

Decision Notice

Decision 104/2015: Ms Veronica Lynch and Social Care and Social Work Improvement Scotland

Whether request vexatious and business names

Reference No: 201500561
Decision Date: 6 July 2015



Summary

On 8 January 2015, Ms Lynch asked Social Care and Social Work Improvement Scotland (SCSWIS) for information relating to the workload and job description of a named member of staff.

SCSWIS responded by providing her with the job description but withholding business names under section 33(1)(b) (commercial interests) of FOISA. It stated that it considered the remainder of her request to be vexatious in terms of section 14(1) of FOISA. Following a review, Ms Lynch remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated. She accepted SCSWIS's reliance on section 33(1)(b) of FOISA in relation to business names but did not accept that the remainder of Ms Lynch's request was vexatious. She required SCSWIS to provide Ms Lynch with an alternative response to her requirement for review, in respect of those parts of the request it considered vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 14(1) (Vexatious or repeated requests); 33(1)(b) (Commercial interests and the economy)

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 8 January 2015, Ms Lynch made a request for information to SCSWIS. She requested:
 - (i) The total number of applications managed by a named officer over a specified period;
 - (ii) The names of the business and providers whose applications were managed by the named officer;
 - (iii) The start and completion date for each application managed by the named officer over the specified period;
 - (iv) A copy of the officer's job description.
2. SCSWIS responded on 6 February 2015. SCSWIS notified Ms Lynch that it considered the majority of her request to be vexatious in terms of section 14(1) of FOISA. In relation to the business names (part (ii) of the request), it also argued that the information was exempt from disclosure under section 33(1)(b) of FOISA. SCSWIS supplied Ms Lynch with a copy of the job description for the named individual.
3. On 11 February 2015, Ms Lynch wrote to SCSWIS requesting a review of its decision. She did not accept that her request was vexatious and argued that section 33(1)(b) of FOISA did not apply.
4. SCSWIS notified Ms Lynch of the outcome of its review on 4 March 2015. It maintained its reliance on sections 14(1) and 33(1)(b) of FOISA.

5. On 23 March 2015, Ms Lynch wrote to the Commissioner. Ms Lynch applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Lynch stated she did not consider her request to be vexatious and did not accept the application of section 33(1)(b) of FOISA.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms Lynch made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 8 April 2015, SCSWIS was notified in writing that Ms Lynch 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. SCSWIS was invited to comment on this application and answer specific questions, with particular reference to the application of section 14(1) of FOISA. Later in the investigation, it was asked to explain its application of section 33(1)(b) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all withheld information and relevant submissions, or parts of submissions, made to her by both Ms Lynch and SCSWIS. She is satisfied that no matter of relevance has been overlooked.

Section 14(1) of FOISA – Vexatious requests

10. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with an information request if the request is vexatious.
11. SCSWIS applied this provision to Ms Lynch's request, with the exception of that part seeking the named officer's job description. SCSWIS also applied section 33(1)(b) of FOISA to elements of the request. Section 14(1) will be considered in the first instance.
12. Ms Lynch's request was made as a result of a complaint to SCSWIS relating to the time taken to complete a registration process. Ms Lynch stated that her request had no intention of targeting a particular officer and was made on the basis that she had been told the delay in the registration process was due to the officer's workload. She made the request to substantiate this claim.
13. SCSWIS submitted that the requested information, if disclosed, would not accurately reflect the officer's workload: an array of factors would need to be considered in order to make an accurate evaluation. On that basis, SCSWIS considered her request to lack serious purpose or value. It believed the request demonstrated an intention to scrutinise and target an individual inspector, which would cause unjustified distress.
14. SCSWIS stated that the appropriate channel for identifying whether it delayed unnecessarily in the registration process was via its complaint investigation process. SCSWIS argued that Ms Lynch's request demonstrated an intention to conduct her own investigation, outwith the complaint investigation process.
15. At the point of writing, SCSWIS explained, the relevant complaint investigation process was underway. It would identify whether any unnecessary delay occurred in relation to the

registration. SCSWIS considered all three elements of Ms Lynch's request were designed to target the named officer's performance and therefore the request had the effect of harassing a member of their staff, and so was deemed vexatious. SCSWIS submitted that disclosure of the information would not assist Ms Lynch in reaching any reliable conclusions regarding her complaint.

The Commissioner's view

16. The Commissioner has published guidance on the application of section 14(1) of FOISA¹. This states:

'There is no definition of "vexatious" in FOISA. The Scottish Parliament acknowledged that the term "vexatious" was well established in law and opted to give the Commissioner latitude to interpret that term in accordance with this background, in order that the interpretation might evolve over time in light of experience and precedent.'

17. There is no single formula or definitive set of criteria that enable an entirely formulaic approach to determining whether a request is vexatious, and each request must be considered on the merits of the case, supported by evidence and clear evaluation and reasoning. The Commissioner considers the following factors to be amongst those which can be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious:

- (i) it would impose a significant burden on the public authority;
- (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 to be manifestly unreasonable or disproportionate.

