

# Decision Notice



Decision 167/2012 Mr Archie Burns and the City of Edinburgh Council

Portobello High School

Reference No: 201200584

Decision Date: 11 October 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Burns asked the City of Edinburgh Council (the Council) for information about the new Portobello High School (the school). The Council refused to disclose the information on the basis that it was legal advice.

During the investigation, the Council reconsidered Mr Burns' request and concluded that it would cost more than the £600 to provide the information – as such, the Council was not required to comply with the request. The Commissioner agreed. However, she also found that the Council had not provided reasonable advice and assistance to Mr Burns in making his request.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 25 November 2011, Mr Burns made the following request through the Council's website:  
"I am seeking to understand the legal issues associated with the new Portobello High School. Please provide all the information relating to the risks associated with the new Portobello High School Project. This should include the initial education consultation which identified a legal issue and the PERT project management process which managed to mitigate this risk. Can you also include the costs associated with the legal case including all current activities."
2. On 21 December 2011, the Council advised Mr Burns that the information he had requested was considered exempt in terms of section 36(1) of FOISA, as there was ongoing court action and legal privilege applied.



3. On 22 December 2011, Mr Burns emailed the Council requesting a review of its decision. Mr Burns noted that the legal opinion had already been made public and the other information he sought, regarding the PERT risk analysis and costs, were not legal issues.
4. The Council notified Mr Burns of the outcome of its review on 20 February 2012. It upheld its previous decision without amendment, but provided a link to online reports relating to his request. The Council advised Mr Burns that it did not use the PERT project management process, and the costs associated with the legal case would not be known until the conclusion of the litigation.
5. On 29 March 2012, Mr Burns emailed the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Burns had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.

## Investigation

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7. On 11 April 2012, the Council was notified in writing that an application had been received from Mr Burns and was asked to provide the Commissioner with any information withheld from him.
8. On 12 June 2012, following a number of reminders, the Council advised the Commissioner's office that, after considering the request in detail, it had concluded that it involved a substantial volume of material distributed across a number of departments, and the cost of complying with Mr Burns' request would exceed £600. The Council therefore wished to rely on the "cost exemption" in section 12(1) of FOISA. The case was then allocated to an investigating officer.
9. The investigating officer contacted Mr Burns to advise him that the Council now considered that his request would incur excessive costs. Mr Burns disagreed with this decision and explained that the information he was seeking was likely to be found in the risk register for the project. He stated that he would like to receive the topic headings in the risk register so he could understand the scope of the risk assessment, and wanted detailed information only for the legal issues and their potential effect on timescale and cost. He thought that most of this information would be documented in the project management process.
10. On 21 June 2012, the Council was invited to provide comments on Mr Burns' application (as required by section 49(3)(a) of FOISA). The Council was asked to provide submissions to support its view that compliance with Mr Burns' request would incur excessive costs, and was asked whether it would be willing to enter into dialogue with Mr Burns now that he had identified specific information in which he was interested.



11. On 17 July 2012, the Council disclosed a redacted version of the risk register and copies of two reports to Mr Burns.
12. Following this disclosure, Mr Burns confirmed that he still required a decision from the Commissioner in relation to his original request to the Council, which he considered would not incur excessive costs.
13. The Council responded fully to the investigating officer's letter on 17 August 2012. Its response is discussed in detail in the next part of this decision notice, but, in summary, the Council presented arguments to support its view that it would cost over £600 to provide Mr Burns with the information he had requested.
14. Mr Burns' submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

## **Commissioner's analysis and findings**

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15. In coming to a decision on this matter, the Commissioner has considered all of the submissions which have been presented to her and is satisfied that no matter of relevance has been overlooked.

### **Information falling within the scope of the request**

16. The Council noted that Mr Burns sought detailed information about the legal issues and their potential effect on timescale and cost. The Council commented that the risk of legal challenge had been identified since the commencement of the project and was the reason for the delay in the project; consequently, the information held by the Council was substantial and was distributed across a number of departments.
17. The Commissioner's interpretation of the scope of Mr Burns' request is that he sought any information relating to the legal issues; any information about costs associated with the legal case; and a risk register (which has now been partially disclosed to Mr Burns).

### **Section 12 – Excessive cost of compliance**

18. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations. The Commissioner has no power to require the release of information should she find that the cost of responding to a request for information would exceed this amount.



