



Scottish Information
Commissioner

Decision 183/2006 Mr Craig McLaren and Midlothian Council
<i>Request for all information relating to CMT and Labour Group minutes</i>

Applicant: Mr Craig McLaren
Authority: Midlothian Council
Case No: 200501434
Decision Date: 11 October 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 183/2006 Mr Craig McLaren and Midlothian Council

Request for all information relating to CMT minutes and Labour Group minutes – Labour Group minutes section 17(1) information not held applied – CMT minutes section 30(b) and section 30(c) applied – section 12(1) costs exceeded prescribed limit – section 14(2) considered whether application vexatious

Facts

Mr McLaren wrote to Midlothian Council (the Council) requesting all information regarding CMT and Labour Groups minutes of meetings for the period January 2004 to January 2005. In response the Council advised that the CMT minutes were exempt by virtue of section 30(b) and 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA) and that the Labour Group minutes related to party political activity and were therefore not accessible under FOISA. Mr McLaren was dissatisfied with this response and sought a review. The Council upheld its original decision on review and confirmed that the Labour Group minutes were not held under section 17(1). During the course of the investigation the Council indicated that the supply of the CMT minutes would exceed the prescribed limit of £600.

Outcome

The Commissioner found that the Council had failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in failing to issue a notice under section 16(4) of FOISA indicating that the cost of complying with the request for CMT minutes would exceed the prescribed limit of £600.

The Commissioner found that the cost of complying with the request for CMT minutes exceeded the prescribed limit as set out in section 12(1) of FOISA and that therefore the Council was under no obligation to comply with the request.

The Commissioner found that the Council had complied with Part 1 of the FOISA in advising the applicant that the Labour Group minutes were not held by the Council under section 17(1) of FOISA.



Appeal

Should either Midlothian Council or Mr McLaren wish to appeal against this decision, there is a right to 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 21 January 2005 Mr McLaren wrote to Midlothian Council (the Council) and requested the following information:
 - All information regarding CMT and labour group minutes of meetings for the last year
2. The Council responded to this request on 2 February 2005. The Council addressed the two requests separately:

- CMT Minutes

The Council advised that the Corporate Management Team (CMT) comprises the Chief Executive and the Directors of the six Council Divisions. It meets normally on a fortnightly basis to discuss a wide range of business relating to the work of the Council. The Council indicated that it was important that within this forum members could have free and frank discussions when looking at policy options. The Council advised that the minutes of the CMT were not therefore made publicly available. The Council claimed that the exemptions relating to section 30(b)(i) and (ii) and section 30(c) applied. It advised that it did not consider that it would be in the public interest to release the CMT minutes.

- Labour Group Minutes

The Council cited my guidance in response to Mr McLaren which indicated that information held by a councillor in relation to his/her party political or constituency activities will not be accessible under FOISA.

The Council also referred to the Councillors' Code of Conduct which states that:



“Party group meetings, whilst they form part of the preliminaries to Council decision-making, are not empowered to make decisions on behalf of the Council. Conclusions reached at such meetings do not therefore rank as Council decisions and it is essential that they are not interpreted or acted as such.”

The Council claimed that the Labour Group minutes requested related to party political activity and were not therefore accessible under FOISA.

3. Mr McLaren was dissatisfied with this response and on 21 March 2005 he requested a review of these decisions.
4. In its notice of review of 8 April 2005 the Council confirmed its original decision. In respect of the Labour Group minutes the Council advised that the group meetings were party political and in no circumstances capable of conducting Council business or taking Council decisions. The Council advised that it could have served a notice under section 17 stating that it did not hold this information, the Labour Group minutes instead being held by the Group as such for its own party political purposes. The Council reaffirmed its position that the CMT minutes were exempt by virtue of section 30(b) and section 30(c).
5. Mr McLaren was dissatisfied with this response and on 11 April 2005 he applied to me for a decision. Mr McLaren was dissatisfied because he considered that meetings held in Council buildings should be available for public scrutiny.
6. The case was allocated to an investigating officer.

Investigation

7. Mr McLaren's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
8. The investigating officer contacted the Council on 26 April 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by Mr McLaren's case and to provide supporting documentation for the purposes of the investigation.



