

Decision Notice 049/2021

Rent paid for office space at Marischal Square

Applicant: The Applicant

Public authority: Aberdeen City Council

Case Ref: 202000137



Scottish Information
Commissioner

Summary

The Council was asked about Aberdeen Journals Ltd's lease of office space at Marischal Square, Aberdeen.

The Council provided the Applicant with some information, but withheld other information on the basis that disclosure would prejudice commercial interests. It also told the Applicant it did not hold some of the information asked for and that providing other information would exceed the cost ceiling of £600.

The Commissioner investigated and found that the Council had partially complied with FOISA in responding to the request. However, he found the Council had failed to notify the Applicant that it did not hold information falling within one part of her request and had failed to offer her reasonable advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 26 May 2019, the Applicant made a request for information to Aberdeen City Council (the Council). The information requested was:
 - a) the market value per square metre of office space in Marischal Square;
 - b) the amount the Press & Journal is paying per square metre;
 - c) if that amount is less than the market value, all correspondence concerning how the lower rate was arrived at;
 - d) minutes of any committee meeting at which this subject and rental rate was mentioned that are not in the public domain (request d)(i)) and all correspondence between Aberdeen Journals Ltd companies (known commonly as Evening Express and Press & Journal and any AJL entities) from 1 January 2017 to 26 May 2019, including invoices, agreements, memos, formal legal documents, emails, letters, memos, phone call records (request d)(ii));
 - e) whether Council personnel, elected officials or staff (including officers and the Chief Executive) have accepted any discounts, hospitality, gifts or favours from Aberdeen Journals Ltd and its companies between 1 January 2017 the date of the request.

2. The Council contacted the Applicant on 5 June 2019. It sought clarification of request d), and asked the Applicant if she was seeking correspondence held by the whole Council or within a particular service.
3. On 9 June 2019, the Applicant confirmed that she was seeking correspondence held by the whole Council.
4. The Council acknowledged receipt on 13 June 2019 and, while it apologised for the delay on 9 July 2019, failed to respond to the Applicant's request.
5. On 23 August 2019, the Applicant wrote to Council requesting a review of its decision on the basis that the Council had failed to provide her with the information she had requested.
6. Following further correspondence between the Applicant and the Council, the Applicant wrote again to the Council on 18 September 2019, reiterating that she wanted the Council to conduct a review of its failure to respond to her request.
7. The Council notified the Applicant of the outcome of its review on 20 September 2019, apologising for the lateness of its response. It advised her that applicants can only make one request for review before appealing to the Commissioner's office, and the review can either be based on lateness or content. It suggested that the Applicant may wish to withhold her review based on the lateness of the Council's response, and to use her review opportunity to challenge the Council's response. The Council:
 - withheld information falling within the scope of requests a) and c) under section 33(1)(b) of FOISA
 - provided the Applicant with information in response to request b)
 - refused to comply with request d) on the grounds of excessive costs, arguing that section 12(1) of FOISA applied to that request
 - confirmed that no gifts, discounts, hospitality had been accepted in response to request e)
8. Later that day, the Applicant wrote to the Council on the 20 September 2019, expressing dissatisfaction with the outcome of its late response, and essentially seeking another review. The Applicant's reasons for dissatisfaction with the Council's response were supplemented on 24 September 2019.
9. The Council responded to the Applicant's latest requirement for review on 18 October 2019. It apologised for the length of time and:
 - provided information in response to request a)
 - applied the exemption in section 33(1)(b) to request b)
 - maintained its reliance on section 33(1)(b) of FOISA to withhold information captured by request c)
 - notified the Applicant, under section 17(1) of FOISA, that it did not hold information falling within the scope of request d)(i) (committee minutes not in the public domain) and
 - upheld its decision to refuse to comply with request d)(ii) under section 12(1) of FOISA

- in relation to request e), directed the Applicant to the Council's published Register for Gifts and Hospitality, explaining that only gifts with a monetary value of less than £50 would be excluded from the register.
10. On 26 January 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Council's review because it did not provide her with all of the information she requested and it did not offer her advice and assistance to narrow the scope of request refused under section 12(1). In later correspondence, the Applicant also expressed dissatisfaction with the Council's reliance on section 17(1) of FOISA.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
12. On 3 February 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions on the provisions in Part 1 and exemption in Part 2 of FOISA it was relying on to withhold information from the Applicant.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Scope of the investigation

15. The Applicant made five requests for information: a), b), c), d) and e). The Commissioner will not investigate the Council's handling of request e) as the Applicant did not express dissatisfaction with the Council's response to this request in her application.
16. During the investigation (18 September 2020), the Council provided the Applicant with a "heads of terms" document that provided the Applicant with the information she had asked for in request b). Although this information has now been disclosed to the Applicant, the Commissioner will consider whether the Council was correct to withhold this information at the time of her request.

