

Decision Notice



Decision 066/2011 Mr Thomas Gatley and Renfrewshire Council

Corporate Management Team papers

Reference No: 201002302
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Scottish Information Commissioner

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Summary

Mr Gatley requested from Renfrewshire Council (the Council) the agendas, minutes, etc. of all Corporate Management team meetings, or advice as to where they might be viewed. The Council responded by asking Mr Gatley to clarify his request in terms of section 1(3) of FOISA and refusing to process his request without such clarification. Following a review, which confirmed the Council's requirement for clarification, but also advised that the cost of complying with the request as it stood exceeded the upper limit prescribed for the purposes of section 12(1) of FOISA, Mr Gatley remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Gatley's request for information in accordance with Part 1 of FOISA. He found that it had not acted reasonably in seeking clarification of the request in terms of section 1(3) of FOISA, although it had been entitled to refuse to comply with the request under section 12(1) (i.e. on grounds of excessive cost). He also found that the Council should have provided Mr Gatley with advice and assistance on narrowing down his request, and required the Council to do so.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 12(1) and (4) (Excessive cost of compliance) and 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

1. On 22 October 2010, Mr Gatley wrote to the Council requesting the following information:
“... agenda, minutes, etc, howsoever held of all Corporate Management Team [CMT] meetings or advise where they may be viewed.”



2. The Council responded on 10 November 2010, confirming that it held CMT minutes for a seven year period and asking for clarification as to what precisely, within this set of records, he was seeking. It also explained that inspection of the minutes at the Council's offices would still involve a significant amount of officer time.
3. On 10 November 2010, Mr Gatley telephoned and emailed the Council, indicating that it would assist him if the Council clarified what matters were discussed by the CMT and also how the minutes were indexed. On 12 November 2010, the Council responded to the effect that it required to know the exact information he was looking for in order to comply with his request. It confirmed this again on 15 November 2010, following a further communication from Mr Gatley.
4. Also on 15 November 2010, Mr Gatley wrote to the Council seeking a review of its decision not to process his FOI request.
5. The Council notified Mr Gatley of the outcome of its review on 14 December 2010, upholding its decision not to proceed with his request until clarification of the scope of his request had been received. It believed the requirement for clarification to be reasonable and therefore considered that section 1(3) of FOISA applied: accordingly, it was not obliged to proceed with Mr Gatley's request until it had the clarification it required. The Council also, however, referred to previous advice given to Mr Gatley, to the effect that as it held CMT minutes dating back seven years, the cost of providing all relevant information would exceed the £600 limit prescribed for the purposes of section 12(1) of FOISA.
6. On 15 December 2010, Mr Gatley wrote to 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.
7. The application was validated by establishing that Mr Gatley had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 20 December 2010, the Council was contacted in writing, advising that an application had been received from Mr Gatley and inviting the Council to provide comments on the application (as required by section 49(3)(a) of FOISA), and also asking it to respond to specific questions. In particular, the Council was asked questions on:
 - the information it held which fell within the scope of Mr Gatley's request
 - why it required clarification of the request
 - the cost of complying with the request



- the advice and assistance which had been, or could be, provided to Mr Gatley in relation to his request, and
 - providing Mr Gatley with an opportunity to inspect some or all of the requested information.
9. The Council responded on 17 January 2011, by explaining the information it held, commenting on its reasoning for seeking clarification from Mr Gatley of his request and detailing how it had estimated the costs involved in fulfilling Mr Gatley's request in full. Further comments were sought and obtained from the Council in the course of the investigation, including comments on the possibility of inspecting the requested information. The Council also provided clarification on what information falling within the scope of the request was already in the public domain: this turned out to be the minutes (only) for the 2004 meetings, of which Mr Gatley already had copies.
10. The relevant comments received from both Mr Gatley and the Council will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Gatley and the Council and is satisfied that no matter of relevance has been overlooked.

