

Decision Notice 113/2020

Records relating to a café

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 202000138



Scottish Information
Commissioner

Summary

The Council was asked for information relating to a café. Having initially considered the request to be vexatious, the Council changed its position at review stage. The Council considered part of the request to be repeated and, for the remainder, estimated that responding would cost more than the £600 limit. The Council also disclosed some information, stating it had done so under its duty to advise and assist.

The Applicant believed the Council was not entitled to deem part of his request to be repeated, as he believed it held further information, not previously disclosed. For the remainder, he disagreed with the Council's decision that responding would be excessively costly, as it had responded to previous similar requests without cost being a factor. Again, he believed the Council held further information for this part.

The Commissioner investigated and found that the Council had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 14(2) (Vexatious or repeated requests); 15(1) (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 and 5

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 30 April 2019, the Applicant made a request for information to Glasgow City Council (the Council). The information requested was all Council records since and including 1 February 2019 related to a named café, to include:
 - all copies of all documentation and correspondence including emails, letters, records of telephone calls and meeting notes, Building Standards records, site inspection records, Development and Regeneration Services (DRS) and Land and Environmental Services (LES) records, and any other records held by the Council in relation to the café.
 - all the Council's internal communications regarding the café, correspondence with all other parties including members of the public, media, councillors etc., correspondence with the [Scottish] Public Services Ombudsman (SPSO), Scottish Information Commissioner and records of all correspondence, communications and meetings with the café management/representatives/owners/staff, complaints from the public and the Council's replies with respect to these complaints and visits to the café by Council staff.

- all records (written, including emails and verbal contact, telephone calls and visits to the café).
2. The Council responded on 21 May 2019. It refused the request in terms of section 14(1) (Vexatious or repeated requests) of FOISA, considering it to be vexatious (with explanation).
 3. On 8 July 2019, the Applicant wrote to the Council, requesting a review of its decision and explaining why he disagreed that his request was vexatious. He repudiated the Council's view that his request lacked serious purpose or value and was designed to cause disruption.
 4. The Council notified the Applicant of the outcome of its review on 21 July 2019, modifying its original decision. The Council withdrew reliance on section 14(1) of FOISA, accepting that the request had a valid purpose. It informed the Applicant that to respond in the terms set out in the request, this would require an all-Council search (which would include a search of its entire email system), and any information identified would require to be checked for relevance and possible redaction. As a result, the Council considered the costs involved would exceed the £600 limit, and so it was not obliged to respond by virtue of section 12(1) (Excessive cost of compliance) of FOISA.
 5. The Council informed the Applicant that, under its duty to advise and assist (section 15(1) of FOISA), it had conducted searches within the specific Council departments cited in the request. The Council disclosed the information identified as a result of these searches (with some personal data redacted under section 38(1)(b) (Personal Information) of FOISA), explaining this covered only the period from 9 March to 30 April 2019.
 6. For the remainder of the period stipulated in the request (1 February 2019 to 8 March 2019), the Council considered this to be a repeated request in terms of section 14(2) (Vexatious or repeated requests) of FOISA. This, the Council explained, was on the basis that the Applicant had previously submitted a substantially similar request on 8 March 2019, for which it had already provided him with a response disclosing the information requested for that period.
 7. The Council referred to its earlier consideration of section 14(1) of FOISA. For any future requests the Applicant might wish to submit on this subject, the Council suggested exploring with him ways in which it could provide the information requested, without impacting significantly on its resources, for example through meeting with Council officers, or by narrowing the scope of future requests so they were more specific.
 8. On 24 January 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 believed the Council held more information which had not been disclosed to him, providing specific examples in support of his position.
 9. Agreeing that his earlier request (of 8 March 2019) was made in substantially similar terms, the Applicant further argued that any information not included in the response to his earlier request should not be covered by section 14(2). He believed that the Council should not use this provision as an excuse to withhold any information not previously identified.
 10. The Applicant subsequently informed the Commissioner that he was also dissatisfied with the Council's decision to rely on section 12(1) for the remaining part of his request. He highlighted that the Council had responded to a number of previous similar requests, some of which covered longer periods, and had disclosed information in response to those requests

without cost being a factor. He was further dissatisfied as he believed the Council held more information than had been disclosed to him for this part of his request.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
12. On 27 January 2020, the Council was notified in writing that the Applicant had made a valid application 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. These focused on the Council's justification for relying on sections 14(2) and 12(1) for the respective parts of the request.
14. The Council provided submissions to the Commissioner.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of 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.
16. The Applicant has raised no dissatisfaction with the Council's decision to withhold some personal data under section 38(1)(b) of FOISA. As such, this matter does not fall within the scope of the Commissioner's investigation.