Withheld information

17. In this case, the Council is withholding two documents (a sublease and a minute of variation) under section 33(1)(b) of FOISA. The Council has argued that these documents fall under the scope of requests b) and d). The "heads of terms" document, that the Council provided to the Applicant on 18 September 2020, was also withheld under section 33(1)(b) at the time of her request, and this will also be considered with the withheld information.

18. The Commissioner has reviewed the content of the sublease and the minute of variation, along with the terms of request b) and request d)(ii) and he is not satisfied that the sublease is captured by request b). Request b) is simply seeking the amount that AJL Companies is paying *per square metre*, and this information is not contained within the sublease. As a result, the Commissioner does not accept that the sublease falls within the scope of request b). However, the information asked for in request b) does appear in the minute of variation and the heads of terms document.
19. The Commissioner also considers that the sublease, minute of variation and heads of terms documents are “formal legal documents” and that they therefore all fall within the scope of request d)(ii).
20. The Commissioner will now consider whether the Council was correct to withhold the two documents (the minute of variation and heads of terms) under section 33(1)(b) of FOISA, at the time of the Applicant’s request.

Section 33(1)(b) - Commercial interests and the economy

21. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
22. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - i) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - ii) the nature of those commercial interests and
 - iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
23. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

Council’s submissions

24. The Council submitted that it holds Marischal Square as an investment asset which is required to deliver a market return on the letting of the space within the scheme. Therefore, the information requested by the Applicant relates to the Council’s own commercial interests.
25. The Council argued that disclosure of the information at the time of the request (including the heads of terms which it has since provided to the Applicant) would have substantially prejudiced the Council’s negotiating position for future transactions at Marischal Square.
26. It explained that at the time of the request being made, AJL Companies were within a rent-free period, which was one of the incentives offered to all prospective customers at that time.
27. The Council explained that, when a tenant takes on a new commercial property lease, the terms of that lease will generally be governed by the open market, i.e. how much demand there is for the property type, the location, condition etc. In most property markets it is normal for a tenant to receive an incentive to take on a new lease of a property. This incentive can

take the form of a rent-free period, a capital contribution, agreement that the landlord would undertake works, increased flexibility in lease term (increased tenant break clauses) and other similar offerings.

28. The size and form of the incentive will depend on the terms of the lease being agreed to along with the prevailing market conditions. For example, a lease for 10 years with no breaks will generally receive a larger incentive than a lease for five years. Other factors that might affect the size of an incentive a landlord might be prepared to offer is the financial standing of the company, the level of headline rent agreed, works agreed to be undertaken by the tenant and the speed a tenant is prepared to take occupation of the space. Therefore, taking one element of the transaction (a rent-free incentive) and having that in the public domain reduces the options for the Council to form a deal that would be acceptable to both the prospective tenant and landlord.
29. The Council argued that, if it had been required to disclose the details of the rent-free period that AJL Companies had received, then all future tenants looking to negotiate would have started their negotiating position with a request for the same rent-free period. Future tenants would then have looked to negotiate additional incentives on top of this (using the rent-free period as a benchmark from which negotiations would start). If this occurred, it would weaken or prejudice the Council's negotiating position and would result in the Council either having to agree to increased incentives or lose tenants to competing office space.
30. The Council contended that, if it had to provide more incentives to prospective tenants than the market normal, it would affect its ability to generate best value.
31. The Council submitted that AJL Companies' rent-free period ended in February 2020 and, since then, the company has been paying the market value rent.
32. The Council provided the Commissioner with details of tenants who had not completed leases at the time the Applicant made her information request, but which now occupy Council office space. The Council contended that disclosure of the information at the time of the request would have affected negotiations with these tenants.
33. The Council explained that all tenants at Marischal Square have benefited from an incentive package, and that most tenants have received this in a mixture of rent-free, reduced rent payments or capital contributions.
34. The Council explained that it was able to disclose the heads of terms to the Applicant due to the passage of time since the transaction concluded. It noted that changes in the property market govern when past transactional information becomes less relevant in negotiations. The Council explained that the recent, dramatic drop in the oil price, followed by the effects of the COVID-19 pandemic on the demand for office accommodation, significantly affected the Aberdeen office property market. This has resulted in the relevance of the past transactional information to future negotiations being reduced.