19. The projected costs the 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, 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. The public 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. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour.
20. The Council explained that in December 2006 it approved the location for the new school; however, a legal challenge was mounted over the proposed location, leading to a court hearing. Because of this legal challenge, information covered by Mr Burns' request was held across a number of Council departments, including City Development; Children and Families; Corporate Services – Real Estate; and Corporate Services – Communications Services. An external consultant was also likely to hold relevant information.
21. The Council went on to explain that members of staff within the Real Estate department held around 3,856 emails in a subfolder called "Portobello High School", together with three boxes of paper files on the school (a 'screen shot' of this individual's email inbox was provided). The Council also provided examples of what it considered to be 'simple', 'medium' and 'complex' emails, each requiring different amounts of time to check.
22. The Council advised that it would take on average a minute for each of the 3,856 emails to be reviewed and the information falling within the scope of his request to be identified. In total, it would take over 60 hours to review all of the emails which the Real Estate department alone held about the school.
23. The Council stated that a senior member of staff would be required to complete the search of the Real Estate department emails, and the hourly rate for this individual was £15 per hour. At £15 per hour the total cost of searching just the Real Estate department emails would exceed the prescribed amount of £600.
24. The Commissioner has considered the Council's submissions and Mr Burns' request in detail. Due to the wide-ranging nature of Mr Burns' request, the Commissioner accepts that it would be difficult to use a targeted keyword search to reduce the number of emails potentially covered by Mr Burns' request, and that all the emails held by the Real Estate department in the "Portobello High School" subfolder would have to be reviewed to assess which ones contained the information sought by Mr Burns. The Commissioner notes that several departments are known to hold information covered by the request, and so the estimated cost of searching the Real Estate department emails accounts for only one part of the total cost calculation.



25. Having considered the Council's submissions, the Commissioner is satisfied that its estimate of the cost of complying with Mr Burns' request for information is reasonable and can be justified by the amount of information covered by his request and the fact that it is held by several different departments within the Council. The Commissioner does not consider that the request could have been responded to within the £600 limit. Consequently, she is satisfied that the Council was entitled to rely on section 12(1) of FOISA in relation to Mr Burns' request.

### **Section 15 – duty to advise and assist**

26. Having established that the Council was correct to rely on section 12(1) of FOISA in relation to Mr Burns' request, the Commissioner has also considered whether the Council complied with the duty to advise and assist Mr Burns prescribed by section 15 of FOISA.
27. In its submissions, the Council apologised for the fact that it had failed to contact Mr Burns in order to help him narrow the scope of his request. The Council explained that, at the time of Mr Burns' request, the Portobello High School project was subject to judicial review and therefore any information falling within the scope of his request would be considered exempt in terms of section 36(1) of FOISA. The Council commented that it had not appreciated that the relevant information was extensive and held by a number of departments until the Commissioner's investigation commenced and clarification had been received from Mr Burns.
28. The Commissioner notes this explanation, but has made in clear in previous decisions that she expects a Scottish public authority relying on section 12 of FOISA to ensure that it offers reasonable advice and assistance to the applicant. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. The Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA (the Section 60 Code) includes advice that where section 12(1) applies, public authorities may "consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly."<sup>1</sup>
29. The Commissioner considers that the Council should have engaged in discussion with Mr Burns when responding to his initial request. The fact the project was being judicially reviewed may have caused the Council to overlook the possibly that, despite this, some of the information falling within the scope of his request might not have been exempt from disclosure and could be disclosed in full or in redacted form. Since the Council appears to have interpreted Mr Burns' request narrowly, and did not engage with him to offer advice or assistance until after he had applied for a decision, the Commissioner has concluded that the Council failed to provide advice and assistance to Mr Burns in line with section 15(1) of FOISA.

<sup>1</sup> See paragraph 1.9 in Part 2 of the Code at <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



30. More positively, the Commissioner notes that the Council contacted Mr Burns during the investigation and disclosed some information to him, and that this discussion has enabled Mr Burns to submit a more focussed request. The Commissioner would encourage the Council to engage with requesters in future, especially if extensive or wide-ranging information is being sought.

### **Change in Council's reasons for withholding information**

31. Mr Burns expressed dissatisfaction that the Council had changed its reasons for withholding the requested information. The Council had moved from a position where the information was considered exempt under section 36(1) of FOISA to one where the Council considered that complying with his request would incur excessive costs. Mr Burns was dissatisfied that, until the investigation had commenced, he had been unaware that the Council considered his request to be wide-ranging.
32. The Commissioner notes Mr Burns' dissatisfaction and has commented on the Council's failure to provide advice and assistance above. The Commissioner accepts that it is frustrating for an applicant when a public authority cites new exemptions, or other relevant provisions of Part 1 of FOISA, during an investigation. However, the Commissioner acknowledges that an authority is entitled to do so (or to withdraw exemptions or other provisions previously relied upon), at any point before her decision is issued, and that she must consider any such provisions the authority continues to rely upon at the time she reaches that decision. Where this happens, the Commissioner will normally give the applicant an opportunity to comment on the new position and arguments adopted by the public authority.

## **DECISION**

The Commissioner finds that the City of Edinburgh Council partially complied with the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Burns.

She finds that the Council generally complied with Part 1 of FOISA in responding to Mr Burns' request and upholds the Council's application of section 12(1) of FOISA. However, in failing to provide advice and assistance to Mr Burns, the Council failed to comply with section 15(1) of FOISA. The Commissioner does not require the Council to take any further action with respect to this failure.



## Appeal

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Should either Mr Burns or the City of Edinburgh Council wish to appeal against this decision, there is an 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**  
**11 October 2012**



## Appendix

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### 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.

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- (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.

...

##### 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.