

Decision Notice



Decision 060/2011 Mr Norrie Moane and North Lanarkshire Council

Cost of restructuring the addiction service

Reference No: 201002195

Decision Date: 21 March 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Moane asked North Lanarkshire Council (the Council) for information about the costs of the proposed restructuring of its addiction service.

The Council withheld the information under section 27(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), explaining that the information would be published on its website within 12 weeks. The Council confirmed this decision after review. Mr Moane remained dissatisfied and subsequently applied to the Scottish Information Commissioner for a decision.

From the arguments provided by the Council, the Commissioner was not satisfied that it had been correct to rely upon the exemption in section 27(1) of FOISA to withhold the information requested by Mr Moane. As the information has since been published, the Commissioner did not require the Council to take any further action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 27(1) (Information intended for future publication)

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 26 April 2010, Mr Moane wrote to the Convenor of the Council's Housing and Social Work Services Committee in relation to proposed changes affecting the Council's addiction service. He asked for the opportunity to review the cost of these proposals.
2. On 30 April 2010, the Council wrote to Mr Moane to explain that the Councillor had passed the request to the Council for response, and to obtain confirmation that he was seeking "information relative to the cost of proposals managed by Social Work", understood to be the proposals for the addiction service. He was invited to provide more detail about the information he required.
3. On 7 May 2010, Mr Moane wrote to the Council to advise that he was seeking the costs of the proposed service redesign for the addiction service.



4. On 26 May 2010, the Council provided its response to Mr Moane's information request. It advised that information on the proposals for the addiction service would be made available on the Council's website on 30 July 2010, and provided a link to the section of the website where the information was to be published (Council papers). Because the information was due to be published within 12 weeks, the Council advised that it was exempt from disclosure under section 27(1) of FOISA.
5. On 31 May 2010, Mr Moane wrote to query the Council's response. He believed that the exemption in section 27(1) had been wrongly applied, pointing out that if 12 weeks were calculated from the date of his request on 26 April 2010, the period would end on 19 July 2010.
6. On 1 June 2010, the Council wrote to advise Mr Moane that it had calculated the 12 week period from 7 May 2010, this being the date on which he had provided the clarification which the Council required in order to source the information he had requested.
7. On 1 June 2010, Mr Moane wrote to seek a review of the Council's response to his request, expressing concern that the request was being delayed without due cause.
8. On 24 June 2010, the Council wrote to Mr Moane with the outcome of its review. The Council upheld the decision that the information was exempt under section 27(1) of FOISA, on the grounds that it was due for publication on 30 July 2010, within the 12 week period calculated from 7 May 2010 (which was considered to be the commencement date for dealing with Mr Moane's information request under FOISA).
9. On 6 August 2010, Mr Moane wrote to complain that the information had not yet been made available on the Council website, and that he felt he had been misled. An exchange of correspondence followed, in which Mr Moane pursued his complaint through the Council's internal complaints procedure.
10. On 26 August 2010, the Council wrote to Mr Moane in relation to his assertion that he had been misled. The Council explained why publication of the information he had requested had been delayed.
11. Mr Moane remained dissatisfied with the Council's response, and applied for a decision from the Commissioner in a letter received on 26 November 2010. He believed that he had been misled by the Council and that the Council had failed to comply with FOISA.
12. The application was validated by establishing that Mr Moane had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner, in terms of section 47(1) of FOISA, only after asking the authority to review its response to that request. The case was allocated to an investigating officer.



Investigation

13. On 21 December 2010, the Council was notified in writing that an application had been received from Mr Moane and was asked to provide any comments it wished to make on Mr Moane's application (as required by section 49(3)(a) of FOISA).
14. On 23 December 2010, the Council confirmed that it was satisfied that the e-mail communication addressed to Mr Moane on 26 August 2010 set out the reasons why publication of the information had been delayed.
15. On 7 January 2011, the Council was asked for some additional information. The Council was asked whether it could confirm that there was an existing intention to publish the information on or before 7 May 2010, when Mr Moane made his request. It was also asked why it was "reasonable in all the circumstances" to withhold the information until the planned publication date. Finally, the Council was also asked why it considered that the public interest in withholding the information until the planned publication date outweighed the public interest in disclosure.
16. The Council replied on 21 January 2011, later providing further explanation of the information it held as at 7 May 2010 (letters dated 8 February 2011 and 14 March 2011). Its submissions are considered in the next part of this decision.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the information withheld and the submissions presented to him, and is satisfied that no matter of relevance has been overlooked.
18. Mr Moane has not disputed that the information he requested has now been published on the Council website. Accordingly, the Commissioner will consider only whether the Council complied with Part 1 of FOISA in withholding the information under section 27(1) when Mr Moane made his request and request for review.

Section 27(1) of FOISA

19. Section 27(1) provides that information is exempt from disclosure where the following tests are met:



- a) the information is held with a view to its being published by a Scottish public authority or any other person at a date not later than twelve weeks after that on which the request for the information is made;
 - b) when the request is made, the information is already being held with that view; and
 - c) it is reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.
20. This exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA. It applies to any information which an authority has already planned to publish within 12 weeks from the date on which the request is made. Information intended for publication within 12 weeks is exempt where it is “reasonable in all the circumstances” to withhold the information until the date when the information is due to be published. The authority should be able to demonstrate that a publication timetable has already been decided, and that it is not simply delaying the release of the information for 12 weeks.
21. It should be noted that there is no requirement within section 27 that publication must actually take place as planned: only that it must be held with a view to publication at the time the request is received. The Commissioner is therefore unable to comment on the fact that publication of the information was delayed beyond the date initially indicated to Mr Moane by the Council.

Was the information held by the Council at the time of request?