Submissions from the Applicant

35. The Applicant submitted that she had serious concerns about the accuracy of data coming out of the Council concerning Marischal Square's finances. She argued that, because it is public money, the public needs transparency to see that as much money as is reasonable is being charged in rent.

Commissioner's findings on section 33(1)(b)

36. Having considered the Council's submissions, the Commissioner is satisfied that the interests identified by the Council are commercial interests for the purposes of this exemption. The information sought comprises the commercial rent achieved by the Council from one tenant at Marischal Square.
37. The Commissioner accepts that the disclosure of this information would have been likely to undermine the Council's ability to obtain value for money when renting to future tenants, as each tenant would have expected the deal offered to AJL Companies, as a minimum offer from which to negotiate. This would prejudice substantially the commercial interests of the Council by allowing competitors and prospective tenants an insight into the rent free option that had been obtained by AJL Companies. The Commissioner considers that disclosure of this information, at the time of the request, would have restricted the Council's ability to generate financially lucrative rental agreements with future clients.
38. Accordingly, in this case, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA was engaged in relation to all of the information withheld by the Council in relation to request b) (namely, the heads of terms and the minute of variation).

Public interest test

39. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

The Council's comments on the public interest

40. The Council acknowledged that there is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. Members of the public may be interested to know how much rent is being paid by tenants at Marischal Square for the reasons above.
41. The Council explained that Marischal Square is an investment asset developed to regenerate a vacant site within Aberdeen city centre, but also to generate a return to the Council. The information requested is commercially sensitive as the Council competes with other landlords in the city for tenants and negotiates the terms of leases with prospective tenants. As stated previously, the likely harm of releasing the information would have resulted in the Council at best securing future lettings on terms potentially less favourable and at worst had competing landlords know the full details of the lease packages that were being offered by the Council and being able to better these deals when pitching to tenants and might have seen tenants going to alternative buildings in the city and resulted in fewer lettings and less income to the Council.
42. Further, the Council argued that it is in the public interest for it to withhold commercially sensitive information in order that the Council can be in the strongest commercial position to ensure best value for money is delivered from the development. It commented that any surplus income from the development will be used by the Council as general revenue to support the delivery of public services.
43. The Council acknowledged that the public interest can relate to the public good, and what is in the best interests of the public. Not releasing the information at the time was considered

to be in the public interest due to the likely harm to the negotiating position of the Council and the significant effect which this would likely have had on the Council's financial position.

Applicant's comments on the public interest

44. The Applicant made a number of arguments in favour of finding that the public interest favoured disclosure. Not all of these arguments are detailed here, but they have all been taken into account.
45. The Applicant argued that, once a contract has been issued by a public body, and public money was involved, then there is no more commercial confidentiality and the public have a right to know how their money was used. She argued that she was not the only person seeking this information, and referred to an email from the Council indicating that the information had been subject to previous FOI requests. The Applicant contended that withholding the information eroded public confidence and the public's right to know.
46. She considers that the fact that a news outlet is now dependent on the Council for a subsidised rent (in her view, the Council would not have called what AJL Companies now pays a "headline rent" if there was no previous discount) has led to serious ethical and democratic compromises to the harm of the taxpayer. She said this was evidenced by AJL Companies' newspapers' coverage of the city's Marischal Square plan moving from "sceptical" to "glowing praise" once they became tenants. The Applicant noted that she could supply newspaper cuttings to support this conclusion.
47. The Applicant argued that the taxpayer had paid to create the Marischal Square complex in a city which was filled with empty offices. She claimed the taxpayer was told it could not back out of building Marischal without incurring huge financial penalties, but, in her view, this was not true.
48. The Applicant submitted that the taxpayer was told that rent from the building would provide much-needed revenue and yet the taxpayer cannot find out which occupants are paying how much rent from day one to the present. The Applicant argued that this is wholly contrary to the central purposes of FOI legislation and the right to know how public funds are deployed.

