. Macroberts, again acting on behalf of Millar & Bryce Limited, replied to this correspondence on 28 January 2005. In their reply, Macroberts requested a breakdown of the costs calculated by the Council, and also invited the Council to review its decision to withhold the information.

5. The Council's response to this request for review, dated 24 February 2005, upheld the decision to withhold the requested information on the basis of section 12(1) of FOISA. The Council stated that the requested information was held in 540 separate files, and the retrieval of the information would require each file to be examined. The Council estimated that it would take a member of staff employed on the GS1/3 pay scale 30 minutes to examine each file and extract the information. As the cost per hour for staff members on this pay scale was stated to be £9.60, the cost of providing the information was estimated at £2,592.00, excluding reproduction charges.

6. On 4 March 2005, Macroberts submitted an application for decision to my Office on behalf of Millar & Bryce Limited. This application was allocated to an Investigating Officer.

The Investigation

7. The application was validated by establishing that Macroberts had made a request on behalf of their clients to a Scottish public authority, and had applied to me for a decision only after requesting the authority to review its decision.

8. In their application, Macroberts stated that they did not accept that the methodology suggested by the Council was plausible, as it suggested that the Council maintains no centralised records of the requested information, and the only method of extraction would be to review every file on the Council's system.

9. On 7 April 2005, my Office contacted the Council to invite comment and seek further information relating to the case. This information was provided on 6 May 2005. Following receipt and consideration of this response, the investigating officer visited the Council's premises in July 2005 to interview key staff directly and to examine the systems and processes used by the Council to store and access the relevant information. Additional information and comments were subsequently sought from the Council through various communications. The findings of this investigative work is summarised below.

10. The Council firstly informed my staff that the nature of the information requested by the applicant was misunderstood at the time of Macroberts' initial request, and that this misunderstanding was not identified during the Council's review of the information request. As a result, the Council stated that the initial calculation of fees on the basis of analysis of 540 separate files was erroneous.

11. The Council indicated that this misunderstanding arose as a result of the process used to filter information requests to relevant departments. This process led to the request being inappropriately summarised, with the result that the Council subsequently interpreted the request as being for details of all notices served under section 108 of the HSA, as opposed to only those notices which remained extant as at 1 January 2005.

12. The Council also informed my Office that, when the information request was reconsidered following receipt of the request for review, the case was again considered on the basis of the incorrect summary. The error was not, therefore, identified until Macroberts applied to me for a decision.

13. Following its reconsideration of the original information request, the Council informed my Office that the decision to withhold the information under section 12(1) of FOISA (due to the excessive cost of compliance) still applied, albeit based on different calculations than those supplied to Macroberts.

14. The Council stated that it has never had any requirement to maintain a centralised record of the information requested by Millar & Bryce Limited and therefore no such central records exist.

15. While the existence of extant notices under section 108 of the HSA are considered when preparing Property Enquiry Certificates, the Council stated that this is possible due to the provision of a property name and/or address, which the Council described as the "key" to interrogating their systems. Different departments would then use this "key" to interrogate their individual systems and retrieve the information required. The Council added that Millar & Bryce Limited were essentially requesting the same level of information, but without this "key" to accessing the data, and their systems were therefore not designed to deliver the information requested.

16. The Council indicated that there would essentially be two stages involved in responding to the request. The first would involve the identification of all notices served under section 108 of the HSA, while the second stage would involve establishing whether any such notices remain extant.

17. In order to identify notices served under section 108 of the HAS, the Council stated that it would be required to interrogate its 'UNIX' grant IT system in order to identify properties which have been the subject of a repair notice. The Council stated that, at the time of the initial request, there were 540 files identified where such a notice had been served. This list of properties would then be cross referenced with an internal 'Cardex' system in order to identify specific individual address and/or flat locations on which notices had been served. The Council stated, however, that the 'UNIX' system came into use in 1994, so no computerised records would exist prior to that date. The Council would therefore also have to review the relevant Housing Committee minutes from 1987 to 1994 in order to identify additional properties on which section 108 notices had been served, while a subsequent review of the Assessor's Roll would be required to identify unique addresses within those properties.