18. SCSWIS's application of section 14(1) of FOISA is focused on a perceived intention to cause distress to the named officer. The Commissioner must therefore consider whether that could reasonably be considered to have been Ms Lynch's intention, when making this request. Having considered all the circumstances, she is of the view that SCSWIS has failed to provide cohesive arguments to this effect.

19. Although the Commissioner acknowledges that this request focusses primarily on the performance of an individual in their professional capacity, she cannot accept that this alone renders the request vexatious. Furthermore, the request was made to substantiate claims made by SCSWIS, so the Commissioner cannot accept that the request lacked serious purpose or value.

20. Although Ms Lynch's request was made in conjunction with SCSWIS's complaint process, the Commissioner cannot accept this as sufficient reason for finding the request to be vexatious. The fact that a requester is utilising other methods to pursue their complaint should not necessarily negate their right to request information. The Commissioner accepts that there may be cases in which it is reasonable to conclude that the requester's primary

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

purpose is to pursue an argument, on a matter addressed and commented on thoroughly already, rather than to obtain information, but SCSWIS has failed to produce any evidence that this is such a case.

21. The Commissioner therefore finds that the SCSWIS was wrong to conclude that Ms Lynch's request was vexatious. The Commissioner requires SCSWIS to provide Ms Lynch with another review response, otherwise than under section 14(1) of FOISA.
22. SCSWIS also relied upon section 33(1)(b) of FOISA in relation to part of Ms Lynch's request. This will be considered below.

Section 33(1)(b) – Commercial interests and the economy

23. SCSWIS relied on section 33(1)(b) of FOISA to withhold the names of businesses and providers whose applications were considered by a named officer.
24. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
25. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure;
 - (ii) the nature of those commercial interests, and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
26. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on the disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
27. SCSWIS stated that the businesses in question were preparing to compete in a competitive market with other registered care providers. Releasing their intentions to become a care service provider had the potential to impact on the provision of commercial services for the purpose of revenue generation. Therefore, SCSWIS argued, releasing this information prior to registration was likely to prejudice their financial interests, giving existing competitors a significant commercial advantage over potential new entrants to the sector (by allowing them to reduce costs, offer free meals etc. and give them an opportunity to modify other areas of their business whilst new entrants went through the registration process).
28. In addition, SCSWIS argued that staff at an existing registered service undergoing re-registration were usually unaware of the application, so there was a real likelihood that staff might leave or be approached by a competitor if there is uncertainty during the transfer. In SCSWIS's view, this situation was likely to affect the financial and commercial interest of the new applicants.
29. The Commissioner accepts that businesses registering or re-registering with SCSWIS have a commercial interest in the information requested by Ms Lynch. Having reached this conclusion, she must go on to consider whether SCSWIS was correct to conclude that these

commercial interests would, or would be likely to, be prejudiced substantially by disclosure of the information.

30. The Commissioner accepts the arguments presented by SCSWIS in terms of the potential harm that would be likely to result from disclosure of this information. She accepts that this information would give competitors a commercial advantage and cause uncertainty amongst existing staff, and so be likely to prejudice their commercial interests substantially. In reaching this conclusion the Commissioner notes that at the point of Ms Lynch's request (the Commissioner considers the circumstances at the time of the request) a number, if not all, of these businesses were still in the registration process.
31. In all the circumstances, therefore, the Commissioner is satisfied that disclosure of the business names would have prejudiced substantially, or would have been likely to prejudice substantially, the commercial interests of those businesses. She is therefore satisfied that the business names were exempt from disclosure under section 33(1)(b) of FOISA.

Public interest test

32. The exemption in section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
33. SCSWIS submitted that financial considerations, and particularly the impact on the care sector and staffing referred to above, favoured maintaining the exemption.
34. The Commissioner acknowledges the general public interest in transparency and accountability in allowing the public to understand the volumes, workloads and processes involved in the operation of this organisation. She does not accept that this need extends to the names of specific businesses going through the registration process.
35. The Commissioner has accepted the prejudicial effect of disclosure, as argued by SCSWIS, and it is clear to her that such prejudice would not be in the public interest. In order to conduct its registrations effectively and efficiently, the Commissioner accepts that there is generally a reasonable expectation of confidentiality, at least until the registration process is complete.
36. On balance, taking account of all the circumstances, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs that in disclosure. Consequently, she finds that SCSWIS was entitled to withhold the business names under section 33(1)(b) of FOISA.

Decision

The Commissioner finds that Social Care and Social Work Improvement Scotland (SCSWIS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Lynch.

The Commissioner finds that by applying section 33(1)(b) to withhold business names, SCSWIS complied with Part 1 of FOISA.

However, the Commissioner also finds that SCSWIS was not entitled to refuse to comply with the remainder of Ms Lynch's request on the basis that it was vexatious in terms of section 14(1) of FOISA. In doing so, it failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires SCSWIS to respond to Ms Lynch's requirement for review again, in terms of section 21(4)(b) of FOISA and other than in terms of section 14(1), by **20 August 2015**.

Appeal

Should either Ms Lynch or Social Care and Social Work Improvement Scotland 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.

Enforcement

If SCSWIS fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that SCSWIS has failed to comply. The Court has the right to inquire into the matter and may deal with SCSWIS as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

06 July 2015

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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.

...

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.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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