

Decision Notice

Decision 090/2018: Mr D and Scottish Enterprise

Arrangements for addressing new evidence

Reference No: 201800323

Decision Date: 26 June 2018



Scottish Information
Commissioner

Summary

Scottish Enterprise was asked for information about its arrangements for addressing new evidence of financial irregularities. Scottish Enterprise considered the request was vexatious and refused to comply with it.

The Commissioner agreed that the request was vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (general entitlement); 14(1) (Vexatious or repeated requests)

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 13 December 2017, Mr D made a request to Scottish Enterprise. Mr D asked:
 - a. What arrangements does Scottish Enterprise have to address new evidence of financial irregularities?
 - b. Has Scottish Enterprise recently addressed any such new evidence?
2. Scottish Enterprise responded on 16 January 2018, notifying Mr D that it considered his request was vexatious, in line with section 14(1) of FOISA. Scottish Enterprise considered that his request was a continuation of a previous complaint and had the effect of prolonging correspondence on matters which had been exhaustively addressed.
3. On 18 January 2018, Mr D wrote to Scottish Enterprise requesting a review of its decision. He refuted the reasons Scottish Enterprise considered his request vexatious. He requested a review “in the light of all the available information including the important new evidence supporting my allegations” and stated that the response to his request was based on “deliberate falsehoods”.
4. Scottish Enterprise notified Mr D of the outcome of its review on 15 February 2018. It upheld its previous response without amendment.
5. On 16 February 2018, Mr D applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr D did not believe that his request was vexatious..

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr D 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 27 March 2018, Scottish Enterprise was notified in writing that Mr D 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. Scottish Enterprise was invited to comment on this application and answer specific questions. These questions focussed on why Scottish Enterprise considered the request vexatious and referred to the Commissioner's briefing on section 14(1)¹ of FOISA.
9. Scottish Enterprise responded on 19 April 2018.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr D and Scottish Enterprise. He is satisfied that no matter of relevance has been overlooked.

Section 14(1) – vexatious requests

11. In terms of section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
12. FOISA does not define the word "vexatious". The Commissioner's general interpretation, as set out in his guidance on section 14(1), is that the following factors are relevant when considering whether a request is vexatious:
 - it would impose a significant burden on the public body
 - it does not have a serious purpose or value
 - it is designed to cause disruption or annoyance to the public authority
 - it has the effect of harassing the public authority
 - it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
13. However, this is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.
14. While the Commissioner's view is that "vexatious" must be applied to the request and not the requester, he acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of a request and its surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.

Mr D's submissions

15. In his request for review, Mr D refuted each of the reasons Scottish Enterprise had given for considering his request vexatious. He commented that his request:
 - had serious purpose;

¹ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

- was not an attempt to re-open issues;
 - did not represent the continuation of a pattern of behaviour which had been deemed vexatious in another context;
 - did not relate to a matter which had been previously investigated and concluded; and
 - was not designed to cause disruption or annoyance to the public authority.
16. He submitted that, if the request had the effect of harassing Scottish Enterprise, it was justified in the circumstances.
17. In a letter dated 21 December 2017, which was attached to his request for review of 18 January 2018, Mr D argued that Scottish Enterprise had never provided a response to his complaint (a complaint about financial irregularities at a Scottish Enterprise subsidiary). He submitted that he had new evidence, which he had obtained since 2014 when he was informed by Scottish Enterprise that it would no longer respond to any correspondence from him unless he had new evidence.
18. In his letter of 21 December 2017, Mr D claimed that over £150,000 of taxpayers' cash was omitted from the company's financial accounts and bank accounts while it was simultaneously transferred into the personal bank account of one of his supervisors. He also alleged that interest associated with this cash had been credited to the same employee's personal bank account instead of one of the company's bank accounts.
19. Mr D provided a detailed account of why he was dissatisfied with the investigation of his complaint, and why he considered that there were still matters to be investigated with respect to the alleged financial irregularities at the Scottish Enterprise subsidiary.
20. Mr D also referred to a newspaper report of a recent court case (entirely unconnected to Scottish Enterprise or its subsidiary), during which a local authority employee was warned that passing on inaccurate information was potentially a criminal offence. Mr D provided examples of Scottish Enterprise employees he considered had provided false information about the financial irregularity since 2014. Mr D considered that he had obtained new evidence which proved financial irregularities had taken place.