The Commissioner's conclusions on the public interest

49. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to scrutiny of public finances. The Commissioner notes that other individuals have requested information from the Council about Marischal Square, demonstrating the public's interest in how the space was rented out.
50. That said, the Commissioner accepts that there is also a public interest in Scottish public authorities being able to achieve best value and maximise returns from the effective management of assets. The Commissioner also acknowledges that there is public interest in ensuring that there is fair competition in the commercial environment in which the Council operates.
51. The Commissioner recognises that it would be contrary to the public interest to place the Council in a disadvantageous position with respect to its competitors. The Commissioner must consider the circumstances at the time the request was made. It is the Commissioner's view that disclosure of the amount that AJL Companies was paying per square metre, at the time the request was made, would have negatively impacted on the Council's discussions with other tenants, and would have resulted in the Council obtaining less money for rental space, as potential tenants would have had expectations of the discount they could obtain

through negotiation. The Commissioner notes that the information asked for in request b) was later disclosed to the Applicant, when the Council deemed that circumstances had changed to a degree that the information was no longer likely to cause the harm previously cited.

52. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b), at the time of the request, outweighs that in disclosure of the information under consideration.

Section 12(1) – Excessive costs

53. As stated above, the Applicant was dissatisfied with the Council's decision to refuse to comply with request d)(ii) on the grounds that compliance would exceed £600. The Applicant disputed the Council's reliance on section 12(1) of FOISA.
54. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed this sum.
55. The projected costs a Scottish public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) it reasonably estimates it will incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 per hour. The authority may not charge for the cost of determining (i) whether it actually holds the information, or (ii) whether or not it should provide the information.
56. The Council submitted that section 12(1) applied to request d)(ii), arguing that the cost of locating, retrieving and providing all of the information falling within the scope of the request would exceed the £600 cost limit.
57. In support of its view, the Council explained that the Marischal Square electronic case file has 169 folders and, within that, 1,497 files. It argued that a high-level review of each file would be required to remove all files prior to January 2017 and then a review to only collate files that refer to AJL companies. Thereafter, each file which relates to AJL companies would have to be reviewed in detail and all appropriate redaction completed. In addition to the electronic file, the paper case file for the property would need to be reviewed to establish if there are any documents contained within it, along with a review of the email files from all officers of the Council involved in the process.
58. The Council provided a breakdown of the costs that would be incurred by complying with the request;
- High-level review of Marischal Square electronic case file – 1,497 files @ 2 minute each = 2,994 minutes
 - Detailed review of every file containing AJL companies – circa 50 files @ 15 minutes each = 750 minutes
 - Review of paper case file – 120 minutes

- Review of Council staff emails (2 staff) – 120 minutes
- Review of non-Corporate Landlord file systems – 120 minutes
- Total estimated time 4,104 minutes equals 68.4 hours @ £15/hour equals £1,026 estimate costs.

59. The Council submitted that the above calculations are restricted to Marischal Square. If it applies to the renting of any property asset then the cost would be increased significantly as all 738 property case files would have to be reviewed to ensure it has established that it has picked up every AJL company in occupation of a Council asset.
60. The Council submitted that the work would likely be undertaken by a Technical Clerical Officer (£10.80 - £12.14) per hour with a limited assistance to collate and prepare information.
61. Each file would need to be quality assured by the Property Estates Manager (£26.58 - £30.34) per hour, to ensure any commercially confidential information is suitably redacted. It would be appropriate that this role be undertaken for this work as he is the officer with responsibility.

Applicant's comments on section 12(1)

62. In her application to the Commissioner, the Applicant argued that the Council did not tell her how to narrow the scope of her request, which they later claimed would cost over £600 to fulfil. She disagreed with the high cost the Council quoted for fulfilling request d)(ii) and she maintained that the Council should have helped her narrow the request.
63. In later correspondence, the Applicant disputed the Council's argument that it would cost more than £600 to respond to request d)(ii). The Applicant maintained that all councils are supposed to keep clear electronic records, uniformly filed and easily searchable electronically.
64. The Applicant also argued that the time period involved in her FOI is not huge. She argued that if she had been offered advice on how to break her request down into smaller parcels she has no doubt she would have had at least some of the information she required long before now, and without having to involve the Commissioner's office. The Applicant considers that her request could have been complied with in full under £600, but even if that was not the case, she argued that the Council had a responsibility to help her narrow her request to bring it within the £600 cost limit.

