

Decision Notice



Decision 118/2009 Ms N and East Lothian Council

Information relating to private sector housing grants

Reference No: 200900374

Decision Date: 21 October 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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



Summary

Ms N requested from East Lothian Council (the Council) information relating to private sector housing grants. Ms N did not receive a response and, after the Council refused to carry out a review of her request on the grounds that it was vexatious, Ms N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Ms N's request for information in accordance with Part 1 of FOISA, on the basis that Ms N's request was not vexatious in terms of section 14(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 10(1) (Time for compliance); 14(1) (Vexatious or repeated requests) and 21(8)(a) and (9) (Review by Scottish public authority)

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 20 January 2009, Ms N wrote to the Council requesting details of certain housing grants approved by the Council in 2004/05, certain applications made to Scottish Ministers by the Council under section 242(4) of the Housing (Scotland) Act 1987 and the reason why a grant of £0.5m in respect of private sector housing grants was paid to a named organisation in 2003.
2. Ms N did not receive a response to this request. On 24 February 2009, she emailed the Council requesting a review of its failure to respond to her request.



3. The Council emailed Ms N on 25 February 2009, explaining that it had provided a response on 29 January 2009 and enclosing a copy of a letter from the Chief Executive explaining that it was refusing to respond to the request on the grounds that it was vexatious in terms of 14(1) of FOISA. The email of 25 February 2009 also informed Ms N that the Council would not provide any further response to her. (In terms of section 21(8)(b) of FOISA, a public authority is not required to comply with a request for review where it considers that the request to which the request for review relates was one with which it was not obliged to comply by virtue of section 14(1). However, the authority is still required, in terms of section 21(9), to notify the applicant of this. The Commissioner has proceeded on the basis that the email from the Council to Ms N fulfilled this obligation.)
4. On 30 March 2009, Ms N wrote to the Commissioner, stating that she 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. Her application contained submissions to the Commissioner as to why she did not consider her request to be vexatious. Ms N also expressed dissatisfaction with the time taken by the Council to respond to her request for information.
5. The application was validated by establishing that Ms N 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

6. On 5 May 2009, the Council was notified in writing that an application had been received from Ms N and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the Council was asked to justify its reliance on section 14(1) of FOISA.
7. The Council replied on 2 June 2009, providing its submissions and supporting evidence. In its response, the Council provided comments on the various questions raised by the investigating officer, including its reasons for asserting that Ms N's request was vexatious in terms of section 14(1) of FOISA.
8. During the investigation, the investigating officer sought and received additional information from the Council to substantiate its reliance on section 14(1).



Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Ms N and the Council and is satisfied that no matter of relevance has been overlooked.

Section 14(1) – Vexatious requests

10. Section 14(1) of FOISA states that section 1(1) (which confers a general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
11. If the Council was correct in its application of section 14(1), it would be under no obligation to comply with Ms N's request (although it would remain under an obligation to, for example, notify Ms N that it was not complying with her request and why).
12. FOISA does not define the word "vexatious." The Commissioner's general approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
- (a) it has the effect of harassing the public authority; and/or
 - (b) it does not have a serious purpose or value; and/or
 - (c) it is designed to cause disruption or annoyance to the public authority; and/or
 - (d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
13. In *Decision 062/2005 MacRoberts and the Scottish Executive*, which related to 720 requests for information made to the then Scottish Executive on the same day, the Commissioner commented that he is likely to be sympathetic to public authorities refusing a request under section 14(1) where responding to that request would impose a significant burden on the public authority and would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate.
14. In considering what is manifestly unreasonable or manifestly disproportionate, it will, therefore, sometimes be necessary to consider the effect of dealing with the request on a public authority. Even if an applicant does not intend a request to be vexatious, it is possible that dealing with that request will impose a significant burden on a public authority and the request should be considered manifestly unreasonable or manifestly disproportionate. The nature and effect of the request, rather than the intentions of the applicant, can therefore be taken into account in certain circumstances.



15. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as “the Section 60 Code”) makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious, stating that the power to refuse to respond to a request on the grounds contained in section 14(1) should be used sparingly and should not be abused simply to avoid dealing with a request for information.
16. The Commissioner notes that an applicant's identity and the history of their dealings with a public authority may be relevant. This does not mean, however, that a request for information should be automatically refused in the light of such issues.
17. In its submissions, the Council argued that Ms N had communicated on several occasions various comments which expressed or implied wrongdoing by the Council or its officials, and which were highly critical of the Council in certain specified respects.
18. The Council pointed out that some of Ms N's communications contained certain wording which indicated that Ms N would seek redress against the Council, for example by seeking to bring criminal charges. The Council provided several examples of communications from Ms N which it considered inappropriate or insulting.
19. The Council submitted that there would be a significant amount of work involved in responding to Ms N's information request and that it could not, for example, simply reproduce a spreadsheet with the requested information and it would need to redact a great deal of information to comply with data protection legislation. The Council considered that the limited amount of information that it would be able to release would provide Ms N with no insight into how the figures in question were reached.
20. The Council argued that, given the background and history of information requests and other contacts with the Council, the request was made with a design to annoy or harass Council staff. The Council noted that one official felt harassed by Ms N and had taken offence at the tone used in communications and the suggestions of wrongdoing levelled at the official personally. The Council submitted that full explanations of the Council's actions had been offered to Ms N, and on numerous occasions the official had tried to explain the Council's position.
21. The Council also stated that Ms N had made numerous information requests and complaints to the Council over the past four years, all of which had received a response. The Council indicated that it had received ten information requests from Ms N since 2006.
22. The Commissioner has reviewed in detail the arguments presented by the Council to support its assertion that the request for information under investigation in this case was vexatious. In the Commissioner's view, Ms N's request does not meet any of the criteria set out in paragraph 12 above and, while these should not be considered the only grounds on which he might accept that a request is vexatious, he does not accept that the Council has provided valid alternative reasons that might apply in this case. In conclusion, he does not accept that the request is vexatious in terms section 14(1) of FOISA.



23. The Commissioner observes that there is no numerical limit in FOISA on the number of requests which any one person may make in any period of time. In *Decision 062/2005*, approximately 700 requests made in one day were held to be vexatious. In *Decision 128/2007 Domhnall Camshron and James Watt College of Further & Higher Education*, 4895 requests made at the same time was held to be vexatious. Whilst the Commissioner accepts that it is not possible to put any specific figure on the level of requests at which section 14(1) would apply, because other criteria are relevant (and because one single request may be vexatious), he is not persuaded by the Council's submissions that the level of requests made by Ms N in all the circumstances of this case is at a level which could intrinsically be considered vexatious.
24. The Commissioner also considers that the information request itself is neither unduly wide nor onerous. He concludes that the request cannot be considered manifestly unreasonable or disproportionate. The Commissioner is unable to accept that dealing with this request would, in the circumstances of this case, require a disproportionate amount of time and the diversion of an unreasonable proportion of the Council's resources away from its core operations.
25. Although there is an underlying dispute between Ms N and the Council, the Commissioner is not persuaded by the Council's arguments that the request was designed to annoy and harass the Council, nor that it could be assessed as having that effect. The information request was framed in such a way as to seek information on the amount of money the Council would provide by way of a housing grant which had been the subject of previous correspondence. The information request is merely seeking underlying or general background information which is clearly relevant to that correspondence. It would be highly unfortunate if members of the public were prevented from pursuing information requests alongside existing disagreements with public authorities in such circumstances
26. The Commissioner also notes that it is always open to a public authority to respond to an information request which it considers would involve a substantial amount of work (and consequent expense) in terms of sections 9 or 12 of FOISA.
27. The Commissioner does not consider that the fact that certain information may have to be withheld in line with the Data Protection Act 1998 (by relying on an exemption in section 38(1)(b) of FOISA) before a response can be provided to Ms N to be relevant in this case to the consideration of whether this request is vexatious.
28. Accordingly, the Commissioner does not uphold the Council's application of the provisions in section 14(1) of FOISA to Ms N's request made on 20 January 2009.

Timescale for responding

29. As noted above, in her application to the Commissioner, Ms N considered the Council had not responded to her request for information within the timescale prescribed in FOISA.
30. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the day following receipt of the request to comply with a request for information subject to certain exceptions which are not relevant in this case.



31. Ms N submitted that she did not receive a response to her initial request of 20 January 2009 and did not receive a copy of the Council's response until after she had submitted a request for review on 24 February 2009.
32. In its submissions to the Commissioner, the Council explained that the Chief Executive's Office retains a record of posting. The Council stated that the letter in question was prepared on 29 January 2009 and was posted from the Chief Executive's Office on 2 February 2009. A "screenshot" of the electronic document's properties was provided to the investigating officer, which the Commissioner accepts confirms the Council's submissions as to the date of creation of the document.
33. The Commissioner accepts the Council's assertion that the letter in question was posted by it on 2 February 2009. However, the Commissioner is unable to make any findings as to the reason why the letter was not delivered to Ms N.
34. The Commissioner accordingly accepts, on balance, that the Council complied with the requirements of section 10(1) of FOISA in responding to Ms N's request for information.

DECISION

The Commissioner finds that East Lothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). He finds that the request was not vexatious and that the Council was obliged to comply with the request for information in terms of section 1(1) of FOISA. The Commissioner therefore requires the Council to respond to Ms N's request for information in terms of Part 1 of FOISA, otherwise than in terms of section 14(1), by 11 December 2009.

However, the Commissioner finds that the Council responded to the information request made by Ms N within the timescales allowed by section 10(1) of FOISA and in doing so complied with Part 1 of FOISA.



Appeal

Should either Ms N 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.

Kevin Dunion
Scottish Information Commissioner
21 October 2009



Appendix

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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

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.

21 Review by Scottish public authority

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if –

...

- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.

- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.