

Decision Notice 051/2021

Information on Council officials' expenses

Applicant: The Applicant

Public authority: Dumfries and Galloway Council

Case Ref: 202000373



Scottish Information
Commissioner

Summary

The Council was asked for information relating to Councillors' expenses, the expenses process and information in Councillors' official diaries.

The Council directed the Applicant to part of its website and provided further information at review.

The Commissioner investigated and found that the Council had breached FOISA in not (i) providing the Applicant with adequate advice and assistance, (ii) providing either the information requested or adequate explanation for why it was not available, and (iii) informing the Applicant of his right to apply to the Commissioner.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 15 (Duty to provide advice and assistance); 20(3) (Requirement for review of refusal); 21(10) (Review by Scottish public authority); 25(1) (Information otherwise available)

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 1 November 2019, the Applicant made a request for information to Dumfries and Galloway Council (the Council). The information requested was:
 - i. Whether elected members were reimbursed for travelling to their main place of work, the Council offices in Dumfries, to carry out their main job of attending council meetings.
 - ii. If elected officials were paid to travel to work, whether the Council had any plans for reimbursing other Council employees for their expenses in getting to their designated place of work.
 - iii. Noting that some claims for travel expenses seemed "an awful lot", confirmation that all claims were adequately assessed (perhaps by outlining the procedure for assessing such claims). The travel expenses of two Councillors were highlighted as of particular interest by the Applicant and he asked if it was possible for members of the public to see official diaries outlining exactly what Council business officials were undertaking to qualify for their expenses. Given the stipulation that expenses could only be claimed for official Council business, he believed it followed that all claims should be allocated to a specific event or undertaking and, as these events or undertakings were official, they must be recorded. He asked to be informed if such information was freely available: if it was, he would advise in more detail of exactly what he would like to see.
 - iv. Whether there were any canteen/cafeteria facilities available at the Council head office in Dumfries and whether this facility was subsidised. If there was a subsidised facility, the Applicant asked to know the cost to the taxpayer of this provision. He also asked whether the elected officials had any separate facility and whether this was subsidised, with any consequent cost to the taxpayer.

2. The Council responded on 27 November 2019 under section 25 of FOISA, informing the Applicant that the information was available by some other means and providing him with a weblink to information on payments to Councillors.
3. On 27 November 2019, the Applicant wrote to the Council, expressing his dissatisfaction with the Council's response. He pointed out that he was aware of the Payments to Councillors page on its website and had quoted from it in several places in his request. He stated that he had requested specific information on four points, relating to elected officials, their expenses and council procedures, so that he could contribute to public consultations on how the Council could make cuts. He stated that the website he was directed to did not contain the information he requested, other than in relation to point i. (above) as to whether councillors are paid to travel to their work.
4. The Council responded to the Applicant on 9 December 2019, using the numbering in his original request to address each of his four points. It explained, with regard to point iii., how travel claims are processed and checked, and stated that official diaries are not kept in relation to members' expenses, although each claim submitted is scrutinised to ensure it complies with the scheme.
5. On 17 March 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he did not believe the Council had responded to his request appropriately as it had not provided information regarding Councillors' expenses and their diaries. He also submitted that the Council had not provided adequate advice and assistance to allow him to take his request forward. The Applicant was also unhappy that the Council did not inform him of his right to appeal to the Commissioner in its review of 9 December 2019.

Investigation

6. 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.
7. On 20 March 2020, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
8. 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. These related to the handling of the request, the provision of advice and assistance, and the information held by the Council falling within the scope of the request.
9. The Council provided submissions to the Commissioner.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered 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.

Handling of the request

11. After contact from the Commissioner's validation officer, the Council stated that it had not intended its response of 9 December 2019 to be a review outcome, although it had attempted to address the dissatisfaction raised by the Applicant in his email of 27 November 2019. In its submissions, it acknowledged that it should have carried out a review in December 2019 and should have asked the Applicant to submit further FOI requests rather than continuing to answer his follow-up questions.
12. While the Applicant did not specifically ask for a review in that email, it clearly expressed his dissatisfaction with the Council's response to his request. It met the other requirements for a valid requirement for review in section 20(3) of FOISA and the Commissioner considers it should have been recognised by the Council as such.
13. In the circumstances, the Commissioner considers the Council's response of 9 December 2019 should be regarded as a review outcome for the purposes of FOISA, whether that was the intention or not. It responded to points of dissatisfaction raised in a requirement for review and made no attempt to suggest that it was intended as anything other than a review outcome.
14. Section 21(10) of FOISA states that a Scottish public authority's response to the Applicant following a review carried out under section 21 must contain particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively.
15. It is a matter of fact that the response provided to the Applicant on 9 December 2019, which the Commissioner regards as a review outcome, did not inform the Applicant of his right of application to the Commissioner, or of his right of appeal to the Court of Session. The Commissioner therefore finds that the Council failed to comply with Part 1 of FOISA, in particular section 21(10).
16. After the Council's response to the Applicant's email on 9 December 2019, there followed extensive further exchanges between the Applicant and the Council. The Council (on 23 January 2020) provided what it considered to be a review outcome, essentially affirming its earlier response to the Applicant. In the course of that further correspondence, while acknowledging that the Council did not hold diaries of the kind he had requested, the Applicant asked to see the relevant expense claims.

Section 15 – Duty to provide advice and assistance

17. Section 15 of FOISA requires a Scottish public authority, so 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. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with the Scottish Ministers' *Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004* (the Section 60 Code)¹

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

18. The Section 60 Code states, at paragraph 5.1.1 in Part 2:

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

The Applicant's submissions

19. The Applicant considered that he was not provided with adequate advice and assistance, for example, by the Council clarifying what information it held that would be of some help. The Applicant emphasised that he was clear in his request as to his purpose.

