

Decision Notice

Decision 037/2018: Mr Allan Nugent and Glasgow City Council

Maternity leave dates of an employee

Reference No: 201702118

Decision Date: 16 March 2018



Summary

The Council was asked when a named employee began and finished her maternity leave. The Council considered the request 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 19 September 2017, Mr Nugent made a request for information to Glasgow City Council (the Council). The information requested related to the 2013/14 taxi tariff process and included a request for the dates on which a named employee began and finished her maternity leave (i.e. the dates that she was absent from work during that period).
2. The Council responded on 17 October 2017. The Council notified Mr Nugent that it was withholding information about the employee's maternity leave dates under section 38(1)(b) of FOISA, as disclosure would breach the data protection principles set out in Data Protection Act 1998 (the DPA).
3. The Council also asked Mr Nugent to give serious consideration to the appropriateness of making such a request, given the likelihood that the request would cause distress, upset and offence. The Council told him that if he were to make a request for review using similar language (the request is not set out in full), the Council might consider it to be vexatious in accordance with section 14(1) of FOISA. The Council referred to the "numerous" requests for information which Mr Nugent had submitted in relation to the taxi tariff review.
4. On 23 October 2017, Mr Nugent wrote to the Council requesting a review of its decision on the basis that he was simply asking for clarification on information that (he said) had already been put into the public domain by the employee, when explaining the reasons for a delay in the taxi tariff review.
5. The Council notified Mr Nugent of the outcome of its review on 14 November 2017. It explained that, after carrying out a full and impartial review of the response sent to him, it was refusing his request in terms of section 14(1) of FOISA, as it was considered to be vexatious.
6. On 20 November 2017, Mr Nugent applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Nugent was dissatisfied with the outcome of the Council's review as he did not consider his request to be vexatious.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Nugent 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.
8. On 15 December 2017, the Council was notified in writing that Mr Nugent had made a valid application and the case was allocated to an investigating officer.
9. 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 answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Nugent and the Council. 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 guidance¹ on section 14(1), is that the following factors are relevant when considering whether a request is vexatious:
 - (i) it would impose a significant burden on the public body
 - (ii) it does not have a serious purpose or value
 - (iii) it is designed to cause disruption or annoyance to the public authority
 - (iv) it has the effect of harassing the public authority
 - (v) it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
13. 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.

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

Mr Nugent's submissions

15. Mr Nugent acknowledged that he had made numerous requests for information relating to the taxi tariff reviews over the past few years. As noted above, he stated that at no time has he intended to cause disruption and/or annoyance to the Council. He argued that in the interests of transparency and the public interest, he is entitled to the information he has requested.
16. Mr Nugent argued that the named employee used her personal circumstances to defend an appeal to the Traffic Commissioner (2013/14) and also to explain the delay in commissioning Transport Research Partners to carry out a tariff review. Mr Nugent noted that the named employee and the Council had stated that maternity leave arrangements had no bearing on the tariff reviews. Mr Nugent argued that this was simply not true and that the Council had failed to provide adequate cover for the named employee's maternity leave.
17. Mr Nugent explained that he wanted the dates of the employee's maternity leave so that he could compare them to the delays to the review of the individual taxi tariff. He believes this would prove that not only did the employee's maternity leave (and lack of cover) affect the tariff reviews, but that the investigation undertaken by the Council's Head of Internal Audit was not a full and thorough investigation. Mr Nugent submitted that at no time did the auditor contact him (in relation to the investigation). If he had been contacted, he would have handed over documents which prove that the employee had previously admitted that the lack of cover for her maternity leave had affected the tariff reviews and ultimately affected the annual turnover of his taxi business. Mr Nugent argued that he had every right to investigate why and who caused this. If this annoyed the Council, that was unfortunate, but it was not his intention: his business is his priority.
18. Mr Nugent argued that if these factors are taken into account it can be seen that his request for information did not lack serious purpose or value and could most definitely not be seen as vexatious in terms of section 14(1) of FOISA. Mr Nugent argued that he is simply seeking further details on information that is already in the public domain, in order to seek clarity.
19. Mr Nugent disputed the Council's assertion that he has been partly responsible for delays in the taxi tariff reviews due to the amount of time and resources the Council has had to devote to the processing of his information requests. Mr Nugent noted that this was the second time that the Council has accused him of this and he considered that the Council's assertions on this point were vexatious. He noted that he represents a substantial number of taxi operators who rely on him, and he suggested that it is the Council's use of "delay and denial tactics", rather than fulfilling requests for information, which has led to unnecessary applications to the Commissioner.
20. Mr Nugent claimed that, on 15 June 2016, the License and Regularity Committee was told that the 2016/17 tariff review would be started immediately. Mr Nugent noted that as of November 2017, some 17 months later, there was no sign of that review.
21. Mr Nugent submitted that his request for information on the maternity arrangements cover for a specific member of staff is far from harassment and not in any way vexatious. He argued that as the named employee oversees the tariff reviews, in the interests of transparency, he, as a taxi driver, is fully entitled to ask questions of her. Mr Nugent argued that the delays in tariff increases being applied to the taxi meter (which he believes are due to Council maternity arrangements) have caused disproportionate and unjustified levels of disruptions,

