

Decision Notice



Decision 124/2011 Mr Terence McKenzie and Glasgow City Council

Information relating to Direct Payments

Reference No: 201001885
Decision Date: 23 June 2011

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Scottish Information Commissioner

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Summary

Mr Terence McKenzie (Mr McKenzie) asked Glasgow City Council (the Council) for information relating to Direct Payments. The Council provided some information to Mr McKenzie, but explained that it could not provide certain other information to him as it did not hold it. Following a review, during which the Council provided further information to Mr McKenzie and an explanation regarding the information which it had previously disclosed, Mr McKenzie remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council indicated to the Commissioner that the cost of complying with parts III) and IV) of Mr McKenzie's request would exceed £600.

Following an investigation, the Commissioner found that the Council was correct to notify Mr McKenzie in terms of section 17 of FOISA that it did not hold information relating to the full three financial years covered by parts I) and II) of his request.

The Commissioner also accepted that the cost of carrying out searches to identify whether any further relevant information was held which would address parts III) and IV) of Mr McKenzie's request would exceed the £600 prescribed limit, and so the Council was entitled to apply section 12(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance) and 17 (Notice that information is not held)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 2 (Interpretation); 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

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 24 December 2009, Mr McKenzie wrote to the Council in the following terms:



- a. *What are the current waiting times for individuals to receive a Direct Payment in Glasgow? Please also provide an explanation of how you have defined "Direct Payment" when calculating the waiting times. It would also be helpful to have the waiting times for the last three financial years.*
 - b. *In total, how many people have been waiting for a Direct Payment over the last three years?*
 - c. *I request a copy of the guidance issued by Glasgow City Council to staff on advising people about "Direct Payments".*
 - d. *I request a copy of the guidance/rules issued by Glasgow City Council to staff who are undertaking 'community care' assessments, on the procedure and the detail for advising people of their health and welfare rights.*
2. The Council responded on 26 January 2010. Information covering each part of Mr McKenzie's request was disclosed to him in the Council's response. However, the Council advised Mr McKenzie that, with respect of parts I) and II) of his request, it only held data from June 2008 to December 2009 (which it provided) and so could not provide full information for the last three financial years as Mr McKenzie had requested.
 3. On 8 March 2010, Mr McKenzie wrote to the Council, requesting a review of its decision. Mr McKenzie indicated that, in respect of parts I) and II) of his request, he believed that more people were waiting for Direct Payments than the numbers reflected in the figures provided by the Council, and asked the Council to check its statistics. Mr McKenzie also asked the Council to explain how it gathers its statistics.
 4. In respect of parts III) and IV) of his request, Mr McKenzie explained that he expected to receive more information than that provided, such as emails, tips on interpreting rules and legislation and any internal guidance issued to staff.
 5. The Council notified Mr McKenzie of the outcome of its review on 6 April 2010. It provided additional information in response to all parts of his request, but advised him that it did not hold information relating to Direct Payment waiting times and those waiting for Direct Payments from the last three financial years.
 6. On 18 September 2010, Mr McKenzie wrote to the Commissioner, stating that he 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.
 7. The application was validated by establishing that Mr McKenzie 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

8. On 7 October 2010, the Council was notified in writing that an application had been received from Mr McKenzie, 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. In particular, the Council was asked to explain how Direct Payment statistics are currently monitored and why it is not possible to retrieve the figures from prior to June 2008. The Council was also asked what searches were carried out to determine what relevant information it held falling within the scope of Mr McKenzie's request and the search terms used.
9. The Council's response (received on 3 October 2010) provided submissions in relation to each part of Mr McKenzie's request.
10. In respect of parts III) and IV) of Mr McKenzie's request, the Council provided an explanation of the information that it had disclosed in order to respond to Mr McKenzie's request. It also explained the process for locating, retrieving and providing this information. The Council explained that it did not consider it necessary to carry out a search of electronic records, as it considered that all of the information falling within the scope of the request had already been provided to Mr McKenzie in response to his request.
11. However, the Council submitted that if it were to carry out a comprehensive search, then this would cost in excess of the £600 prescribed in the Fees Regulations, and so it considered that section 12(1) of FOISA was applicable to this information.
12. Further correspondence was entered into with the Council during the course of the investigation in an effort to understand more about the recording and monitoring systems used by the Council, both currently and historically, for Direct Payments
13. During the course of the investigation, the Council also released further information to Mr McKenzie falling within the scope of parts III) and IV) of his request. The Council also identified further information relevant to parts I) and II) of Mr McKenzie's request (in the form of spreadsheets), but advised that it considered this information to be outwith the scope of Mr McKenzie's request.
14. All submissions received from the Council and from Mr McKenzie, insofar as relevant, are considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



Background

16. The information requested by Mr McKenzie in this case relates to Direct Payments. These are local authority payments for people who have been assessed as needing help from Social Services, and who would like to arrange and pay for their own care and support services instead of receiving them directly from the Council.