Scottish Enterprise's submissions

21. In its initial response to Mr D, Scottish Enterprise stated that the request:
- did not have a serious purpose or value;
 - was an attempt to re-open issues which have previously been dealt with through other processes;
 - represented the continuation of a pattern of behaviour which has been deemed vexatious in another context (Mr D was declared a vexatious litigant in 2005 after raising a large number of court actions against various bodies and individuals, all connected with his original allegations; these actions were either unsuccessful or withdrawn by Mr D);
 - related to a matter which had been previously investigated and concluded;
 - was designed to cause disruption or annoyance to the public authority; and
 - had the effect of harassing to the public authority.

22. As part of its submissions to the Commissioner, Scottish Enterprise provided an overview of the background to Mr D's complaint, noting that it related to an incident which had happened almost 25 years ago.
23. Scottish Enterprise explained that Mr D's original complaint was in respect of an accounting matter which he raised while working for a subsidiary of Scottish Enterprise in 1993 and which he perceives to have been a case of fraud. The complaint was investigated at the time by Strathclyde Police and a report was submitted to the Procurator Fiscal who decided no further action was necessary. The matter was also the subject of an investigation by Scottish Enterprise. No evidence of fraud or wrongdoing was found.
24. Scottish Enterprise outlined the steps by which Mr D has sought to pursue this issue since then.
25. For example, Mr D complained to the Scottish Public Services Ombudsman and to the Commissioner for Ethical Standards in Public Life. Neither of these complaints proceeded.
26. In early 2016, Mr D made a complaint to Police Scotland alleging that he had new evidence in respect of his original complaint. Police Scotland investigated this new complaint, but did not take matters further.
27. Scottish Enterprise submitted that Mr D does not accept that his original complaint has been satisfactorily dealt with despite being investigated both internally and by Strathclyde Police/Police Scotland, and persists in pursuing this matter. It listed correspondence sent by Mr D since January 2017 (eight information requests, four requests under the Data Protection Act 1998 and two complaints), all of which related to Mr D's continued dissatisfaction with its original decision on his complaint.
28. In summary, Scottish Enterprise considered Mr D's current request to be a continuation of his longstanding correspondence. It had therefore taken into account the history and context of the correspondence in reaching the view that the request was vexatious. It acknowledged that answering the request would not impose a burden on Scottish Enterprise, but considered that FOISA was being used as a means to extend dialogue in relation to a complaint which had been fully investigated.

The Commissioner's findings

29. Taken in isolation, Mr D's request of 13 December 2017 might not appear to be vexatious: it is politely worded, clear and concise. The Commissioner is aware, however, that the vexatious nature of a request may only emerge after considering it in the context created by previous or ongoing correspondence.
30. Scottish Enterprise has submitted that Mr D's complaint has been fully investigated and it has corresponded with Mr D over many years about the complaint: both of these factors are relevant when deciding whether the request at issue was vexatious.
31. As described above, Scottish Enterprise provided an overview of the complaint raised by Mr D and how it had been investigated. In his request for review, Mr D described in extensive detail why the complaint required further investigation, because of the new evidence he had uncovered.
32. The Commissioner accepts that the request under consideration has a clear link to Mr D's original complaint about the alleged fraud at the Scottish Enterprise subsidiary: it relates to his concerns about the monies that he considered were misappropriated; whether his

complaint was fully investigated; and why, on the basis of the new evidence he obtained, the matter should be reinvestigated.

33. The very wording of Mr D's request ("new evidence of financial irregularities ...") make it clear that there is a connection between his request and what has happened in the past.
34. The Commissioner accepts that it is appropriate, in the circumstances, to consider this request in the context created by Mr D's previous correspondence relating to his complaint, and that it was reasonable for Scottish Enterprise to take his previous correspondence into account when deciding whether this request should be treated as vexatious.
35. It is in the context created by Mr D's previous correspondence that the Commissioner has considered the factors cited by Scottish Enterprise to justify its reliance on section 14(1) of FOISA.