irritation and stress to the individual taxi drivers and their families. Mr Nugent argued that the Council's tariff reviews are years late and out of date when applied to the meter.

22. Mr Nugent referred to an excerpt from the named employee's response to the Traffic Commissioner, which recorded when she returned from maternity leave. Mr Nugent submitted that he wanted to know the start date of the maternity leave so he could work out how many months the named employee was absent and whether that would explain why the taxi tariff has been delayed for 24 months. Mr Nugent maintained that there was no malice or vexatious motive in his request; he is simply trying to see how or who has been delaying the taxi tariff.

The Council's submissions

23. In its submissions to the Commissioner, the Council explained that it did not take lightly the decision to treat Mr Nugent's request of 19 September 2017 as vexatious. It had taken account of the Commissioner's guidance on vexatious requests and also *Decision 126/2017 Mr X and the Police Service of Scotland*² in which the Commissioner acknowledged that the requester's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of a request.
24. The Council argued that Mr Nugent's requests have imposed a significant burden on the Council. It stated that responding to Mr Nugent's numerous requests about the same issue has caused an unreasonable proportion of its financial and human resources to be diverted from other statutory functions, including the Council's taxi tariff review. Between June 2014 and January 2018, Mr Nugent had made 26 requests for information, the majority of which related to the Council's taxi tariff review and which usually contained numerous separate requests for different information relating to the review. The Council explained that a significant amount of information had been provided to Mr Nugent in relation to the issue of the taxi tariff review, following these requests.
25. The Council stated that its process for dealing with the Taxi Tariff Review is transparent and is in accordance with the provisions of the Civic Government (Scotland) Act 1982 (which imposes a legal duty upon the Council to review the Taxi Tariff at an interval of no more than 18 months). It noted that the correct forum for making an appeal against the Taxi Tariff is the Traffic Commissioner for Scotland, who has already considered an appeal against the proposed 2015/16 Taxi Tariff, and declined to proceed with the appeal.
26. The Council's Legal Services Department is responsible for Freedom of Information review requests and appeals. The Council stated that a search for "Allan Nugent" in one folder within the Legal Services document management system returned 650 items. It submitted that this is indicative of the amount of time and resources that is spent dealing with Mr Nugent's review requests and appeals.
27. The Council stated that information requests that relate to specific licensing issues are primarily dealt with by one Council officer within the Licensing Section, due to the technical knowledge required to answer such queries. The Council noted that this particular officer is also responsible for policy development, service development, operational governance and programme/project management.
28. The Council argued that Mr Nugent's information request lacked serious purpose or value. It noted that Mr Nugent had previously raised concerns that the named employee's maternity

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700860.aspx>

leave arrangements have contributed to the alleged delay of the taxi tariff review. It stated that Mr Nugent had raised this issue at a meeting of the Licensing and Regulatory Committee dated 15 June 2016. Mr Nugent was advised that when a member of staff is on maternity leave, other staff cover their work and this would not result in any delay to the taxi tariff review. The Council provided the Commissioner with a transcript of this meeting.