9. In particular, the Council was asked to supply copies of the information being withheld from Mr McLaren, a detailed analysis of the application of the exemptions to the information withheld and information about how its review was carried out. The Council was also asked a series of questions regarding Labour Group meetings, where these meetings took place and the secretariat support received for those meetings.
10. The Council responded to this request on 11 May 2005. The Council supplied copies of the minutes and set out its submissions in respect of section 30 and the application of the public interest test. The Council also provided information in response to issues relating to Labour Group meetings.
11. Mr McLaren made two requests for information:
 - All information regarding CMT minutes of meetings over the last year
 - All information regarding Labour Group minutes of meetings over the last year
12. Mr McLaren had asked for all information regarding CMT and Labour Group minutes of meetings. The investigating officer therefore sought Mr McLaren's clarification on what he meant by "all information." Mr McLaren confirmed that he was seeking the minutes as well as any supporting documentation forming the basis of the meetings (that is, supporting papers). He confirmed that he was seeking the minutes from January 2004 to January 2005.
13. There followed extensive correspondence between the investigating officer and both parties, largely for the purposes of clarification.
14. As each request raises separate issues I will consider them individually.

Commissioner's Analysis and Comments

Request for Labour Group minutes

15. In its response to Mr McLaren's request for Labour Group minutes the Council indicated that the information was not available under FOISA. On review the Council indicated that it could have issued a notice under section 17(1) of FOISA indicating that the Council did not hold the information requested. In its response the Council cited my guidance which provides that information held by a councillor in relation to his/her party political or constituency activities will not be accessible under FOISA. The Council also cited the relevant section of the Councillors' Code of Conduct (set out above).



16. Nonetheless, my guidance on this matter is just that and I am obliged to consider whether the Council holds the Labour Group minutes for the purposes of Mr McLaren's request for information. FOISA states that a request can be made for any recorded information held by a Scottish public authority. I have stated that councillors are not "Scottish public authorities" under FOISA. Therefore an information request made to a councillor is not valid. However, I am required to determine whether a request made to a Council for information relating to the political activities of councillors is held by the Council for the purposes of FOISA.
17. In response to questions from the investigating officer the Council confirmed that the meetings took place on Council premises. The Council also advised that members of staff, usually Directors or other senior offices could attend the Group meetings by invitation only and were there to provide the group with information or explanations about any problem issues. Such staff, the Council advised, remained to present their information and answer any questions and then left. Two members of staff are employed full time by the Council but are dedicated (on a full time basis) to providing administrative and clerical services to the Group and its members.
18. Further information was sought from the Council about the storage of papers relating to the Group meetings. The Council advised that although the Admin staff took the minutes at the meeting all papers for the meeting were stored on the Group Secretary's computer. I understand that the Group Secretary is an elected member of the Council and is responsible for the production of agendas and other papers for Group meetings. The Council advised that although the two admin staff could access the computer and print off copies, they did not store minutes or group papers on their own computers nor did they retain copies. The Council advised that if members required copies of past papers they would approach the Group Secretary.
19. The Council advised that papers produced for the Group's purposes were not subject to Council retention policies.
20. I am content that this information is held by the Council on behalf of the Group in terms of section 3(2)(a)(i) of FOISA and therefore is not held by the Council for the purposes of FOISA.

Request for CMT minutes

21. Mr McLaren also requested all information regarding CMT minutes of meetings.



Application of the exemptions (1)

22. The Council had applied section 30(b) and section 30(c) to all of the CMT minutes of meetings. The investigating officer advised the Council that the applicant had requested information rather than documents. Therefore an authority must look at the information contained within the documents. The Council was advised that section 30(b) and section 30(c) could not be used to withhold whole categories of documents and that, in each case, the authority would need to consider the information contained in each document and whether it could be released.
23. The Council was therefore asked to provide information on how section 30(b) and section 30(c) applied to the information contained within each set of minutes.
24. The Council was advised that Mr McLaren was seeking the minutes and all supporting papers.

Supply of information over prescribed limit

25. At this stage in the investigation, the Council indicated that the cost of supplying the information to Mr McLaren would exceed the prescribed amount of £600 as set out in the Freedom of Information (Fees for Required Disclosure) (Scotland) 2004 (the Fees Regulations) for the purposes of section 12 of FOISA. The Council advised that it would involve copying and redacting 28 CMT minutes and all supporting papers. The Council advised that the direct and/or indirect costs incurred in locating, retrieving and providing the information could be charged. The Council was also of the view that redaction should be included in such costs.
26. As a result, the Council was asked to provide a breakdown of the estimated costs involved in supplying this information. The Council was reminded that whereas it could charge for the physical deletion of material it could not charge for determining whether information should be released or not.