Section 17(1) – Information not held

17. In parts I) and II) of his request, Mr McKenzie asked the Council for the waiting times for individuals to receive Direct Payments in Glasgow for the last three financial years (the relevant years being 2006/07, 2007/08 and 2008/09), and for the number of people who have been waiting for Direct Payments over the three years.
18. In response, the Council advised that it was not possible to provide information relating to the last three financial years as the monitoring of Direct Payment statistics only commenced in June 2008. The Council did provide some information to Mr McKenzie covering the time period June 2008 to December 2009, but indicated to Mr McKenzie that it did not hold the information requested for the last three financial years in full. It provided Mr McKenzie with a notice in line with section 17 of FOISA to this effect. (In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is that held at the time the request is received. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.)
19. In order to determine whether the Council has dealt with Mr McKenzie's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr McKenzie's request, the Council held any information which would fall within the scope of the request.
20. In its submissions, the Council provided an explanation of the monitoring and recording systems that it had and does have in place for Direct Payments. These are summarised below.
- Prior to June 2006, the Council held electronic records of Priority Lists (these being the Direct Payment waiting lists). The Council explained that no Priority Lists were kept after June 2006.
 - The Council also provided a submission explaining why no Direct Payment waiting list was held for some time after June 2006.
 - A system was put in place between Autumn 2006 and Spring 2007, but this did not capture the required information reliably.
 - A pilot monitoring system existed between 2007 and May 2008, but this was suspended in 2007. As a consequence, the Council advised that no Direct Payment statistics are held for the period between 2007 and May 2008 as the data collected at that time was unreliable.



21. During the investigation, the Council identified further information, in the form of spreadsheets, which related to Direct Payments, but considered that this information fell outwith the scope of Mr McKenzie's request.
22. Having considered the information in the spreadsheets, the Commissioner agrees with the Council that the information in the spreadsheets is outwith the scope of Mr McKenzie's request. As a consequence it will not be considered further in the decision.
23. On the basis of the submissions received from the Council, the Commissioner accepts that no information (other than covering the timescale June 2008 to December 2009) is held by the Council falling within the scope of parts I) and II) of Mr McKenzie's request.
24. As the Council does not (and did not at the time of Mr McKenzie's request and requirement for review) hold information which covers the full financial years falling within scope of parts I) and II) of Mr McKenzie's request, the Commissioner finds that the Council was correct to give Mr McKenzie a notice under section 17(1) of FOISA that no information was held by it.

Section 12 – Excessive cost of compliance – parts III and IV

25. In parts III) and IV) of Mr McKenzie's request, he asked for a copy of guidance issued by the Council to staff on advising people about Direct Payments and also for guidance/rules issued by the Council to staff who undertake community care assessments on the procedure and detail for advising people of their health and welfare rights.
26. Mr McKenzie did not consider that he had received all of the guidance issued by the Council to staff on advising people about 'Direct Payments'. Mr McKenzie commented, in particular, that he would have expected that there would be a range of memos and emails, for example, at critical points in the financial year, as well as specific guidance. Mr McKenzie also indicated in his application that he did not consider that he had been given a copy of the guidance/rules issued by the Council to staff who are undertook 'community care assessments', on the procedure and detail for advising people of their health and welfare rights.
27. The Council has advised that it had confirmed with senior officers, within relevant sections of the Council, that all guidance issued to staff as at the date of the request from Mr McKenzie has been provided to him. Manual searches were carried out by relevant staff and this confirmed that no further guidance had been issued to staff which would fall within the scope of this request.
28. The Council explained that it had not carried out any searches of manual and electronic files held by Social Workers for the information, as it was satisfied that all relevant information had been provided to Mr McKenzie. The Council also advised that it considered it unlikely that any relevant information would be found in the manual and electronic files held by Social Workers.
29. However, the Council advised the Commissioner that, if it were to carry out a comprehensive search of each Social Worker's manual and electronic files, then the time and cost involved in these searches would be over the £600 cost limit.