29. The Council explained that Mr Nugent wrote to its Chief Executive on 7 October 2016 with various concerns about the taxi tariff review, including delays allegedly due to the named employee's maternity leave arrangements. The Council dealt with Mr Nugent's concerns under its official whistle blowing procedure and a full investigation was carried out by the Council's Head of Internal Audit. A response was provided to Mr Nugent on 20 December 2016 which concluded the allegations to be unsubstantiated. The Council provided the Commissioner with a copy of the response issued to Mr Nugent.
30. The Council explained that, under section 17 of the Civic Government (Scotland) Act 1982, it is required to carry out a consultation process on the taxi tariff review with persons or organisations representing taxi operators within its area and consider all representations made in writing to them. The Council noted that the taxi tariff review proposals are considered by the Licensing and Regulatory Committee at its public hearing. At the hearing, those who made written representations are given the opportunity to voice their concerns about the taxi tariff review, as Mr Nugent has done previously. The Council stated that its process for dealing with the taxi tariff review is transparent and is in accordance with the provisions of the 1982 Act.
31. The Council submitted that Mr Nugent's issues with the taxi tariff review, including his allegations about the named employee's maternity arrangements, have been exhaustively explored as a result of his previous information requests and the investigation carried out by the Council's Head of Internal Audit. The Council maintained that Mr Nugent's request lacks serious purpose or value and is primarily a means of causing disruption and annoyance to the Council. The Council stressed that, in terms of section 18 of the 1982 Act, the correct forum for making an appeal against the taxi tariff is the Traffic Commissioner for Scotland.
32. The Council argued that Mr Nugent's information requests about the taxi tariff review demonstrate an obsessive pattern of behaviour designed to cause disruption or annoyance to the Council. It referred to Mr Nugent's application to the Commissioner, where Mr Nugent said that at no time had he intended to cause disruption and/or annoyance to the Council. The Council argued that, even if this was the case, the request had the effect of harassing a member of the Council's staff: it noted that Mr Nugent had made previous remarks about the named employee and her private life, in language that it considered to be inappropriate.
33. The Council noted that, in its response to Mr Nugent dated 17 October 2017, it had asked him to give serious consideration to the appropriateness of his requests about the maternity arrangements of the named employee and in particular the language used to frame the request and its likeliness to cause distress, upset and offence. The Council maintained that it was satisfied that it had correctly dealt with Mr Nugent's request as vexatious in terms of section 14(1) of FOISA.

The Commissioner's findings

34. The Commissioner first considered whether Mr Nugent's request lacked serious purpose or value. The Council submitted that his concerns about maternity cover were addressed during the Licensing and Regulatory Committee meeting of 15 June 2016, when he was advised that when a member of staff is on maternity leave, other staff cover their work and this would

not result in any delay to the taxi tariff review. The Council also referred to the investigation that was undertaken by its Head of Internal Audit, which found that Mr Nugent's complaints about the Council's lack of maternity cover were unsubstantiated.

35. The Commissioner has reviewed the Head of Audit's report and he notes that, while the report covered several matters, Mr Nugent's concerns about maternity leave cover were dealt with in one sentence which simply reiterated the points made at the meeting on 15 June 2016. The Commissioner is not convinced that this demonstrates beyond all doubt that the Council undertook a full and thorough investigation into the concerns raised by Mr Nugent in relation to delays caused by maternity leave, to the extent that it can now rely upon the outcome of this investigation when arguing that Mr Nugent's request lacked value or serious purpose.
36. Having considered the arguments put forward by both parties, the Commissioner is satisfied that Mr Nugent's request did not lack serious purpose. As Mr Nugent explained, he was trying to establish whether the Council took steps to ensure that adequate cover was provided when the named employee was on maternity leave. Mr Nugent suspects that the Council failed to provide adequate cover for the employee and, as a result of this failure, it failed to carry out the taxi tariff review on time.
37. However, a request which has value and serious purpose can still be vexatious, in terms of section 14(1) of FOISA, if other relevant factors apply (see paragraph 12).
38. Mr Nugent's request of 19 September 2017 might not appear, on the face of it, to be particularly vexatious: he asked for factual information which is easily identifiable. However, the Commissioner is aware that the vexatious nature of a request may only emerge after considering the request in context; for example, a history of previous or ongoing correspondence with the applicant.
39. The Council has referred to previous requests made by Mr Nugent on the subject of the taxi tariff review. Since June 2014, Mr Nugent has made 26 requests for information, 19 requests for review and six appeals to the Commissioner (including this one). The Council submitted that the requests usually contained numerous separate requests for information relating to the taxi tariff review.
40. The Commissioner is aware of the complex nature of some of the earlier requests made by Mr Nugent, which have been considered in previous decisions and he is satisfied that it is reasonable for the Council to take in account Mr Nugent's previous requests on the issue of the taxi tariff review, in relation to the decision to rely on section 14(1) of FOISA.
41. The Commissioner also notes that it is not just the number of requests that is relevant, but their complexity; the common theme running through the requests; and whether the requests have placed a disproportionate demand on an authority's resources. He notes that all of the requests relating to the taxi tariff review are dealt with by a single Council officer, due to the technical knowledge required to answer such queries.
42. As noted above, the Council submitted that it has searched the files of its Legal Services Department and a search of one folder within its document management system for "Allan Nugent" yielded 650 items. The Commissioner notes that the Legal Services Department is also responsible for liaising with his office in response to appeals received from applicants; it is possible that some of these 650 items may involve correspondence with his office about the appeals made by Mr Nugent. However, even if that is the case, he accepts it indicates