Commissioner's conclusions

65. Having taken account of the submissions and explanations provided by the Council, the Commissioner accepts that the only way in which an accurate response could be provided to the Applicant's request would be for the Council to manually search through 1,497 electronic files to identify correspondence that fell within the required timeframe and which concerned only AJL companies.
66. In all the circumstances, the Commissioner is satisfied that the request could not have been complied with within the £600 cost limit. Consequently, he finds that the Council was entitled to rely on section 12(1) of FOISA and was under no obligation to comply with the request.
67. As indicated above, the Commissioner considers that the minute of variation, heads of terms and sublease all fall within the scope of request d)(ii). However, they comprise only a small subset of the information that would be captured by that request. In the circumstances, while

the Commissioner is satisfied that these three documents fall within the scope of the request, he cannot compel the Council to provide them to the Applicant, as he is satisfied that complying with request d)(ii) would exceed £600.

68. Having established that the Council was entitled to rely on section 12(1) of FOISA to refuse to comply with this request, the Commissioner will consider whether the Council complied with its duty to advise and assist as required by section 15 of FOISA.

Section 15(1) – Duty to provide advice and assistance

69. Section 15 of FOISA requires a Scottish public authority, as far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
70. Where section 12(1) is engaged, the need for advice and assistance is crucial to the process of refining requests: a requester will not necessarily know how information is structured within a given authority, or the volume of information held in relevant systems, when framing a "narrowed" request, unless the authority advises them accordingly. The section 15 duty goes hand in hand, therefore, with section 12(1).
71. In its submissions to the Commissioner, the Council acknowledged that there was a failure on its part to explain to the Applicant why it was asking for further clarification and to advise her that her request for information may be excessive in terms of the cost of compliance.
72. The Council submitted that an apology was made and further advice given to the Applicant on 20 September 2019. The Council noted that its Access to Information Team have been reminded to provide the reason for clarification and also give an indication to applicants where their request may exceed the cost of compliance.
73. The Commissioner has reviewed the content of the Council's email of 20 September 2019, which comprised its original response to the request, but he cannot see any significant advice or assistance to help the Applicant narrow the scope of her request. In its email, the Council explains the rationale for concluding that section 12(1) applies to request d)(ii) but it does not, to the satisfaction of the Commissioner, give the Applicant any advice on how to reframe her request to bring it within the £600 cost limit.
74. Given this, the Commissioner finds that the Council failed to comply with the requirements of section 15(1) of FOISA and he requires the Council to contact the Applicant and offer her advice on how best to narrow her request to bring it within the £600 cost ceiling.

Section 17(1) – Information not held

75. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
76. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
77. The Council has argued that it does not hold any information falling within the scope of request c) or request d)(i).

Request d)(i): minutes not in the public domain

78. In its review outcome of 18 October 2019, the Council notified the Applicant that it did not hold any information falling within the scope of request d)(i), which was “minutes of any committee meeting at which this subject and rental rate was mentioned that are not in the public domain”. It added that no reports specifically relating to Marischal Square rental rates have been considered by a Council committee within the past year; therefore, no information is held.
79. The Council submitted that its website allows individuals to search all public committee reports, agendas and minutes and its initial response by the FOI team explained this to the Applicant. It went on to note that all committee minutes are in the public domain and available on its website, and if there was any meeting where the Marischal Square rental rate was mentioned in a private session this is unlikely to be recorded in the minute unless it was reflected in the decision. Therefore, no record of such discussion would be available unless it had taken place within the past year.
80. The Council explained that it does consider some committee reports in private if they contain exempt information as defined by Schedule 7A of the Local Government (Access to Information) 1973 Act¹ and the committee agrees to consider those reports in private. (“Exempt information” here does not have the same meaning as information which is exempt from disclosure under Part 2 of FOISA, although there are some similarities.) There are also a small number of occasions when a report is a public report, but an elected member may ask a question (or questions) which requires the committee to go into private session in order for the answer to be provided as it could contain exempt information.
81. The Council explained that, generally, committee minutes contain a very short summary of the report, what the report recommended and what the committee decision was. In the course of reaching that decision, if there was a vote, the details of the vote will be recorded along with the detail of the motion and any amendments. The minute will also record whether any declarations of interest were intimated and a summary if a deputation was made in relation to the report.
82. Any discussion that took place in a private session would be unlikely to be recorded in the minute and would only be recorded in the committee clerk’s notes from the meeting. However, the notes (handwritten) of each committee meeting are only kept for one year and then destroyed. Due to the restrictions in place as a result of the COVID-19 pandemic, all of the committee team are currently working from home and access to the Town House (Council offices) is very restricted, meaning that manual searches have not been possible. However, no reports specifically relating to Marischal Square rental rates have been considered by a Council committee within the past year. Therefore, there would be nothing to search.
83. The Council noted that, after undertaking a further search, the only report relating to Marischal Square considered by a Council Committee in the past year, or thereabouts, is a report considered by the Pensions Committee on 13 September 2019 which is a private report. The minute of that meeting, which contains a short summary of the report, the report recommendations and the committee decision is available on the Council’s website, at point 13².