Timing of application of section 12(1)

27. The Council had not raised the issue of costs when Mr McLaren first made his request for information. Therefore, I sought legal advice on whether section 12(1) could be raised after the conclusion of the initial request for information and during the course of the investigation.
28. Section 12(1) of FOISA states that 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 supplying with the request would exceed the prescribed amount. The fees regulations set the prescribed amount at £600.



29. Legal advice I received indicated that section 49(3) of FOISA requires me in considering the application for a decision on whether a request for information was dealt with in accordance with Part 1 of FOISA to give notice of the application to the authority and to invite their comments. Those comments could relate to the cost of supplying the information requested.
30. The legal advice indicated that due to the wording of section 12(1) I cannot direct an authority to release information where I am satisfied that the application of section 12(1) is valid, even where this matter has only been raised by an authority during the course of the investigation. As a result, my office was obliged to consider this issue raised by the Council.

Consideration of the application of section 12(1)

31. The Council supplied a breakdown of the estimated costs that would be incurred in the supply of the CMT minutes and supporting documentation requested by Mr McLaren.
32. The Council's breakdown listed the number of sheets of each CMT agenda, supporting paper and set of minutes that would require photocopying. This amounted to 4825 pages. The Council was charging 20p per sheet for photocopying with the first 40 sheets at £3.00. The Council also estimated the costs for labour to photocopy, package and take the information to the Post Office. The Council estimated a number of further miscellaneous costs for folders, dividers and postage.
33. The Council advised that this was a reasonable estimate of the time required to copy and package the material with no additional allowance for the necessary costs of redacting the minutes and supporting papers. The total estimated costs were £1,131.50.
34. A copy of this breakdown was supplied to Mr McLaren. Subsequent correspondence between my office, the Council and Mr McLaren discussed the costs being applied by the Council and whether they were reasonable.

Miscellaneous costs and labour costs for packaging and taking information to the post office

35. Mr McLaren indicated that he did not require folders and dividers and that he would be willing to attend the Council offices and take delivery of the information. These costs were therefore removed from the total projected costs.



Staff costs for photocopying

36. The Council had estimated staff costs at £15 per hour for photocopying, packaging and taking the information to the Post Office. The Council was asked to justify the rate per hour in subsequent correspondence given that these were ordinary administrative tasks. The Council was reminded that the level of £15 per hour set out in the fees regulations was an upper limit.
37. The Council advised that this figure was based on someone at AP3 level (the Central Services Supervisor who is in charge of the photocopying section) doing the work because of the confidential nature of the material. The Council indicated that the basic copying (under supervision), packaging and delivery could have been carried out by an experienced assistant, such as someone at the top of the basis GS1-2 grade. The Council advised that the top of the GS1-2 grade paid £7.81 per hour. Adding on the maximum employer's NI and superannuation costs of 31.4% of gross pay and a further 34% oncosts for premises, transport, supplies and services etc plus 10% for management and supervision, gave an uplift of 75.4% on basic salary.
38. My office challenged the oncosts being made by the Council and there was detailed correspondence between the Council and my office on this matter. The estimated staff costs for photocopying subsequently became superfluous when it transpired that the cost of 20p per sheet for photocopying incorporated labour costs. The Council accepted that it could not make a separate charge for labour for photocopying in addition to the 20p charge. As a result, it is not necessary for me to reach a decision on the oncosts the Council was attempting to make. Suffice to say that I will require detailed evidence from an authority on the legitimacy of any oncosts.

Photocopying charges

39. The Council had indicated that it was charging 20p per sheet for photocopying a total of 4825 sheets. The Council was asked to justify the amount of 20p per sheet and to advise whether sheet referred to both sides of paper or one side of a sheet of paper.
40. The Council advised that sheet meant page (as in one side of paper) and that therefore there were 4825 pages and the cost being applied was per page.
41. The Council advised that when reviewing the Access to Information provisions the Council approved a standard charge of 26 pence per copy sheet plus postage for copies of agenda, reports and minutes to individuals with a standard charge of £5.25 per request for retrieval. This charge was subsequently reduced and rounded down to 20p per sheet for photocopying under FOI provisions with the first 40 sheets provided at £3.



