

Decision Notice



Decision 099/2011 Mr Mark Irvine and South Lanarkshire Council

Departure of a member of staff

Reference No: 201100035
Decision Date: 24 May 2011

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Mark Irvine (Mr Irvine) requested from South Lanarkshire Council (the Council) information regarding the early retirement of a particular employee. The Council responded by providing some information, but it maintained that it was not obliged to comply with some parts of the request, on the grounds that these constituted repeated requests for the purposes of section 14(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which some further information was disclosed to Mr Irvine and the Council continued to rely on section 14(2) of FOISA, Mr Irvine remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Irvine's request for information in accordance with Part 1 of FOISA by applying the provision in section 14(2) of FOISA for point IV of Mr Irvine's request. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement) and 14(2) (Vexatious or repeated requests)

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 11 November 2010, Mr Irvine wrote to the Council requesting the following information:
 - a. A copy of all information contained in the Council's Executive Committee Report from 27 February 2002 which approved the principle of fixed term contracts for Executive Directors.
 - b. A copy of the information contained in any other Council document which explains the Council's policy regarding early retirement of employees, including details of any specific provisions designed to ensure fairness and equity of treatment.
 - c. Any information which explains the Council's decision to enhance pensionable service of a former Executive Director of Corporate Services by 7 years and 6 days.



- d. A copy of the information which explains the Council's decision to allow the former Executive Director to access his pension benefits early, using public funds, when in fact the post of Executive Director of Corporate Services was replaced.
2. The Council responded on 24 November 2010. It provided information to Mr Irvine in response to parts II and III of his request. In response to point IV, the Council referred to a list of statutory provisions that was provided in response to point III. The Council otherwise refused to respond to points I and IV on the basis that it considered these to be repeated requests in terms of section 14(2) of FOISA.
 3. Section 14(2) of FOISA states that, where a public authority has complied with an information request, it is not obliged to comply with a subsequent request from the same person which is identical or substantially similar, unless a reasonable period of time has passed between the making of the two requests.
 4. The Council advised Mr Irvine that it had already complied with identical or similar requests, which had been submitted by Mr Irvine on 23 August 2010, and to which the Council had responded on 13 September 2010.
 5. On 25 November 2010, Mr Irvine wrote to the Council, requesting a review of its decision in relation to points I and IV. Mr Irvine disputed that the information requested in these points had already been provided in the Council's response to his previous request. He also maintained that the questions asked in his information request of 11 November 2010 were quite specific and differed materially from any earlier requests.
 6. The Council notified Mr Irvine of the outcome of its review on 22 December 2010. In relation to point I, the Council acknowledged that Mr Irvine's request for information of 11 November could be viewed as being wider than that previously made. It disclosed a full copy of the report referred to in point I to Mr Irvine in response to that part of his request.
 7. In relation to point IV, the Council indicated that the review panel considered this request to be the same, or very similar to, one which he submitted on 23 August 2010. The review panel therefore concluded that it was dealing with a repeated request, and that, as there had not been a change in the information held by the Council pertinent to this request since his previous request was answered, there had not been a reasonable period of time between the requests. The Council upheld its previous decision that section 14(2) of FOISA applied in relation to point IV of Mr Irvine's request.
 8. On 5 January 2011, Mr Irvine wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review in relation to point IV of his information request, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 9. The application was validated by establishing that Mr Irvine 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

10. On 12 January 2011, the Council was notified in writing that an application had been received from Mr Irvine, and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was also asked to respond to specific questions and, in particular, was asked to justify its reliance on section 14(2) of FOISA.
11. A response was received from the Council on 20 January 2011. The Council provided copies of the documents relating to Mr Irvine's earlier request of 23 August 2010.
12. The Council also explained why it considered that point IV of Mr Irvine's request of 11 November 2010 was a repeat of point III of the request he made on 23 August 2010 and why, therefore, the Council was relying on section 14(2) of FOISA.
13. All submissions received from the Council and Mr Irvine, in so far as relevant, are considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 14(2) – Vexatious or repeated requests

15. As noted above, section 14(2) of FOISA provides that, where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.
16. When considering section 14(2) of FOISA, the following points need to be considered:
 - whether the Council complied with Mr Irvine's first request dated 23 August 2010;
 - whether the subsequent request (dated 11 November 2010) was identical or substantially similar to the first request (23 August 2010); and
 - if so, whether there was a reasonable time between the submission of the first request and the submission of the subsequent request.

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Was the first request complied with?

