

Decision Notice 128/2021

Records relating to a café

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 202100039



Scottish Information
Commissioner

Summary

The Council was asked for information relating to a specific café. The Council estimated that fully responding would exceed the £600 cost limit.

The Applicant disagreed with the Council's decision that responding would be too costly, given he had narrowed his request in line with the Council's suggestion for a previous similar request, and believed the Council had failed in its duty to provide reasonable advice and assistance.

The Commissioner investigated and found that the Council had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

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

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 7 October 2020, the Applicant made a request for information to Glasgow City Council (the Council). The information request read as follows:
Please send me the Council records since and including 4th February 2020 related to the premises situated at 291 Byres Road, Glasgow held by Development and Regeneration Services (DRS), Building Standards, Land and Environmental Services (LES) and the Customer Care Team of Glasgow City Council.
2. The Council responded on 27 October 2020. It informed the Applicant that the cost of responding would exceed the £600 limit, and so it was not obliged to respond by virtue of section 12(1) (Excessive cost of compliance) of FOISA. The Council explained that initial searches had, so far, identified over 2,000 pages of correspondence which would need to be read and any personal data removed. These, the Council explained, were in addition to further searches which would need to be carried out across the other departments mentioned in the request. The Council suggested it might be able to provide information were the Applicant to narrow the request, for example, by reducing the time period and the number of departments.
3. On 22 November 2020, the Applicant wrote to the Council, requesting a review of its decision as he disagreed with the Council's decision to rely on section 12(1). He referred to previous recent decisions issued by the Commissioner which had upheld section 12(1) (*Decision 113/2020*¹ and *Decision 124/2020*²), alleging that the Council was now using this provision as a tactic not to provide the information requested.

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000138.aspx>

² <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000294.aspx>

4. The Applicant further stated he had followed the Council's recommendation (in a previous similar case) to be more specific and, for this request, he had asked for information from three specified Council departments (and not the Council as a whole), but no information had been provided. He commented that, as the Council had been able to provide some information in response to previous requests, he believed it should do so for this request.
5. The Council notified the Applicant of the outcome of its review on 18 December 2020, fully upholding its original decision. It explained that a sample search exercise had been carried out by two members of staff, and this had identified over 2,000 pages of correspondence held in their email accounts and electronic files. These officers estimated that locating and retrieving this information and redacting any personal data would take 3 hours and 40 minutes. Noting this was below the cost limit, the Council stated this did not include searches that would be required of all DRS (including Building Standards), Neighbourhood Services (NS) (formerly LES) and Customer Care Team (CCT) staff mailboxes and files, given that the scope of the request covered all records held by these departments. The Council explained that the information was not held centrally and would require department-wide searches across the different systems and databases used by these departments, which employed in the region of 3,600 staff members across DRS and NS.
6. In relation to having provided information for previous requests where it had relied on section 12(1), the Council explained that it had done so under the duty to advise and assist, noting there was no obligation to do so where section 12(1) applied. The Council commented that it treated each request on its own merits, and was entitled to change its position where it considered this to be the correct response, regardless of action taken in any previous request. In conclusion, the Council believed it had provided reasonable advice and assistance by detailing the searches required to meet the scope of the request, and in suggesting ways to narrow the request to allow the Council to comply.
7. Noting the sample exercise had demonstrated the cost of complying with the request would exceed the £600 cost limit, and therefore section 12(1) applied, the Council suggested narrowing the scope of the request, for instance, to a specific subject matter (such as records of a specific meeting, or documentation held concerning a particular building warrant) to allow searches to be carried out for that specific information. The Council also offered to discuss with the Applicant ways to narrow his request, in order to be able to provide the information he required.
8. On 10 January 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he disagreed with its decision that responding to his request would exceed the upper cost limit set under section 12(1). He commented that only the records of those staff actually involved with the café premises would need to be searched, not all 3,600 DRS/NS staff.
9. The Applicant also believed the Council had failed to comply with its duty under section 15(1) of FOISA, by not providing reasonable advice and assistance. He submitted that he had followed the advice given by the Council when it last relied on section 12(1), yet the Council had now suggested narrowing the scope further, e.g. to records of a specific meeting. As the only way he could know if any such meetings had taken place was through making FOI requests, the Applicant stated that he was unable to ask about meetings which he had no knowledge of having actually taken place.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
11. On 1 February 2021, the Council was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
12. 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 to answer specific questions. These focused on the Council's justification for relying on section 12(1) of FOISA, and what advice and assistance it had given to the Applicant in terms of the duty in section 15(1).