Information described in Mr Gatley's request

12. Section 1(3) of FOISA provides that if a Scottish public authority requires further information in order to identify and locate the information an applicant has requested, *and has told the applicant so (specifying what the requirement for further information is)*, it is not obliged to give the requested information until the further information has been received. However, it is only entitled to do this if the requirement for further information is reasonable.
13. The Council considered it entirely reasonable to ask the applicant what sort of information he wished to access, noting the breadth of the request, the lengthy period it covered and the potential sensitivity of the information. It insisted that it did this to allow it to locate and retrieve relevant information on Mr Gatley's behalf. On the basis of his previous interactions with the Council, it considered it possible that he wanted access to specific information and therefore, rather than issue a refusal notice based on the breadth of his request (and therefore the cost of compliance), thought it more helpful to seek clarification as to exactly what he was seeking.



14. While noting the Council's wish to be helpful, the Commissioner must also note that section 1(3) applies only in circumstances where the authority is *unable* to identify and locate the information on the basis of the applicant's request as originally framed, and therefore *requires* additional information in order to do so. The requirement for clarification must be reasonable, and clearly this will not be the case if the authority is in a position to identify and locate the information using the request alone. The application of section 1(3) carries with it significant consequences (specifically, the authority is not obliged to process the request further until it receives the further information it requires) and therefore is not to be resorted to lightly.
15. Having considered all the Council's submissions, together with Mr Gatley's request and his other communications in relation to it, it appears clear to the Commissioner the Council was able to identify and locate the information Mr Gatley was seeking. While the use of the word "etc." might be seen to introduce a degree of ambiguity into the request, the Commissioner considers (as, for that matter, does the Council) it can reasonably be interpreted as embracing all CMT papers held by the Council. The corporate management team of a local authority is a significant forum, albeit not a statutory one, and the Commissioner would find it surprising if a given council could not identify and locate relatively readily such CMT papers as it had identified a need to retain. In any event, an inability to identify and locate the requested information does not appear to be at the core of the Council's arguments.
16. As indicated in paragraph 13 above, the factors identified by the Council in determining that the request required clarification were its breadth, the lengthy period it covered and the potential sensitivity of the information. While these factors may be relevant to the application of other provisions of FOISA (two of which, sections 12(1) and 15, are considered further below), the Commissioner does not consider it to follow necessarily from any of them that the authority could not identify and locate the information the applicant had requested on the basis of the request as originally submitted. Indeed, it is evident from the Council's remaining submissions (particularly on the cost of complying with the request) that it could in fact do this.
17. In all the circumstances of this case, therefore, the Commissioner does not consider it was reasonable for the Council to require Mr Gatley to explain more clearly what information he was seeking (in terms of section 1(3) of FOISA).

Section 12 – Excessive cost of compliance

18. In its review, the Council made reference to the costs of fulfilling Mr Gatley's request, advising that section 12(1) of FOISA would apply if it were to undertake the process required to provide all of the information falling within the scope of his request.
19. 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.
20. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.



21. 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.
22. During the investigation, the Council confirmed that (should the Commissioner not consider clarification of the request to be required in terms of section 1(3)) it would wish to rely upon section 12(1) of FOISA, providing various submissions explaining its calculations to the investigating officer.
23. The Council indicated to the investigating officer that it held CMT minutes from the beginning of 2003. The CMT met every week and its figures were based on 50 meetings a year. It therefore considered there to have been approximately 400 meetings since 2003. It explained that each minute averaged 2-3 pages and there was also an agenda (generally 1 page) for each meeting. Taking into account papers circulated with agenda items, which also fell within the scope of Mr Gatley's request, the Council considered that, at a conservative estimate, the total number of papers for a weekly CMT meeting would average 30 pages. This gave a total of approximately 12,000 pages in all of the relevant papers it held.
24. The Council also indicated that the projected cost of the photocopying or printing was based on a rate of 11p per sheet. This gave a total of £1,320.00. It submitted that copying costs would be incurred even if the information were to be made available for inspection, as it would be inappropriate to allow a member of the public unrestricted access to the electronic database on which the information was held. It also indicated that these costs would be incurred if the information were to be made available electronically, given the need to check the information in hard copy to consider whether any of it should be withheld as exempt.
25. The Commissioner has given consideration to the estimated costs presented by the Council. Given that the Council holds seven years worth of information, and on the basis of approximately 50 meetings a year throughout the seven year period, the total number of meetings seems a little high. The appropriate figure would appear to be 350 rather than 400. On the basis of an (albeit small) sample provided by the Council, the weekly average of 30 pages appears not unreasonable. Even if there were only 350 meetings, therefore, the Council would still be required to provide 10,500 pages of information to fulfill Mr Gatley's request. At the rate of 11p per copy, the estimated cost would still be £1,155, clearly well in excess of the £600 limit. Having considered the volume of information in the 2004 minutes which have been disclosed already, the Commissioner does not find that the costs associated with these would reduce the overall cost significantly.