17. The Council provided the Commissioner with a copy of Mr Irvine's first request (dated 23 August 2010) and its response. At point III of the request of 23 August 2010, Mr Irvine had requested: *"what were the reasons for allowing the Executive Director to retire early, when did the Council approve his early retirement and on what date did his retirement take effect?"*
18. The Council responded to this request on 13 September 2010. It indicated (in response to other parts of the request) that the Executive Director had left the employment of the Council on conclusion of a fixed term contract, with access to pension benefits.
19. In response to point III, the Council indicated that the principle of fixed term contracts for Executive Directors had been approved by the Council's Executive Committee on 27 February 2002, and it confirmed the date of the termination of the Executive Director's employment. The Council notified Mr Irvine that, if he was dissatisfied with the response, he could request a review by writing to the Council's Legal Services Adviser.
20. Mr Irvine submitted a request for review on 22 September 2010. In relation to point III, Mr Irvine considered that the information provided had not explained the actual reasons for the employee being allowed to retire so early. He asked the Council to explain the decision making process properly and fully, and to provide him with a copy of the Executive Committee report (from February 2002) along with any other reports that may have had an impact on this decision.
21. The Council responded to this request for review on 21 October 2010. Having considered whether its initial response had identified and supplied all information held that would explain the reasons for the Council allowing the Executive Director to 'retire early', the Council provided Mr Irvine with sections from the Executive Committee report that related to the introduction of fixed term contracts for Executive Directors. It noted that the remaining parts of the report related to other matters.
22. The Council reiterated that (although Mr Irvine appeared to believe that the Executive Director's post ended or was terminated due to early retirement) the employment was ended because his fixed term contract had ended. However, the Council noted that the Executive Director had received a severance arrangement that involved the enhancement of his pension entitlement. The Council stated that it was clear that Mr Irvine was seeking information regarding the decision to award this severance arrangement.
23. In relation to this matter, the Council indicated that, having taken steps to establish whether any such information was held, and having undertaken searches within personnel services, no recorded information had been located regarding this decision. The Council notified Mr Irvine (in terms of section 17 of FOISA) that no recorded information was held regarding its decision to award the severance payment.



24. The Commissioner notes that, following receipt of the Council's letter of 21 October 2010, Mr Irvine applied to him for a decision in relation to the request of 23 August 2010. That application for decision expressed dissatisfaction with the extent of information supplied to him. However, the additional information he indicated that he wished to access appeared to fall beyond the terms of his request of 23 August. After receiving correspondence from an investigating officer highlighting that it was unlikely that additional information of the types he described would fall within the terms of his request, Mr Irvine decided to withdraw that application for decision by the Commissioner.
25. Having reviewed all of the above, the Commissioner is satisfied that the Council complied with Mr Irvine's original request in line with the requirements laid down in FOISA. Its responses addressed all parts of the request submitted on 23 August 2010, and complied with the technical requirements of Part 1 of FOISA. Since Mr Irvine withdrew his application for a decision in relation to that request, and so the Commissioner has not considered the request of 23 August 2010 in any decision, there is no evidence to suggest that the Council did not comply in full with the terms of that request.
26. Since the Commissioner is satisfied that Mr Irvine's first request was complied with, he will now go on to consider whether the subsequent request was identical or substantially similar to that request.

Was the second request identical or substantially similar to the first?

27. The Council has submitted that, on a reasonable interpretation, Mr Irvine's request of 11 November 2010 repeats point III in the request for information he made by email on 23 August 2010. The two requests are repeated below:

Point III of request of 23 August: what were the reasons for allowing the Executive Director to retire early, when did the Council approve his early retirement and on what date did his retirement take effect?"

Point IV of request of 11 November: A copy of the information which explains the Council's decision to allow the former Executive Director to access his pension benefits early, using public funds, when in fact the post of Executive Director of Corporate Services was replaced.
28. The Commissioner recognises that the two requests are not identical, and so he has considered whether they can be said to be substantially similar. He considers it is clear that the two requests seek related and similar information. In both cases, the request is seeking information that will assist Mr Irvine's understanding of the Council's decision making with respect to the terms upon which the Executive Director left the Council's employment.