22. The Council has not provided any documentary evidence to show that the information requested by Mr Moane was held at the time he made his request. It has explained that the review of the addiction service was discussed at an organisational change meeting held between service management staff and trade unions on 17 February 2010. It has also provided an email (dated 19 May 2010) which advised that Mr Moane’s request was the subject of a scheduled report due to be considered by the Housing and Social Work Services Committee on 5 August 2010. The Council has stated (letter dated 8 February 2011) that while there was no finalised report as at 7 May 2010, there was a fully developed proposal including costs, and this information did not change after 7 May 2010.
23. On the basis that the restructuring of the addiction service was already the subject of discussion within the Council, and that the costs of restructuring had been established and did not change after 7 May 2010, the Commissioner accepts that the Council held the information requested by Mr Moane at the time he made his request.



Was publication of the information already planned at the time of the request?

24. The email referred to in paragraph 22 shows that, by 19 May 2010 and probably earlier, the Council had formed an intention to publish the information in a report due to be considered by the Housing and Social Work Committee on 5 August 2010 (and therefore due to be published with the Committee agenda on 30 July 2010). The Council has not provided the Commissioner with any documentary or other evidence to prove conclusively that the intention to publish already existed when Mr Moane submitted his request, but in its letter of 14 March 2011 it stated that as at 7 May 2010 “it was anticipated that there would be a report in the next cycle of meetings”.
25. The Commissioner is prepared to accept, on the balance of probabilities, that by 7 May 2010 the Council had already decided to prepare a report containing the requested information for the Housing and Social Work Services Committee meeting of 5 August 2010.

Was publication planned within 12 weeks of the date of Mr Moane's request?

26. The Council advised Mr Moane (26 May 2010) that the information he had asked for would be published on 30 July 2010. Mr Moane has argued that this date falls outside the 12 week period allowed by section 27(1) of FOISA, if the 12 weeks are calculated from the date he first asked for the information (26 April 2010). The Council has argued that, for the purposes of FOISA, the 12 week period should be calculated from 7 May 2010, when Mr Moane provided clarification required before the Council could respond to his request. The Commissioner accepts this, for the following reasons.
27. Mr Moane's request of 26 April 2010 was made in the course of an exchange of correspondence with the Convenor of the Council's Housing and Social Work Services Committee. Councillors are not Scottish public authorities under FOISA, so an information request made to a councillor does not fall to be dealt with under FOISA. However, the Commissioner recognises that members of the public will not always make this distinction and expects councils to put arrangements in place, so that any requests which councillors receive for information held by the relevant council are passed to that council, as happened in this case, to enable the council to provide advice and assistance on making a valid request.
28. In the circumstances, the Commissioner considers while that the Council's initial letter to Mr Moane (30 April 2010) referred to a requirement for clarification, it was to all intents and purposes providing him with advice and assistance on making a request which it could accept as a valid request for information under FOISA. The Commissioner is satisfied in the circumstances that Mr Moane's email of 7 May 2010 was a valid request for information, and the statutory period for dealing with the request therefore began on 7 May 2010, the date the Council received it. For this reason, the Commissioner accepts that the 12 week period under consideration should be calculated from 7 May 2010, not 26 April 2010.



Was it reasonable to withhold the information until the planned publication date?

29. Section 27(1) recognises that where a public authority intends to make information available, it should, within reason, be able to determine its own publication timetable and deal with the necessary preparation and administration associated with publication.
30. The Council was asked why it considered that it was “reasonable in all the circumstances” to withhold the information until the planned publication date. The Council’s reply stated that it was reasonably anticipated that there would be information published on a particular date, but that there was no “public interest exemption test” to be satisfied. The Council went on to say:

“while there was quite clearly a report within contemplation, that is not to say that at the date of the enquiry by Mr Moane any proposal was necessarily fully developed and not susceptible to change and it would therefore be the Council’s position that in any event it would not be in the public interest to disclose potentially erroneous or incomplete information.”
31. This response seems somewhat at odds with the Council’s letter of 8 February 2011, which states that while there was no finalised report as at 7 May 2010, there was a fully developed proposal including costs, and this information did not change after 7 May 2010. The Commissioner sought further clarification from the Council on this point and was advised that although a report to elected members was anticipated in the next cycle of meetings, it was not beyond the bounds of possibility that the proposal could have been withdrawn entirely because of a change in circumstance not foreseen at 7 May 2010.
32. Nothing in the Council’s submissions has convinced the Commissioner that the information it held about the cost of the proposed restructuring of the addiction service was likely to change. The Commissioner takes the view that the description of the information as a “fully developed proposal including costs” carries an implication that further significant change was not likely, and he considers that the Council could reasonably have opted to supply the information with a proviso that it was subject to change until published.
33. The Council has not demonstrated to the Commissioner that it was reasonable in all the circumstances to withhold the information requested by Mr Moane until the planned publication date for the report to the Housing and Social Work Committee. The Commissioner therefore finds that the exemption in section 27(1) of FOISA did not apply to the information covered by Mr Moane’s request, and therefore that the Council was wrong to rely upon this exemption to withhold that information. The Council therefore failed to comply with Part 1 (and in particular section 1(1)) of FOISA in dealing with Mr Moane’s request.
34. As the information requested by Mr Moane has now been published, the Commissioner does not require the Council to take any further steps in relation to this case.



DECISION

The Commissioner finds that North Lanarkshire 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 Moane. Specifically, he finds that the Council was not entitled to withhold information under the exemption in section 27(1) of FOISA.

As the information has since been published, the Commissioner does not require the Council to take any steps as a result of this decision.

Appeal

Should either Mr Moane or North Lanarkshire 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
21 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

27 Information intended for future publication

- (1) Information is exempt information if-
- (a) it is held with a view to its being published by-
- (i) a Scottish public authority; or
- (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and



- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...