42. The Council advised that the original calculation of 26p per page was a global charge to cover all aspects including an allowance for staff time and the costs of operating and maintaining the machine, and to a lesser extent, costs of paper, toner, staples etc. The Council indicated that it was not calculated to the exact penny but was a reasonable projection aimed at recovering a fair contribution from the recipient of this service.
43. The Council indicated that the figure of 20p per page covered the labour at each stage of the process and the cost of the labour of every member of staff involved. This included locating and retrieving the information, removing the information from various files or folders and removing all staples, copying all the material, sorting, stapling and complying and supplying all the completed copies. The original information would then have to be replaced in the appropriate files/folders.
44. In support of the figure of 20p per page the Council referred to the charges set by the Law Society of Scotland which permits solicitors to charge at an equivalent rate of 24 per sheet. The Council also indicated that the charges had been approved by my office as part of the Council's publication scheme.
45. There has been detailed correspondence between my office and the Council on the photocopying charges that the Council is seeking to apply in this case. I will address the points raised below.
46. The Council has argued that the 20p per page charge was approved as part of its publication scheme. It is worth noting that the charges that can be made for information supplied under a publication scheme will not necessarily meet the requirements of the Fees Regulations.
47. Section 23 of FOISA, which provides for the adoption and maintenance of a publication scheme, states simply that a scheme must set out whether the information is available to the public free of charge or on payment. It is silent on the level of charges that can be made by an authority. When considering draft publication schemes my office approved schemes where the photocopying charges appeared to be reasonable and did not normally require an authority to justify those charges or to explain how they were calculated. However, we did not accept charges where they appeared *prima facie* excessive and in such cases, would ask the authority to justify their costs. In approving the schemes my office also took into account my view that separate staff costs could not be recovered for supplying information under the publication scheme on the basis that the information should be easily accessible.



48. By contrast, the Fees Regulations govern charges that can be made when responding to section 1 requests. The regulations permit an authority to charge for the costs the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested. Annex 3 to the *Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002* (Section 60 Code of Practice) makes clear that the projected costs must be based only on the estimated actual costs to the authority. Therefore, in considering applications under section 47(1) I must be satisfied that the estimated costs accurately reflect the task being undertaken. As a result, it is possible that the charges appearing in an approved publication scheme will not meet the strict requirements of the fees regulations in cases where an authority is unable to demonstrate that the amount charged reflects the actual cost to the authority.
49. The Council has also argued that charges being made by other authorities are not necessarily based on a scientific assessment. The Council indicates that some authorities may charge 10p per page simply because it is an easy rounded figure. I accept that this may be the case in respect of certain authorities. However, the Council must also see that where Council X decides that 10p per page is a reasonable charge to cover its photocopying that questions will naturally be raised about the legitimacy of Council Y's charges of 20p per page. The reality is that an authority charging more than an equivalent organisation will inevitably be required to justify this figure.
50. The Council indicated that the 20p per page was reduced from 26p and seemed to imply that this was a further reason why this charge was justified. However, the Council was unable provide information about how the original figure had been calculated. Simply because the figure had been approved by Council it does not follow that it will be acceptable under the terms of the Fees Regulations. As I said, an authority will need to be able to justify this figure and show that it reflects the actual cost of undertaking the task.
51. I do not propose to specify the amount the Council may charge for photocopying information. It is for the authority to calculate this figure. However, I consider that the Council has failed to demonstrate that 20p per page reflects the actual cost of carrying out this task.



Charges for redaction

52. The Council also submitted that costs would be incurred in redacting material from the information requested by Mr McLaren. The Council advised that the consideration of the material and the actual deletion would take place at the same time as it would make no sense for a senior member of staff to consider the information and indicate which parts should be withheld only for a junior member of staff to carry out the physical deletion of material. The Council estimated that it would take 40 working hours based on 960 pages per day or 120 pages per hour. The Council indicated that it would consider that half of this time would be consideration of the material and half of this time would be redaction, that is, physically editing with accompanying explanation.
53. The Council advised that this task would require the involvement of senior officers. The task would either be carried out by the Council Secretary or the Head of Law and Administration and that therefore the upper limit of £15 per hour would apply (given that the usual hourly rate for these members of staff would exceed this figure). The Council advised that as a result the total amount for redaction costs would be £300 (£15 x 20 hours).
54. The Fees Regulations make clear that the projected costs are based on the authority's own estimate of the costs that would be incurred. In calculating this figure, therefore, the Council may envisage a level of redaction that would not ultimately be accepted or upheld by me. However, at this point, I am not required to assess the material being withheld and the costs are, therefore, based on the Council's own estimates.
55. Again it would appear that the Council's estimated time for physical deletion of the material is high as it seems to me unlikely that the time spent physically redacting the material will be equal to the time spent actually assessing the material.
56. However, in coming to a conclusion on this issue I have taken into account the volume of information requested by Mr McLaren in this case which amounts to almost 5000 pages. Whilst I have questioned the level of cost which the Council says would be incurred in providing the information requested, I do accept that supply of this information to Mr McLaren will involve retrieval, reproduction, collation of the material and, the Council estimates, some redaction of the information requested. Even if the photocopying was carried out at 10 per page this, combined with some redaction, would still take the supply of this information over the prescribed limit. In the circumstances, I accept that the cost of supplying this information requested would exceed £600.
57. As a result, I cannot direct the Council to release the information to Mr McLaren.



