

Decision Notice

Decision 053/2019: Mr K and City of Edinburgh Council

Complaints about taxi drivers

Reference No: 201801384

Decision Date: 04 April 2019



Scottish Information
Commissioner

Summary

The Council was asked for complaints about public and private hire taxi drivers considered by its Licensing Committee over a three year period.

The Council considered that extracting the information for the request would cost more than £600 and therefore it was not obliged to comply with the request.

The Commissioner agreed. However, he also found that the Council had failed to adequately advise and assist the requester on how to reduce the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

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 14 June 2018, Mr K made a request for information to City of Edinburgh Council (the Council). He clarified the request on 19 June 2018. The information requested was:

“For the last three years (whether financial-year or calendar-year basis) please provide the following data;

Record of date, penalty imposed (or not)/outcomes for any and all hearings/complaints considered and decided by the Edinburgh Council Licensing Committee/sub acting in quasi-judicial capacity and irrespective of holding in camera relating to any/all complaints about both public and private hire taxi drivers licensed by Edinburgh Council and including details of the nature of the legal and/or natural person making such complaints.”
2. The Council responded on 17 July 2018. It stated that the information was exempt from disclosure and that in any event, the cost of locating and retrieving the information requested would exceed the statutory maximum of £600. The Council was therefore not obliged to comply with the request, as section 12(1) of FOISA applied.
3. On 25 July 2018, Mr K wrote to the Council requesting a review of its decision on the basis that it had refused to disclose “public information”. Mr K noted that he did not require personal data such as names or addresses. He considered that “review is necessary because the reasons provided are de minimis and also sound like a ‘smoke-screen’ ‘embarrassment face-saving’ exercise by the council.”
4. The Council notified Mr K of the outcome of its review on 17 August 2018. The Council upheld its view that the cost to the Council of locating, retrieving and providing the information would exceed the statutory maximum of £600 and that section 12(1) applied. It

provided a further calculation and breakdown of the time, work and costs that would be involved in responding to the request, estimating a total cost of £720. The Council explained why each of the 64 relevant meeting records would have to be checked to provide the information.

5. On 20 August 2018, Mr K applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council's review because he considered his request was for "public information", and that the cost to the Council was "minimal" in relation to the Council's "annual turnover". He submitted that, if the Council has chosen a laborious, cost-ineffective way of working or filing data, which should not be used as justification for non-disclosure. Mr K explained why he needed the information and commented that he considered the Council was seeking to hide information about decisions made by its councillors for fear that the information would embarrass them.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr K 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 10 October 2018, the Council was notified in writing that Mr K had made a valid application.
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 evidence required to support the Council's reliance on section 12 of FOISA in relation to the cost of compliance, and how the Council had complied with section 15(1) of FOISA (Duty to provide advice and assistance).
9. The Council provided submissions on 9 November 2018, and again on 21 January 2019.

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 Mr K and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 12(1) – Excessive cost of compliance

11. 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 amount prescribed in the Fees Regulations. This amount is currently set at £600 (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 information would exceed that sum.
12. The projected costs the 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, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA.