the level of work and resources required by the Council to deal with Mr Nugent's information requests, all of which relate to the same subject, the taxi tariff review.

43. The Commissioner's Guidance on vexatious requests states:

"Regardless of the apparent purpose or value of a request, or the intention of the requester, a request may be deemed vexatious if, in the opinion of a reasonable person, it would appear to be manifestly unreasonable or disproportionate."

44. It continues:

"The effect on a public authority of dealing with the request will be relevant in determining whether this is the case. Relevant factors to consider include the complexity of the request, the volume of information requested, the time and resources that would be required to process it, and the impact on the authority's statutory and/or core operations... Balanced against these factors should be the wider value and (where known) purpose of the request, bearing in mind that FOISA is designed to give access to information and to promote transparency in public authorities."

45. As stated above, the Commissioner does not regard Mr Nugent's request, as it stands, to be complex or likely to require extensive resources to process. However, he accepts that it must be seen in the context created by Mr Nugent's previous correspondence with the Council when assessing whether it was disproportionate or unreasonable.

46. Mr Nugent's stated aim is to achieve clarity about the Council's actions regarding maternity cover for the named employee who is responsible for conducting the taxi tariff review; the suspicion being that the Council failed to provide adequate cover. The Commissioner accepts that public authorities should be held accountable for their actions and decisions, and that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance. Nonetheless, the Council has already responded many times to requests for information on issues relating to the taxi tariff review.

47. The Council has now reached the view that Mr Nugent's information requests about the taxi tariff review demonstrate an obsessive pattern of behaviour designed to cause disruption or annoyance to the Council. Seeking to reopen a complaint about an issue which is of genuine concern to a complainant is not necessarily an action designed to cause disruption and annoyance. However, taking into account the number and complexity of information requests made on the same subject, the Commissioner is satisfied that the request can reasonably be considered disproportionate and unreasonable.

48. The Commissioner also accepts that, even if Mr Nugent did not intend his request to cause disruption or annoyance, it is still possible for the request to have had the effect of harassing a member of the Council's staff.

49. In summary, having considered all the relevant circumstances, the Commissioner accepts the Council's view that Mr Nugent's request was vexatious, in terms of section 14(1) of FOISA. He does not consider this particular request lacks value or serious purpose, nor does he consider that it is unduly burdensome, on its own. However, taking into account the amount of resources the Council has so far expended in responding to Mr Nugent's requests on the taxi tariff review, he is satisfied that, in the full circumstances of the case, the request was unreasonable and disproportionate, and could reasonably be considered likely to harass a member of the Council's staff.

50. On balance, the Commissioner accepts that Mr Nugent's request of 19 September 2017, when taken in the context created by his previous correspondence, placed a significant burden on the Council. The Commissioner therefore finds that the Council was not obliged to comply with the request, on the grounds that it was vexatious in terms of section 14(1) of FOISA.

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 Mr Nugent.

Appeal

Should either Mr Nugent or Glasgow City 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.

Daren Fitzhenry
Scottish Information Commissioner

16 March 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.

...

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