58. Mr McLaren can, of course, restrict his request and instead seek this information over a reduced period of time. A number of other matters were raised by the Council during the course of the investigation and so that there is no further delay if Mr McLaren chooses to submit a reduced request for information I consider it helpful to address these matters now.

Application of section 14(1)

59. Section 14(1) of FOISA provides that section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
60. During the course of correspondence between the Council and my office the Council implied that Mr McLaren's request for information was vexatious. In its letter to me of 26 April 2006 the Council indicated that it claimed "an absolute exemption in that the whole circumstances of this application and in particular Mr McLaren's unreasonable refusal to identify the information required, now demonstrate that his application is vexatious."
61. I consider it helpful to address this matter now so that it does not become an issue if Mr McLaren subsequently decides to make a restricted request.
62. The Council has indicated that it considers that Mr McLaren has a grudge against the Council because of previous dealings and that in making this request he may be attempting to tie up Council time and resources. The Council advised that one Mr McLaren's wide-ranging FOI applications was deemed vexatious by the Council.
63. The Council's frustration apparently stems from Mr McLaren's request for all minutes over the period of a year. At one stage the Council asked whether Mr McLaren would be willing to restrict his request to a specific subject matter. The Council expressed surprise that Mr McLaren would wish to see redacted copies of the Minutes if it was ultimately concluded that parts of information requested were in fact exempt.
64. Mr McLaren has advised me that he is seeking this information because he considers that meetings that take place on Council property should be open to public scrutiny. He considers that this information should be made available on public interest grounds. It is for this reason that he is not willing to restrict his request to a particular subject matter.
65. Mr McLaren has indicated that he would be willing to restrict his request to information that could be supplied within the £600 limit. In this way, he would seek all information from January 2004 until that date when the £600 "pool" had been exhausted. Mr McLaren has also accepted that it might be necessary to redact some parts of the information where this information was considered exempt.



66. I consider Mr McLaren's request to be reasonable. He considers that meetings of the Corporate Management Team should be open to public scrutiny and is therefore seeking access to this information over the past year. He is not required under FOISA to identify particular areas of interest or justify why he wishes to see this information.
67. A number of public authorities, including SEPA and Audit Scotland, publish the minutes of their management group meetings on their websites. The Scottish Executive has been doing this since the beginning of 2005. Where information or a specific paper is considered to be sensitive it is simply redacted. My own Office publishes its Management Group minutes.
68. Where an authority considers that the cost of supply of the information exceeds £600 it can rely on the Fees Regulations. In all other cases, an authority is obliged to respond unless it can demonstrate the request to be vexatious.
69. I consider Mr McLaren's request to be reasonable and do not accept the Council's contention that this request for information and subsequent application are vexatious.

Application of the exemptions (2)

70. The Council has argued that the whole context in which CMT documents are prepared and the nature of the forum in which they are considered supports the view that the minutes and supporting documents would be exempt as a category. The Council provided further detail in support of this view in its correspondence with my office.
71. In order that this does not become an issue in the event that Mr McLaren seeks to restrict his request for information I consider it helpful to set out my position on this matter.
72. Mr McLaren's request was for information rather than documents. Therefore an authority must look at the information contained within the documents. Section 30(b) and 30(c) cannot be used to withhold all minutes, agendas and supporting papers without reference to their actual content. In each case, the authority needs to consider the information contained in each document and consider whether it can be released. Even if information is exempt the authority is still obliged to go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding it.

Conclusion

73. In conclusion, therefore, I accept that the cost of supplying the information to Mr McLaren would exceed £600. As a result, the Council is not obliged to comply with the request.



74. I do not find the request or application to be vexatious under section 14(2).

Decision

I find that the Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in failing to issue a notice under section 16(4) of FOISA indicating that the cost of complying with the request for CMT minutes would exceed the prescribed limit of £600.

I find that the cost of complying with the request for CMT minutes exceeded the prescribed limit as set out in section 12(1) of FOISA and that therefore the Council was under no obligation to comply with the request.

I find that the Council had complied with Part 1 of the FOISA in advising the applicant that the Labour Group minutes were not held by the Council under section 17(1) of FOISA.

Kevin Dunion
Scottish Information Commissioner
11 October 2006