The Council's Submissions

20. The Council drew attention to the explanation provided in its review outcome of 9 December 2019, where it explained how claims are processed and that some Councillors choose not to claim every month, but less frequently. It assured him that each claim is scrutinised to ensure it complies with the scheme (while explaining that official diaries are not kept for this purposes).
21. The Council goes on to describe further advice it offered to the Applicant in later emails (23 January 2020), and its offer to discuss what information he was looking for (28 January 2020), although these came after the review.

The Commissioner's view

22. The Commissioner considers that it was clear from the Applicant's request and requirement for review that he was seeking something by way of clarification of the expenses of specific Councillors. The Applicant had identified official diaries as one means of achieving this. It would be unfair to assume the Applicant would have a detailed knowledge of the kinds of records the Council holds in the same way the public authority itself has: advice and assistance in this area would appear to have been appropriate.
23. The Commissioner recognises that the Council provided the Applicant with some assistance, but it is clear that this was not enough. In the absence of adequate advice and assistance, the further communication between the Council and the Applicant appears to have led to further confusion and dissatisfaction, without resolution. There has been further discussion of expense claims in particular, but this does not appear to have addressed the Applicant's concerns fully.
24. Given the nature of the request, the Commissioner considers that it was incumbent on the Council to clarify what else might meet the Applicant's requirements (even if that had resulted in a new request being made by the Applicant). It had the opportunity to do this at the outset, in terms of section 1(3) of FOISA.
25. In the circumstances, the Commissioner finds that the Council failed to comply fully with its duty under section 15(1) of FOISA to provide the Applicant with adequate advice and assistance in relation to his request. It should have provided him with assistance to understand what records the Council held and the verification process the expenses claims of Councillors go through, to assist him to pursue the information he sought.
26. Given that the Council has not fully complied with its duty under section 15 of FOISA, the Commissioner requires the Council to contact the Applicant with a view to providing further advice and assistance to him in terms of section 15 of FOISA, to clarify what he is seeking and provide him with a fresh review (to the extent that his concerns remain within the scope

of the original request), or enable him to make a further request for specific information should he so wish.

Section 25 – Information otherwise available

27. Information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt from disclosure. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA. Section 25(1) is not intended to prevent or inhibit access to information, but to relieve public authorities of the burden of providing information that an applicant can access readily without asking for it.
28. When responding to the Applicant's request, the Council relied on section 25(1) of FOISA, directing him to part of the Council's website². The information available there describes what things, and in some cases how much, Councillors may claim, by way of reimbursement, and in what circumstances. It refers to a scrutiny process, but does not go on to explain what this consists of. It also provides some details of individual claims.
29. In its subsequent review of 9 December 2019, the Council provided an explanation of why some claims might seem higher and confirmed that official diaries are not kept for this purpose. It again referred to a scrutiny process to which expense claims are subject, but did not provide the Applicant with any further information on this scrutiny process or identify what (if any) other relevant information it held.
30. In its submissions to the Commissioner, the Council submitted that section 25 still applied to the request, specifically to information on expense claims published on its website. It also highlighted that in correspondence from the Applicant it was sometimes difficult to distinguish requests for information.
31. The Applicant considered the webpage he was referred to did not fulfil his request and considered the Council had not provided him with the information he requested.
32. The Commissioner refers to his earlier comments about adequate advice and assistance and considers that, if there is any doubt as to what is a request and what it is for, then clarification should be sought by the public authority from the applicant (preferably at the earliest opportunity, applying section 1(3)) and where appropriate, advice and assistance provided.
33. The Commissioner notes that the matter has not been resolved following the further correspondence between the Applicant and the Council, but rather more questions have been asked that appear to be new requests for information not covered by this appeal.
34. Within the scope of this appeal, the Commissioner considers the information the Applicant was referred to by the Council did not answer his request and the review did not provide adequate explanation of the information that was held by the Council falling within the scope of the request. Given the terms of the request, and certainly by the time the Applicant sought a review, it should have been apparent that the Applicant was not seeking information already available on the Council's website. In the circumstances, the Commissioner is not satisfied that the Council appropriately applied section 25(1) to this request.
35. The Commissioner requires the Council to provide the Applicant with a new review outcome (subject to the requirements noted in paragraph 26 above).

² <https://www.dumgal.gov.uk/article/15144/Payments-to-councillors>

Decision

The Commissioner finds that Dumfries and Galloway Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant as the Council:

- i. failed to comply with section 15(1) of FOISA, by not providing the Applicant with adequate advice and assistance;
- ii. failed to comply with section 21(10), in that it failed to include in its review particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively;
- iii. wrongly relied on section 25(1) for information which did not meet the Applicant's request, providing no further explanation or explanation why information should not be provided (and thereby failing to comply with section 1(1)).

The Commissioner therefore requires the Council to contact the Applicant to provide him with advice and assistance in terms of section 15 of FOISA, with a view to clarifying what information he is looking for and providing him with a fresh review outcome in terms of section 21(4)(b) (to the extent that his concerns remain within the scope of the original request), by **7 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

20 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.
- ...
- (3) If the authority—
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),
- then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
- ...
- (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 –
- (a) the provision does not confer absolute exemption; and
- ...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- (a) section 25;
- ...

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.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

20 Requirement for review of refusal etc.

...

- (3) A requirement for review must-
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify-
 - (i) the request for information to which the requirement for review relates; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

21 Review by Scottish public authority

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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