Request does not have a serious purpose or value

36. Scottish Enterprise argued that the request did not have a serious purpose or value. As stated in his published guidance on vexatious requests, the Commissioner's view is that a public authority should not reach this conclusion lightly.
37. In considering whether his request lacked serious purpose, it is appropriate for the Commissioner to take into account the whole correspondence between Mr D and Scottish Enterprise, and to consider whether, in that context, his request of 13 December 2017 had a serious purpose.
38. Mr D has continually contacted individuals within Scottish Enterprise, other public bodies and MSPs to raise his concerns about alleged financial irregularities. His latest request asks about arrangements for new financial irregularities and purports to provide new evidence. Taken on its own, Mr D's request might not appear, at first sight, to lack serious purpose or value. However, considered in the light of his previous correspondence, which goes back over 10 years, the investigation by Scottish Enterprise which found no evidence of fraud or wrongdoing, and the investigation by Strathclyde Police/Police Scotland which found no action was necessary, the Commissioner agrees that Mr D's request can reasonably be regarded as lacking serious purpose. His reasons for reaching this conclusion are as follows.
39. The request is for information about arrangements for addressing new evidence of financial irregularities, and whether Scottish Enterprise has recently addressed any such new evidence. The request is inextricably linked to his previous correspondence about the alleged fraud, and his belief that previous investigations have not reached the correct conclusion.
40. There have been several investigations into the concerns raised by Mr D. In addition to the investigations by Scottish Enterprise and Strathclyde Police /Police Scotland, there have been several court cases which resulted in no action being taken about the alleged financial irregularities, the most recent in 2014 (a case dropped by Mr D). His request therefore appears to be an attempt to extend correspondence on a matter which has been fully considered and investigated.
41. Taking account of the history between the parties, it is the Commissioner's view that this request was designed to further Mr D's view that there were financial irregularities and alleged fraud at the Scottish Enterprise subsidiary. It is reasonable to assume that Mr D was asking for this information so that he could press Scottish Enterprise for another

investigation. It is therefore reasonable to see Mr D's request as the continuation of a pattern of behaviour which he was first warned about when Scottish Enterprise advised that it would no longer correspond with him on the issue unless he had new evidence.

42. As Mr D's request relates to a matter which has been fully investigated, the Commissioner agrees with Scottish Enterprise that it lacks serious purpose or value. It is also clear that the resolution of Mr D's concerns would not be brought any closer by Scottish Enterprise providing a response to his request, given the history of his correspondence and dealings with Scottish Enterprise. The Commissioner accepts that responding to his request would have the effect of re-opening and prolonging correspondence on matters which seem to have been fully investigated through the processes established for dealing with such complaints.
43. As noted above, Scottish Enterprise advised Mr D in 2014 that it would no longer communicate with him on this matter unless he brought "new evidence" to them. Mr D clearly believes that he has brought new evidence, some of which was considered by Police Scotland in 2014. The fact that Mr D believes he has found new evidence would not, in the Commissioner's view, preclude Scottish Enterprise from concluding that the latest request was vexatious.
44. For these reasons, the Commissioner accepts that it was reasonable for Scottish Enterprise to conclude that Mr D's request was vexatious, in terms of section 14(1) of FOISA.

Vexatious requests: other factors

45. In addition to the factors considered above, Scottish Enterprise informed Mr D that his request was vexatious in line with section 14(1) of FOISA, because:
 - it was designed to cause disruption or annoyance to the public authority; and
 - it had the effect of harassing to the public authority.
46. The Commissioner considers that these factors may also have been relevant: Mr D's correspondence may well have been disruptive and harassing to Scottish Enterprise. However, Scottish Enterprise did not provide detailed submissions on these points. Given the lack of reasoning provided by Scottish Enterprise, the Commissioner will not consider these factors further in his decision. He is satisfied that there is sufficient reason to find Mr D's request vexatious, without reaching a decision on these additional factors.

Conclusion

47. In reaching a conclusion on this decision, the Commissioner agrees that the request can be regarded as without serious purpose, and that this factor is a strong factor. He also considers on the basis of the explanatory submissions provided by Scottish Enterprise that responding to Mr D's request would prolong correspondence on a matter which has been exhaustively addressed. Having considered all the relevant circumstances, the Commissioner accepts Scottish Enterprise's view that Mr D's request was vexatious, in terms of section 14(1) of FOISA and that Scottish Enterprise were not obliged to comply with the request.

Decision

The Commissioner finds that Scottish Enterprise complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr D.

Appeal

Should either Mr D or Scottish Enterprise 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

26 June 2018

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.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info