18. The Council stated that this work would be carried out by staff at the AP3 grade. AP3 staff's hourly rate was stated to be £20.75, but this figure was reduced to £15.00 for charging purposes, in line with the Fees Regulations. The Council stated that 16 hours of staff time would be required to identify properties from the UNIX system and cross-reference these with the Cardex files. In addition, the Council estimated that it would take approximately 4.6 hours to review the Housing Committee minutes, plus an additional 12 hours to cross reference the properties identified with the Assessor's Roll. The total amount estimated by the Council to identify addresses where notices have been served was therefore indicated to be £489.00.

19. While the above work would facilitate the identification of addresses in relation to served section 108 notices, it would not confirm whether any such notices had been complied with or withdrawn, and therefore whether they were extant. Additional work would therefore be required in order to identify those notices remaining extant.

20. The Council stated that this work would involve the Finance and Support Service Departments interrogating their systems and files in order to establish whether each notice remained extant. Given that the UNIX system identified at least 540 properties which had been subject to section 108 notices since 1994, an estimate was produced on the basis of these 540 properties. It was stated that it would take an average of 5 minutes to interrogate Council systems in relation to each property. It was therefore estimated that at least 45 hours of work would be required, which would be carried out by staff graded at GS3. Staff graded at this level were valued at approximately £12.56 per hour, so the estimate provided for this work was set at £565.00.

21. The total estimated figure submitted to this Office was therefore said to be £1,054.00 which, the Council pointed out, was in excess of the £600 upper cost limit prescribed by the Fees Regulations. As a result, the Council confirmed its belief that the request should be refused on the grounds of section 12(1) of FOISA.

22. The Council also stated that its Legal Division may also have to undertake additional work in relation to the request in circumstances where the above work could not identify whether a notice remained extant. The Council did not, however, provide an estimate of the cost of any such work, for the reason that the estimated figure was already significantly in excess of the prescribed limit.

The Commissioner's Analysis and Findings

The Council's Review

23. I would first like to comment on the Council's failure to recognise at review stage that its interpretation of the original request, and therefore the estimate of the work required in order to fulfil it, was erroneous.

24. The requirement to conduct a review under FOISA provides public authorities with the opportunity to consider the issues which arise from a particular information request afresh, providing that authority with the opportunity to reconsider its handling of the initial request, and assess whether that request has been processed fully in accordance with FOISA. In conducting its review in relation to this case, the Council failed to identify that the request had been misinterpreted, and that subsequently both the information identified, and the cost for providing it, was erroneous.

25. The Council has, however, informed my staff that its procedures have been reviewed following its experience of responding to this information request, and that, as a result of the misunderstanding in this case, the Council no longer summarises requests before delegation to an appropriate officer for response.

The Council's Methodology

26. In their application to me, Macroberts disputed the Council's assertion that it maintains no centralised records of the requested information, and that the only method of extraction would therefore be to manually review individual files.

27. As noted above, the Council subsequently revised its assessment of the nature of the request and of where the information could be correctly located, following Macroberts' application to me. Despite this, however, the core argument put forward by the Council remained the same. This was:

    - that the information was not centrally accessible
    - that retrieval of information would require a manual review of relevant files and
    - that the cost of this manual review would exceed the prescribed amount set out in the Fees Regulations.

28. In order to assess the validity of this position, the Investigating Officer visited the Council's premises to inspect the systems used and to interview key staff, to establish whether it was in fact the case that information cannot be extracted from the existing systems.

29. During this visit, the Council made it clear that it has never been asked to, nor has it had any need to, maintain a centralised record of notices served under section 108 of the HSA. It was also made clear that the existing Council databases are not designed to record details of such notices.

30. The Council also stressed in its submissions to my Office that it considers the methodology outlined above, as the only way in which the information requested by Macroberts could be accessed.

31. As a result of the submissions provided by the Council, and the subsequent site inspection carried out by my investigating officer, I am satisfied that the information requested by Macroberts cannot be readily accessed through the Council's existing IT systems. As such, I concur with the Council's position that the methodology proposed in paragraphs 16-20 above is the only way in which relevant information could be identified by the Council.

The Council's assessment of charges

1. As described above, the Council has stated that Millar & Bryce Limited's request should be refused on the grounds of section 12(1) of FOISA, which allows requests to be refused if they exceed the upper cost limit prescribed by the Fees Regulations. As noted in paragraph 21 above, the Council indicated that the cost of carrying out the work to respond to the request would be in excess of £1,054, significantly more than the upper limit of £600 set by the Fees Regulations.