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 12(1) – Excessive cost of compliance

14. As stated above, the Applicant was dissatisfied with the Council's decision that responding to his request would be excessively costly and so refusing the request in terms of section 12(1) of FOISA.
15. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed this sum.
16. The projected costs a Scottish 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) it reasonably estimates it will incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 per hour. The authority may not charge for the cost of determining (i) whether it actually holds the information, or (ii) whether or not it should provide the information.
17. The Council submitted that section 12(1) applied to the request, arguing that the cost of locating, retrieving and providing all of the information falling within its scope would exceed the £600 cost limit.
18. In support of its view, the Council referred to *Decision 113/2020* and *Decision 124/2020* issued by the Commissioner in respect of similar requests for "all Council records". These decisions, the Council submitted, upheld section 12(1) as Council-wide searches would have been required to satisfy the requests. While the request under consideration here had been narrowed to specific departments, the Council maintained the scope was still wide and would require extensive searches by all staff within these departments, which would exceed the cost limit.

19. The Council explained that it did not hold the information centrally and multiple searches would be required across the different databases and systems used by the departments named in the request, in addition to searches of shared and individual staff email accounts. Given the Applicant's ongoing correspondence regarding the premises with various officers in the named departments, the Council believed a substantial amount of relevant information would be held across these departments.
20. By way of illustrative example to support its position, the Council explained that, while full searches were not undertaken, a sample search exercise was carried out at initial request stage, where two staff members (from NS and CCT) searched their emails and electronic files. These searches identified 2,000 pages of results and the time required to locate, retrieve and redact any personal data from this information was estimated, by these staff, to be 3 hours and 40 minutes. The Council confirmed that details of this sample exercise had been provided to the Applicant at initial request and review stages, together with an explanation of why it could not comply within the cost limit.
21. The Council submitted that, since then, a further sample search exercise had been carried out by a staff member in Planning and Building Standards. This identified 104 emails falling within scope, and this officer estimated it would take 5 hours and 18 minutes to locate and retrieve this information, and redact any personal data.
22. The Council explained that the total time estimated by these three officers (approximately 9 hours) did not take into account similar work that would require to be carried out by all staff in the departments specified in the request (approximately 3,600 employees).
23. With regard to staff costs, the Council stated that searches would require to be carried out by staff on various grades or hourly rates. However, as staff on even the lowest grade incurred an employment cost of over £15 per hour, this was the rate used to calculate the cost of staff time.
24. The Council submitted it would be difficult to calculate the estimated costs of fully responding to the Applicant's request but, based on the sample exercises conducted, it believed responding would exceed the cost limit.
25. With regard to information disclosed to the Applicant in response to previous requests where section 12(1) had been relied on, the Council explained that this information had been provided by way of advice and assistance, as a result of asking specific individual staff members to carry out searches given their known involvement with the premises. The Council submitted that this resulted in the Applicant believing he had not been provided with all relevant information. In the Council's view, the Applicant would likely be dissatisfied with whatever limited information could be provided in this way. In the circumstances, the Council believed conducting department-wide searches was the only way to satisfy this request. As highlighted in *Decision 113/2020*, the Council argued that it was entitled to change its position where it considered this to be the correct response, regardless of any action taken in previous requests, and there was no obligation for it to provide information where section 12(1) applied.
26. While the Council acknowledged it had some awareness of those staff members most likely to be involved with the premises, it was not possible to know or identify each and every staff member who had actually been involved, and so limit the searches accordingly. The Council reiterated that the Applicant was often dissatisfied with the level of information provided in response to his information requests and expected more information to be held, despite

robust searches having been conducted, as rehearsed in *Decision 171/2019*³. For these reasons, the Council believed responding to this request would require a search for information in any form held throughout the named departments, and maintained that department-wide searches to locate, retrieve and redact information could not be completed within the £600 cost limit.

27. Taking into account all of the circumstances, the Commissioner is satisfied that the Council has provided reasonable arguments in support of its view that the cost of complying with this request would exceed the £600 cost limit. He considers the scale and extent of the tasks described to be appropriate in the circumstances. It is clear, as the Council has argued, that department-wide searches would be required to satisfy the Applicant's requirements. Given the nature of the work required, the Commissioner accepts that this request could not have been responded to fully within the £600 cost limit.
28. While the Commissioner acknowledges the Council may be able to restrict searches to those staff members who were known to most likely have had involvement with the premises, he recognises the impracticalities of "knowing" (and therefore being able to identify) every member of staff actually involved. Furthermore, the Commissioner accepts that such searches would not guarantee that all relevant information would be identified, given the possibility that further information might be held by other members of staff not identified in this way, and would therefore not satisfy the request as it stands.
29. The Commissioner further notes that there is no provision in FOISA obliging an authority to provide information in response to a request which it has deemed to be cost excessive in terms of section 12(1) of FOISA. He recognises that, in previous requests, the Council chose to provide some information, solely under its duty to advise and assist, but doing this did not nullify the application of section 12(1) in those cases, and did not set any precedent for the Council being required to do so in response to any future similar requests.
30. The Commissioner recognises that each request must be considered on its own merits, and that this might involve a different response by the authority where it considers this to be the correct course of action, regardless of the decisions taken in responding to previous similar requests.
31. Consequently, the Commissioner is satisfied that the Council was entitled to rely on section 12(1) of FOISA in relation to this request, and was therefore under no obligation to comply with it.

Section 15(1) – Duty to provide advice and assistance

32. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code⁴).