29. The first request refers to the early retirement of this member of staff, but the second refers instead to his accessing pension benefits early. While there is a material difference between the two, the Commissioner notes that the first request was submitted prior to the Council providing its explanation that the employee had not retired early, but left at the completion of a short term contract. The November request was submitted at a later date, at which Mr Irvine possessed more accurate knowledge of the circumstances of the Executive Director's departure. The events in which Mr Irvine has an interest remain the same.
30. The Council has argued that, using a reasonable interpretation, point IV of the request of 11 November 2010 was either the same or very similar to that made on 23 August. It has provided a detailed submission setting out how it interpreted and responded to Mr Irvine's request of 23 August 2010 and how the information that was pertinent to this request was also pertinent to his later request of 11 November 2010.
31. When responding to point IV in Mr Irvine's request of 11 November 2010, the Council indicated to Mr Irvine that the paragraphs from the Committee Report which had been provided to Mr Irvine in response to his earlier request were also relevant to this request.
32. It also referred Mr Irvine to a list of statutory provisions, which was supplied in response to (point III of) the request of 11 November 2010, and which set out the framework under which the Council was empowered to act in relation to the severance package and access to pension benefits. In its submissions, the Council therefore noted that it had provided some information falling within the terms of point IV, but where this request overlapped with point III of the request of 23 August, it had refused it in terms of section 14(2).
33. The Council has explained that, on reviewing its handling of Mr Irvine's request of 23 August 2010, the review panel interpreted Mr Irvine's request as including information regarding the severance arrangement that involved the enhancement of the Executive Director's pension entitlement. The Council advised that, ultimately, the review panel decided that no information was held by the Council in relation to this matter, and it gave a notice to Mr Irvine under section 17 of FOISA.
34. Having considered the submissions from the Council, the content of Mr Irvine's requests and his application, the Commissioner considers that Mr Irvine's request for information in point IV of 11 November 2010 is substantially similar to that in point III of his request of 23 August 2010. In both cases, the information sought by Mr Irvine concerned the decision of the Council to allow an Executive Director to leave its employment and have access to his pension benefits early. Although the phraseology of the second request is slightly different to the first, the Commissioner accepts that the same information was being requested, and was covered by the requests.
35. This is supported by the comments in Mr Irvine's application, in which he indicated that correspondence with the Chief Executive revealed that the information he was seeking does exist - albeit in a general body of circulars. He indicated that he was dissatisfied that the Council refuses to explain which of these circulars were used to justify the treatment of one of its own senior officials.



36. The Commissioner understands from these comments that, with his requests, Mr Irvine was seeking information to understand which of the statutory provisions governing local government pension arrangements the Council relied on in making the decision it did in relation to the Executive Director. He notes that the provisions referred to in the Chief Executive's email to Mr Irvine were those mentioned also in the Council's response to Mr Irvine's request of 11 November 2010.
37. Having looked at the review carried out by the Council in response to Mr Irvine's request of 23 August 2010, the Commissioner concludes that this considered that request sufficiently widely, and searches were undertaken that would have established whether any information regarding the consideration of those rules in the context of a particular individual's departure from the Council's employment were held. He therefore considers that the Council's understanding of the intention behind this part of Mr Irvine's request of 11 November 2010 had already been addressed in the Council's review of his earlier request.
38. The Commissioner considers that it was therefore reasonable for the Council to conclude that the request of 11 November 2010 was substantially similar to the request of 23 August 2010.
39. The Commissioner will now consider whether a reasonable period of time passed between the making of the request complied with (23 August 2010) and the making of the subsequent request (11 November 2010).

Had a reasonable period of time passed?

40. In his guidance on the application of section 14(2) of FOISA, the Commissioner has commented that there is no attempt to define "a reasonable period of time" in the legislation, because it will depend on the circumstances of the case. Consideration should be given to two questions which will help to assess whether a reasonable period of time has elapsed. These are:
 - Has the information changed?
 - Have the circumstances changed?

Have the information or circumstances changed?

41. In deciding whether the information has changed, it is important to consider the actual information captured by the request.
42. As noted above, the Council submit that the information which would address Mr Irvine's request of 11 November 2010 is the same information that was the subject of his request of 23 August 2010.
43. The Council also advised that, in relation to the information regarding the decision to award a severance package to the Executive Director, this information was not held by the Council in relation to Mr Irvine's request of 23 August 2010 and the circumstances had not changed when Mr Irvine submitted his request on 11 November 2010.



44. Having considered the submissions from the Council, the Commissioner accepts that the same information was relevant to both of Mr Irvine's requests and there was no change in the information in the eleven weeks between the submission of the two requests. The Commissioner does not consider that there have been changes of circumstances which prompt the conclusion that a reasonable period had passed between Mr Irvine's two requests.
45. The Commissioner does consider that the simple passage of time between requests will eventually be sufficient to allow the conclusion that a reasonable period has passed between two identical or substantially similar requests, irrespective of whether there have been any changes in the circumstances surrounding the request. He therefore considers that the application of section 14(2) will eventually fall away.
46. In this case, however, the period between the requests was very short. The Commissioner does not consider that this period is sufficient to find that the passage of time alone means that a reasonable period has passed between the two requests.
47. The Commissioner therefore finds that the Council was entitled to refuse to comply with point IV of Mr Irvine's request of 11 December 2010 on the grounds that section 14(2) was applicable.

DECISION

The Commissioner finds that South Lanarkshire Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in notifying Mr Irvine that point IV of his request dated 11 November 2010 was a repeated request in line with section 14(2) of FOISA. As such, the Council was not obliged to comply with that request.

Appeal

Should either Mr Irvine or South 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
24 May 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.

14 Vexatious or repeated requests

....

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.