26. Having considered the various means by which the information in question could be provided, together with the relative estimated costs cited by the Council, the Commissioner is satisfied that the cost of fulfilling Mr Gatley's request for information would exceed £600. Consequently, he accepts that the Council was entitled to refuse to comply with the request in terms of section 12(1) of FOISA. In the circumstances, this would have been a more appropriate means of dealing with the request than requiring clarification in terms of section 1(3) of FOISA.

Section 15 – Duty to provide advice and assistance

27. 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. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA (the Section 60 Code – in the version which applied at the time the Council dealt with Mr Gatley's request) include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling"¹.
28. While acknowledging the relevant provisions of the Section 60 Code, the Council considered that, in this particular case, the applicant could be expected to describe precisely what he wished to receive. Given what it described as a "wish list", it suggested that the applicant might submit a number of requests with the aim of ensuring that the cost of each was below the £600 limit. It also noted that agendas for the CMT meetings, for example, contained details of all items ever discussed by the CMT over the relevant period, for the purposes of deliberation (and therefore questioned their suitability as a means of advising and assisting the applicant).
29. The Commissioner notes what appear to be genuine concerns on the Council's part as to the uses to which advice and assistance on this matter might be put. FOISA does, however, provide other means of dealing with such concerns, particularly if further requests become significantly burdensome to deal with by virtue of factors extending beyond simply cost. Ultimately, it is for the authority to determine what advice and/or assistance would be reasonable in the circumstances, but the Commissioner does not consider it reasonable in this case to dismiss the suitability of any information of this kind for disclosure within the £600 limit, or to expect the applicant to have a sufficiently comprehensive understanding of the information in question to enable him to reduce the scope of the request (to bring it within the limit) without advice or assistance from the authority (which can always be expected to have a considerably better understanding of the subject matter of the information and the way in which it is held).
30. In conclusion, the Commissioner considers it would have been a relatively simple matter for the Council to provide Mr Gatley with appropriate advice and/or assistance to allow him to narrow his request to the point where the Council was more likely to be able to comply. In failing to do so, the Commissioner finds that the Council failed to discharge its duty under section 15(1) of FOISA.

¹ See paragraph 20 in Part II of the Code at <http://www.scotland.gov.uk/Publications/2004/09/19894/42618>



31. In light of this, the Commissioner now requires the Council to advise Mr Gatley of the various means by which it could provide elements of the information he has requested, identifying what information it could provide (whether by inspection or in hard copy or electronically) without exceeding the £600 cost limit.

DECISION

The Commissioner finds that Renfrewshire Council (the Council) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gatley. In particular, the Commissioner does not consider it was reasonable for the Council to require Mr Gatley to explain more clearly what information he was seeking, in terms of section 1(3) of FOISA, and therefore finds that it was not entitled to decline to deal with Mr Gatley's request until it had that clarification.

However, the Commissioner also finds that the Council was correct in concluding that the cost of complying with Mr Gatley's request would exceed £600 (which it should have addressed by refusing to comply with the request in terms of section 12(1) of FOISA). He also finds that the Council did not comply fully with the requirements of section 15(1) of FOISA in dealing with Mr Gatley's request, by failing to advise him on narrowing his request to bring the cost of compliance within the £600 limit.

The Commissioner requires the Council to provide advice to Mr Gatley, as described in paragraph 31 of this decision 10 May 2011.

Appeal

Should either Mr Gatley or the 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 notice.

Margaret Keyse
Head of Enforcement
25 March 2011



Appendix

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.

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.

...

- (4) The regulations may make provision as to-
- (a) the costs to be estimated; and
 - (b) the manner in which those costs are to be estimated.

...



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.