13. The authority may not charge for the cost of determining:
 - (i) Whether it actually holds the information requested or
 - (ii) Whether or not it should provide the information.
14. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
15. In its submissions to the Commissioner, the Council detailed the sample exercise that it had conducted when first responding to Mr K, explaining that it had reviewed five committee meeting notes and that it took on average 45 minutes to review minutes, agendas and action sheets for each meeting. Between 1 June 2015 and 1 June 2018, there were 64 meetings of the Licensing Sub-Committee. Therefore, the Council estimated that the process required to comply with Mr K's request would take 48 hours to complete and that the cost would exceed the statutory maximum of £600.
16. The investigating officer sought further evidence from the Council regarding the estimated 45 minutes required to review the paper work for each meeting. The Council was also asked why a "Higher Enforcement Officer" would be required to carry out the work at a cost of £15 per hour.
17. The Council explained that, due to limited storage at the City Chambers, all paperwork from the Committee meetings is archived with a commercial information storage company immediately following the meeting. The committee action sheet contains sufficient information to manage any consequential activity, but these documents (provided to the Commissioner in the course of the investigation) do not provide the information necessary to respond to Mr K's specific request.
18. The Council stated that the committee documents are filed with the storage company separately, in month order, so 64 separate requests would have to be made to the storage company, each taking an estimated five minutes.
19. The Council explained that the licensing committee consider these cases in private to protect the identity of the individuals involved and in recognition that, by the nature of the committee hearing process, the accuracy or relevance of the information contained in the reports can be considered or challenged and potentially be set aside by the committee. It noted that, previously, a basic summary of all license cases to be considered by the committee was published online, but this practice was discontinued because of the persistent complaints that the information published was damaging to the reputations of the individuals involved.
20. The Council informed the Commissioner that each individual report was likely to contain a considerable amount of personal data, including sensitive personal data and special category information regarding convictions, medical information, anti-social behaviour and accompanying police letters. Such personal information would require to be identified and redacted and there would also be sensitive information where complaints had been found to be unfounded. Therefore, the Council considered that the estimate of 45 minutes per report to review and extract disclosable information was reasonable in respect of the nature and range of personal data contained within each report.
21. The Council explained that, due to the nature of the case, the work should be carried out by a Higher Enforcement Officer; staff at that level are familiar with the type of personal information involved and the legislative arena as they regularly attend the committee meetings, enabling them to identify the information falling within the scope of the request. The Council stated that staff at a lower grade would not have the necessary skills, knowledge

or understanding. It accepted that staff at a lower grade could undertake some of the administrative work, such as requesting archived files etc., but submitted this would be likely to only reduce the cost by £27 overall and would still require the Higher Enforcement Officer to check work for accuracy.

22. Given the detailed explanations provided by the Council, and having considered the nature of the work involved, the Commissioner is satisfied in all the circumstances that the Council could not have complied with Mr K's request 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.

Section 15 of FOISA – duty to provide advice and assistance

23. Section 15 of FOISA requires a Scottish public authority, so far as it is reasonable for it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice¹ on the discharge of functions by public authorities under FOISA include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling".

24. The Council acknowledged to the Commissioner that some of the information requested could have been provided within the £600 limit set by the Fees Regulations. However, it submitted that Mr K had requested information for a three year period; consequently, the Council had not provided the costings for each individual year (which would depend on the number of meetings held in each time period).

25. The Council submitted that where requests are refused on cost ground, its usual practice is to include a standard paragraph of text:

"The Council appreciates that you may not have been aware of the size and scope of the information that you requested the Council provide you with as a result of your request. It may be possible to provide you with a portion of the information that you are seeking. Please note that requests revised in this way are considered as new requests under the legislation. If you wish to discuss this option further, or have any other queries, please do not hesitate to contact me."

26. However, this was omitted from the response sent to Mr K. The Council was unable to explain why this information was omitted on this occasion and noted that it would feed back to staff the necessity of including this information in responses where cost was an issue.

27. The Commissioner notes that the Council's response to Mr K's review request included the following paragraph:

"By conducting the manually [sic] checks set out above it may be possible to identify further information held within the Council's records. Please note that requests for this revised information would be considered as new requests under the legislation."

28. It is not clear to the Commissioner what advice was intended in this confusing statement. The Council had already stated that it would not carry out the manual checks of the committee records because of the cost.

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

29. The Commissioner finds that the Council failed to give Mr K reasonable advice and assistance in re-framing his request to bring it within the cost threshold of £600, and therefore failed to comply with section 15(1) of FOISA. He now requires the Council to provide advice and assistance to Mr K.

Decision

The Commissioner finds that, in respect of the matters specified in the application, City of Edinburgh Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr K.

The Council was entitled to refuse to comply with the request under section 12(1) of FOISA, as the cost of complying with the request would be more than £600.

However, in failing to give Mr K adequate advice and assistance about how to narrow the scope of the request, the Council failed to comply with section 15(1) of FOISA. The Commissioner now requires the Council to provide reasonable advice and assistance to Mr K by **19 May 2019**.

Appeal

Should either Mr K 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.

Margaret Keyse
Head of Enforcement

04 April 2019

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.
- ...

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.
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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).

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.

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