Section 14(2) – Vexatious or repeated requests

(Relative to the part of the request covering the period 1 February 2019 to 8 March 2019)

17. As stated above, the Applicant was dissatisfied with the Council's decision, at review stage, to consider this part of his request to be a repeated request in terms of section 14(2) of FOISA.
18. Section 14(2) of FOISA provides that where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar, unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.
19. For section 14(2) to apply, therefore, the following need to be considered:
 - (i) whether the Applicant's previous request was identical or substantially similar to the request under consideration here;
 - (ii) whether the Council complied with the previous request and, if so
 - (iii) whether there was a reasonable period of time between the submission of the previous request and the submission of the subsequent request.

Was the request identical or substantially similar to the previous request?

20. The Council provided the Commissioner with the content of the previous request made by the Applicant on 8 March 2019 to support its position that the relevant part of the request under consideration here (covering the period 1 February 2019 to 8 March 2019) was a repeated request.
21. In his application to the Commissioner, the Applicant agreed that his earlier request of 8 March 2020 (covering the relevant period) was made in substantially similar terms to the request under consideration here.
22. The Commissioner has considered the content and context of the previous request. He notes that it is almost identical to, and expressed in almost exactly the same terms as, the request of 30 April 2019. As such, the Commissioner is satisfied that it is seeking essentially the same information concerning the café, for the period 1 February 2019 to 8 March 2019.
23. The Commissioner notes that the time period covered by the previous request is shorter than that stated in the current request. However, he also notes that, in its review response, the Council made clear to the Applicant that it considered the provision in section 14(2) of FOISA applied solely to that part of his request covering the period 1 February 2019 to 8 March 2019.
24. The Commissioner is therefore satisfied that part of the request of 30 April 2019 (to the extent that it covers the period 1 February 2019 to 8 March 2019) is substantially similar to the previous request made by the Applicant.

Was the previous request complied with?

25. The Council confirmed its response to the Applicant's previous request was issued on 1 April 2019. This included information on the right to seek a review if dissatisfied with its decision.
26. The Council stated that the Applicant had submitted a number of previous requests to the Council in similar terms, and had made a number of requests for review and subsequent appeals to the Commissioner. As such, the Council believed the Applicant was familiar with its processes where an individual was unhappy with its initial response.
27. The Council confirmed it held no record of the Applicant requesting a review of its response (to the previous request) issued on 1 April 2019. It was satisfied that, having received the information in response to his request of 8 March 2019, the Applicant had the opportunity to seek a review of the Council's decision at that time, but failed to do so.
28. As the period 1 February 2019 to 8 March 2019 was captured by the scope of the previous request, and being satisfied that the previous request had been responded to, the Council maintained that the corresponding part of the request under consideration here was a repeated request in terms of section 14(2) of FOISA.
29. In his application to the Commissioner, the Applicant argued that it was obvious, from the information disclosed in response to the request under consideration here, that information had been omitted from the Council's response to his previous request (of 8 March 2019). In his view, any information missing from that previous response should not be covered by section 14(2), and that the Council should not use this provision as an excuse for not releasing information.

30. As far as the Commissioner is aware, the Applicant did not challenge the Council's decision in its response of 1 April 2019 (to the previous request), within the timescales allowed by FOISA.
31. In the absence of any review being sought at the time, the Commissioner is unable to conclude, in terms of section 14(2), that the Council's response of 1 April 2019 did not comply with the Applicant's previous information request. The Commissioner has no option other than to accept that the Council complied with the Applicant's previous request for information at that time.

Had a reasonable period of time passed?

32. In his application to the Commissioner, the Applicant argued that the time period in his request covered a rapidly moving situation, and explained why he believed the period from 9 March 2019 to 30 April 2019 was a period of intense activity and changing circumstances, thereby justifying his request. He argued it was obvious, from the information provided by the Council, that information was missing, and so he had a valid reason for repeating his request for the period 1 February 2020 to 8 March 2020.
33. In response, the Council submitted that it had not applied section 14(2) of FOISA to the period covering 9 March 2019 to 30 April 2019 but had, under its duty to advise and assist, provided information retrieved by a number of Council departments (namely those specified in the request) for that period.
34. The Commissioner notes that there was a relatively short period between the response to the previous request and the making of the request under consideration here. In fact, only a few weeks had passed between the previous response of 1 April 2019 and the subsequent request of 30 April 2019.
35. There is no definition of a 'reasonable period of time' in FOISA; what is reasonable will depend on the circumstances of the case. However consideration can be given to questions such as:
 - (i) Has the information changed?
 - (ii) Have the circumstances changed?
36. As the Commissioner has already determined, the information requested in this, and the previous, request is substantially similar, in respect of the period 1 February 2019 to 8 March 2019. The Commissioner accepts that neither the information nor the circumstances, other than the passage of time, have altered in this case.
37. The Commissioner considers that the simple passage of time between requests may eventually be sufficient to allow the conclusion that a reasonable period of time has passed between two identical or substantially similar requests, irrespective of whether there has been any other change in the circumstances surrounding the requests.
38. In this case, however, taking into account the nature of the information and the absence of any change in circumstances for the period in question (1 February 2019 to 8 March 2019), the Commissioner does not accept that the time which has passed can be considered reasonable. The Applicant had a remedy available to him on receipt of the Council's response to his previous request and appears to have not chosen to take this up: no valid reason has been identified which would suggest that he should be permitted to resurrect the matter now. Regardless of whether or not the Council did hold further information falling