³https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201901240_201901241.aspx

⁴<https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

33. The Section 60 Code states, at paragraph 5.1.1 in Part 2:

Authorities should offer advice and assistance at all stages of a request

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

34. It further states, in section 9.4.3 in Part 2:

Where excessive costs apply

When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.

35. In his submissions to the Commissioner, the Applicant believed that the Council had not provided him with reasonable advice and assistance. He contended that, having followed the advice given by the Council when it last relied on section 12(1) (which suggested narrowing his request to specific departments), the Council was now suggesting he narrow the scope further, for example to records of a specific meeting, which, he argued, he could only be aware of through making FOI requests.
36. In its submissions to the Commissioner, the Council stated that in both its initial response and review outcome, it had suggested ways in which the request could be narrowed. At initial response stage, it had suggested reducing the time period or the number of departments. At review stage, it had suggested narrowing the request to a specific subject matter, e.g. records of a specific meeting or concerning a particular building warrant, and had also offered to discuss with him ways to narrow future requests to enable the Council to provide the information he required.
37. The Council submitted that it had repeatedly tried to engage with the Applicant in this regard. It stated that it had explained to him the significant impact dealing with his requests had on public resource (both human and financial) and had repeatedly offered to explore with the Applicant ways in which it could provide the information he required without such a significant resultant impact on Council services. However, the Applicant had not engaged with the Council in any such discussions.
38. Given this lack of engagement, together with the scope of the requests being so wide-ranging and the Applicant's dissatisfaction with information previously provided, the Council submitted it was difficult to know exactly what the Applicant was seeking to obtain. The Council believed the Applicant was aware of the volume of information held by the specified Council departments, given his regular correspondence with individuals employed therein.
39. Noting the Section 60 Code guidance at section 9.4.3, the Council acknowledged that, while the scope of the request was limited to records held by named departments, searches would still require to be carried out of all staff mailboxes and files within those departments in order to comply with the request, which it had determined to be too costly. Therefore, the Council subsequently suggested it would be able to carry out searches were the scope narrowed to a specific subject matter.

40. Referring to the Commissioner's online guidance⁵, which encourages requesters to be specific and which suggests how requests can be narrowed (such as specifying the matter of interest, a date period, type of information and/or listing those involved in its creation etc.), the Council submitted it had made similar suggestions to the Applicant, along with repeated offers to discuss with him ways in which to narrow his request to bring it within cost, but he had not engaged with the Council in this way.
41. In conclusion, the Council believed it had complied with the duty to advise and assist, through suggesting how to narrow the scope of future requests to allow it to comply, and by explaining why responding would be cost-prohibitive and that it was not required to provide any information in response to requests where section 12(1) was invoked, as doing so would unnecessarily divert resources from its core business.
42. The Commissioner has carefully considered the submissions from both parties.
43. It is evident, from the Council's initial response and review outcome, that it suggested ways in which the Applicant might wish to narrow his request to bring it within scope. The Commissioner notes that, at review stage, the Council also offered to discuss with him ways in which his request could be narrowed, but the Applicant failed to engage in this way.
44. The Commissioner is also aware, from previous decisions involving the same Applicant and the same subject matter (namely *Decision 113/2020* and *Decision 124/2020*), that the Council has done so in the past, with similar outcomes.
45. The Commissioner notes that, in this case, the Applicant followed the Council's suggestion, when it last relied on section 12(1) for a similar request, to narrow the scope of the request to specific departments, but that this still resulted in a section 12(1) response. While it may have been unfortunate that this suggestion, having been followed, had the outcome it did, the Commissioner acknowledges that, without having the opportunity to engage personally with the Applicant, the Council would not have been able to predict which, or how many, departments the Applicant would have chosen to narrow his request to in this case. Consequently, he recognises the Council would have similarly been unable to predict its likely response when it made this suggestion.
46. In all of the circumstances of the case, the Commissioner is satisfied that the Council, as far as was reasonable, complied with its duty to provide the Applicant with advice and assistance as required by section 15(1) of FOISA. The suggestions given by the Council on narrowing the request, and its offers to discuss with him ways to do so, appear to have been perfectly reasonable in the circumstances, and it is unfortunate that the Applicant has made no attempt to engage with the Council in such discussions. Whatever issues the Applicant may have with the Council, it is difficult to see how such engagement could possibly be to his detriment.
47. In situations of this nature, applicants should bear in mind that the narrowing of a request such as this will, if it is to be effective, generally need to be a two-way process, involving both parties in order that the public authority can gain a better understanding of an applicant's requirements, as well as providing useful advice on how they might be met. If an applicant is not prepared to engage on that basis, the Commissioner recognises that there will be limits to how far the authority can reasonably be expected to take matters forward in this way.

⁵ <https://www.itspublicknowledge.info/YourRights/Tipsforrequesters.aspx#quick-tips>

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 the Applicant.

Appeal

Should either the Applicant or the 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.

Margaret Keyse
Head of Enforcement

1 September 2021

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.

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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

...

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

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.

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