¹ <https://www.legislation.gov.uk/ukpga/1973/65/schedule/7A>

² <https://committees.aberdeencity.gov.uk/ieListDocuments.aspx?CIId=506&MID=6658#A169154>

84. The Council noted that it could check for the clerk's notes from that meeting the next time the clerk is in the office, but it stressed that there is no guarantee that the notes will still exist as the meeting was over a year ago and may have been deleted. It is also highly unlikely that there is any reference to rent. The Council noted that reports have also been considered by the Licensing Board with regard to licensing applications for premises at Marischal Square. However, the Licensing Board is a separate legal entity to the Council and is not a Council committee. In any event, licensing applications/matters would not, according to the Council, involve any reference to rental rates.
85. The Commissioner has reviewed the link to the single report the Council found that mentioned Marischal Square in the last year. He does not consider it relevant to the request, and so he has not asked the Council to look for any handwritten notes. The Commissioner considers it likely that any handwritten notes that would have existed would have fallen outwith the scope of the request.
86. The Commissioner has concluded that the information requested by the Applicant in request d)(ii) is not held by the Council, and that the Council were correct to notify the Applicant that section 17(1) of FOISA applied to this request.

Request c): correspondence calculating a lower rate

87. In this request, the Applicant asked: "If that amount [the amount paid per square metre by AJL Companies] is less than the market value, then supply all correspondence concerning how the lower rate was arrived at."
88. In its review outcome, the Council argued that it was withholding information under section 33(1)(b) in relation to request c). During the investigation, the Council was questioned about this approach and was asked to reconsider whether any of the withheld information actually fell within the scope of this request. The Commissioner noted that request c) was seeking correspondence and yet none of the withheld information comprised correspondence (it consisted of a sublease and minute of variation).
89. The Council does not agree that the agreed lease deal to AJL Companies was at less than market value. Therefore, it does not believe that there is any information to be shared in relation to request c). The Council acknowledged that the incentive resulted in no rent being paid at the start of the lease. However, it contended that an incentive package is expected in a lease of this kind and the lease entered into was on market value terms.
90. The Council reiterated that the rent-free period was one of the incentives offered to all prospective customers at that time. The Council conducted searches for any relevant information, but none was found and it maintained that there was no correspondence held that relates to how a lower rate was decided.
91. Having considered the relevant submissions and the terms of part c) of the request, the Commissioner finds that the Council failed to notify the Applicant that the information she had requested was not held. Instead, the Council led the Applicant to believe that it held information that fell within the scope of request c), information which it was withholding under section 33(1)(b) of FOISA.
92. The Commissioner accepts that, during the investigation, the Council took adequate, proportionate steps to establish what information it held, but this should have been done when responding to the requirement for review. Given the explanations and submissions provided, the Commissioner is satisfied that the Council does not hold any information which falls under the scope of request c).

Decision

The Commissioner finds that Aberdeen City 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 the Applicant.

The Commissioner finds that the Council:

- was not obliged to comply with part of the request under section 12(1)
- was entitled to withhold information under section 33(1)(b) of FOISA
- does not hold information falling within the scope of request d)(i)

However, the Commissioner finds that the Council failed to:

- offer the Applicant reasonable advice and assistance to enable her to reduce the scope of request d)(ii), as required by section 15(1) of FOISA
- notify the Applicant that it did not hold any information falling within the scope of request c).

The Commissioner requires the Council to contact the Applicant and offer her advice on how to reduce the scope of request d)(ii), to bring the cost of compliance to under £600, by 1 June 2021.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

14 April 2021

Appendix 1: 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.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

33 Commercial interests and the economy

(1) Information is exempt information if-

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
- (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info