30. Therefore, the Council considered that the cost to it would be more than the upper limit allowed under section 12(1) of FOISA and the Fees Regulations.
31. In response to a request for further information about the costs that would be incurred in searching for relevant information, the Council indicated that it could not provide a full breakdown of costs of the electronic searches as the Council would have to raise a Business Enquiry Form (BEF) with its outsourced IT provider as it cannot undertake the work in-house. The Council explained that the cost of the work to raise the BEF and for the external IT provider to draft an outline proposal setting out the work and costs required to complete the searches would be £280 per day. Since the Council estimate that it would be likely to take several days for such a complex BEF and outline proposal to be prepared, it maintained that the cost would be over the £600 limit. The Council explained that, even if it did not proceed with the searches, the cost raising the BEF and preparation of the outline proposal to establish the cost of doing so would still be chargeable to it.
32. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. The amount is currently set at £600 in terms of regulation 5 of the Fees Regulations.
33. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to the request for information exceeds this amount.
34. The projected costs that the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the public authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 an hour.
35. The Commissioner, having considered the submissions from the Council, accepts that the cost of locating and retrieving all information that Mr McKenzie has indicated he intended his request to capture would exceed the £600 prescribed limit. He recognises that a thorough search for this information would not be simple, as discussion of and guidance on the Council's Direct Payments could arise in a range of day to day activities, and within the context of the consideration of both particular cases and more general communications. He therefore accepts that locating all relevant information would require consideration of records held both electronically and in paper form, by a wide range of Social Work staff.
36. In relation to searching of archived file, etc., the Council submits that there are inherent difficulties in searching for emails that are not printed off and placed in a file or not being specifically referenced in terms of date sent, sender and recipient. The Council explained that searching on terms such as 'Direct Payments' will identify large numbers of emails. Given that Mr McKenzie has not specified any date limit on his request for information, the information could be held in the records of staff who no longer work for the Council.



37. In relation to carrying out email searches to find any relevant information, the Council advised that a test exercise was carried out by two members of staff, using the term 'Direct Payments'. This resulted in over 21,100 emails being located. Around 50 of these emails were checked, with all of these being false hits, as none of them contained information falling within the scope of the request.
38. The Council submitted that if each Social Worker were to carry out the same exercise then a similar amount of hits would be achieved. Each Social Worker would, the Council submits, have to read through these emails, to check if they contain any relevant information.
39. The Council's comments have suggested that a complete search could only be done with the assistance of its external IT provider to be able to review archives and backup data, and a BEF and outline proposal would have to be prepared, at a cost of £280 per day for a number of days work to enable the external IT provider to establish what the cost of the search would be. The Commissioner accepts that the costs of its outsourced IT provider carrying out searches, where these could not be conducted in house are a direct cost associated with locating, retrieving and providing any relevant information, which can be included when determining whether section 12(1) is applicable.
40. However, since the Council has not been able to provide any breakdown or explanation of the costs that would be incurred via the work of its external IT provider, other than to state that the BEF and outline proposal would require several days' work, the Commissioner does not consider the Council has provided sufficient evidence to suggest that the cost of IT searches conducted by the outsourced IT supplier alone would be sufficient to exceed the £600 limit. Nonetheless, the Commissioner accepts that the need to draw upon this assistance would incur some cost.
41. Bearing in mind this cost, and that associated with staff in the Council's Social Work Services checking their own paper and electronic records, and reviewing content to identify whether this relates to the matters raised in Mr McKenzie's request, the Commissioner accepts, on the basis of the submissions from the Council, that searches through emails to locate, retrieve and provide relevant information would incur costs in excess of the £600 prescribed limit specified in the Fees Regulations. The Commissioner is therefore satisfied that the Council was entitled to apply section 12(1) of FOISA to Mr McKenzie's information request.

DECISION

The Commissioner finds that Glasgow City Council correctly notified Mr McKenzie (in terms of section 17 of FOISA) that it did not hold information relating to the full three financial years covered by parts I) and II) of his request and that the Council was entitled to apply section 12(1) of FOISA to other, relevant information which may be held by it falling within the scope of parts III) and IV) of Mr McKenzie's request.



Appeal

Should either Mr McKenzie or Glasgow City 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.

Margaret Keyse
Head of Enforcement
23 June 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.

....

- (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.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

....

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,



it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

....

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

2 Interpretation

In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“prescribed amount” means the amount prescribed in regulation 5; and

“projected costs” has the meaning set out in regulation 5.

3 Projected costs

(1) In these Regulations, “projected costs” in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.

(2) In estimating projected costs –

(a) no account shall be taken of costs incurred in determining -

(i) whether the authority holds the information specified in the request; or

(ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and

(b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost – prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.