within the scope of this part of the request (which the Applicant clearly believes to be the case, as a result of the information disclosed by the Council for the remaining part of his request, albeit under its duty to advise and assist), there is nothing in FOISA that obliges a public authority to accept and respond to a repeated request on that basis.

39. In all the circumstances, therefore, the Commissioner finds that the Council was not obliged to comply with the Applicant's request on the grounds that section 14(2) of FOISA applied.

Section 12(1) – Excessive cost of compliance

(Relative to the part of the request covering the period from 9 March 2019 to 30 April 2020)

40. As stated above, the Applicant was dissatisfied with the Council's decision, at review stage, to determine that responding to this part of his request would be excessively costly, and refuse his request in terms of section 12(1) of FOISA.
41. 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.
42. 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.
43. The Council submitted that section 12(1) applied to the request. It confirmed that it held information falling within the scope of the request, but argued that the cost of locating, retrieving and providing that information would exceed the £600 cost limit.
44. In support of its view, the Council explained it was the largest local authority in Scotland, employing over 27,400 employees across six service areas. Given this size and scale, the Council submitted it would be difficult to calculate the estimated costs of fully responding to this part of the Applicant's request.
45. By way of illustrative example to support its position, the Council explained that a search of its records management system (ERDMs), using the café's address, returned approximately 22,000 pages of results. Accepting that only a proportion of these records would relate to the café, with a smaller percentage falling within the scope of the request, the Council believed this to be indicative of the scale and volume of records held, which would require to be searched to identify and locate any relevant information.
46. In addition to this, the Council submitted, searches of all staff email accounts would, by themselves, significantly exceed the £600 cost threshold, given the time and resources this would entail.

47. With regard to staff costs, the Council stated that these would be calculated at the maximum rate of £15 per hour, as even the lowest staff grade incurred an employment cost which took the cost, to the Council, over that hourly sum.
48. For the reasons stated above, the Council confirmed its view that, while it was unable to provide an estimated cost calculation for a search of all Council records, it was clear that such a search would exceed the cost limit set by the Fee Regulations.
49. With regard to the information disclosed to the Applicant for this part of his request, the Council explained that this had been identified as a result of searches of the specific departments cited in the request. It confirmed that, while it maintained that section 12(1) applied to this part of the request, it had taken the decision to provide the Applicant with the information identified as a result of these searches, as part of its duty, under FOISA, to advise and assist. It further confirmed that this information had not been provided under any other provision in FOISA.
50. The Council acknowledged that it had responded to a number of previous similar requests made by the Applicant, all covering different date ranges, without citing cost as a factor, but argued that it was entitled to change its position. In responding to these requests, the Council explained, it believed it had carried out thorough and robust searches of the departments cited in the requests, but the Applicant often argued he had not been provided with all the relevant information. Taking this into account, the Council took the view that the Applicant's request, in this case, for "all Council records" required a search of the whole Council, in order to be able to respond fully.
51. Taking into account all of the circumstances, the Commissioner is satisfied that the Council has provided reasonable arguments in support of its view that the cost of complying with this part of the request would exceed the £600 cost limit. He considers the scale and extent of the tasks described to be appropriate in the circumstances. Given the nature of the work required, the Commissioner accepts that this request could not have been responded to within the £600 cost limit.
52. The Commissioner notes that the Council responded to previous similar requests, following searches of the departments cited in the requests, without citing cost as an issue. He would comment that, as each request must be dealt with on its own merits, the Council is indeed entitled to change its position, where it considers this to be the correct response, regardless of the action taken for previous requests.
53. The Commissioner further notes there is no provision in FOISA obliging an authority to provide information in response to a request it has been deemed to be covered by section 12(1) of FOISA. He recognises that, in this case, the Council chose to provide some information, solely under its duty to advise and assist and not under any other provision in FOISA. In his view, doing so did not cancel out the fact that section 12(1) applied, were the Council to respond fully to that part of the request.
54. Consequently, the Commissioner is satisfied that the Council was entitled to rely on section 12(1) of FOISA in relation to the request, to the extent that it was not repeated, and was therefore under no obligation to comply with it.

Decision

The Commissioner finds that Glasgow City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

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.

Margaret Keyse
Head of Enforcement

29 September 2020

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.

...

- (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.

...

14 Vexatious or repeated requests

...

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

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.

...

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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