33. However, it was noted by my Investigating Officer that the staff required conducting the work described in paragraphs 17-18 above appeared to be graded at a higher level than those staff required to respond to the Council's initial interpretation of the request (AP3 staff as opposed to GS1/3 staff). In addition, it was noted that the GS3 level staff required to carry out the work described in paragraph 20 above were charged at an hourly rate of £12.56, as opposed to the rate of £9.60 quoted in the Council's response to Macroberts' request for review. The Council was asked to provide an explanation for these discrepancies, which it duly did.

34. In response to the former point, the Council stated that this was a result of the initial misunderstanding over the nature of the request. The Council stated that when the misunderstanding had been resolved and the request was considered again, it was concluded that it would be necessary for the work to be carried out by a staff member at AP3 level. AP3 level staff were described as having the relevant skills and experience required to carry out the work, while GS1/3 level staff were described by the Council as providing clerical support. The Council therefore intimated that the additional work required to review and collate the various information sources would require staff with a detailed knowledge of the relevant department's records and systems, as well as the skills required to identify, assess and collate the information.

35. In response to the latter discrepancy, the Council stated that the original calculation of the hourly rate for GS1/3 staff was estimated incorrectly, in that it did not take account of holidays, training, sickness absence and other 'non-productive' time in calculating working hours. The revised rate of £12.56 accounts for such 'non-productive time'.

36. Before I comment directly on the Council's response, it should first be noted that, even if the Council had maintained that the entire scope of the work could be undertaken by GS1/3 staff charged at £9.60, the cost of responding to the request would still have exceeded the upper cost limit of £600 set down in the Fees Regulations. As such, the issue of the Council's subsequent amendments to the calculation of Fees would not have any direct impact on the outcome of the case. However, given that the Council significantly amended its assessment of the fees following notification of the commencement of the investigation, it is appropriate to comment on whether, under the circumstances, such an amendment should be considered to be reasonable.

37. With regard to the issue of staff grading, I find that, in this case, it is appropriate that the work undertaken be carried out at staff at the AP3 level and that, therefore, the levied charge of £15 per staff hour to identify individual property addresses is appropriate. I agree that the this work would require members of staff with detailed knowledge of the relevant systems, as well as knowledge of the process involved in issuing notices or orders under section 108 of the HSA.

38. In addition, I also agree that the higher rate of £12.56 for GS1/3 staff is appropriate, in that it is appropriate for the Council to include costs of such 'non-productive time' in the calculation of its hourly rates.

39. It should, however, be noted by the Council that such amendments are only acceptable under FOISA provided that they do not increase the total fee beyond that originally estimated by the authority. In this case, however, it is clear that the £1,054 actual cost of responding to the information request is significantly less than the original estimate of £2,592.00, and as such the above amendments are considered to be appropriate.

40. To conclude then, I am of the opinion that the Council acted correctly in refusing Millar & Bryce Limited's information request under section 12(1) of FOISA, on the grounds that providing a response to the request would exceed the upper cost limit set out in the Fees Regulations.

The duty to advise and assist

41. I would finally like to comment on the Council's approach to the duty to advise and assist provided by section 15 of FOISA. Under section 15, authorities have a duty to assist those making information requests. The 'Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002' (the Section 60 Code) provides authorities with guidance on the interpretation of this duty.

42. With regards to cases where the cost exceeds the upper limit set out in the fees regulations, paragraph 20 of the Section 60 Code makes clear that authorities should aim to provide:

    "An indication of what information could be provided within the cost ceiling, in instances where a request would be refused on cost ground."

43. While it is not immediately clear whether, in this case, meaningful or valuable information could have been provided within the upper cost limit, nevertheless the Council should have, in its communications with Macroberts, attempted to establish whether the request could have been rephrased or limited in any way in order to facilitate compliance within the upper limit.

44. In this case however, the Council failed to do so and, as a result, failed in their duty under section 15 of FOISA.

Decision

I find that the Council acted correctly in refusing to respond to Millar & Bryce Limited's information request under section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the grounds that the estimated cost of complying with the request would exceed the amount prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.

I also find, however, that the Council failed in its duty under section 15 of FOISA, by failing to assist Millar and Bryce in establishing whether relevant information could be provided within the upper cost limit.

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

Kevin Dunion
Scottish Information Commissioner
8 February 2006