

# Decision Notice

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**Decision 189/2016: Mr William Stewart and North Lanarkshire Council**

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**Request for a contract and employment details: failure to respond within the statutory timescale**

Reference No: 201600975

Decision Date: 12 September 2016



Scottish Information  
Commissioner

## Summary

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On 2 December 2015, Mr Stewart asked North Lanarkshire Council (the Council) for the terms of the contract between the Council and Mears Contractors (the Mears Group), and the former Chief Executive's retirement details and employment arrangements. The Council did not respond to this request or to Mr Stewart's subsequent request for a review.

Mr Stewart applied to the Commissioner for a decision because he did not receive a response to either his request or his request for a review. The Commissioner investigated and found that the Council had partially failed to respond to Mr Stewart's request for information in accordance with Part 1 of FOISA. The Commissioner accepted that the Council was not required to issue a response to Mr Stewart's information request of 2 December 2015 (in line with section 16(5) of FOISA). She also found that the Council failed to give Mr Stewart notice that it was not required to carry out a review because his request was vexatious (in terms of section 21(8) of FOISA). By failing to provide this notice, the Council failed to comply with section 21(9) of FOISA.

The Commissioner required the Council to give Mr Stewart the appropriate notice under section 21(9) of FOISA, or to respond otherwise to his request for review.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1) (Timescale for compliance); 14(1) and (2) (Vexatious or repeated requests); 16(5) (Refusal of request); 21(1), (4), (5), (8), and (9) (Review by Scottish public authority)

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

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1. On 2 December 2015, Mr Stewart made a request for information to the Council. The information requested was:
  - (i) the terms of the contract between the Council and the Mears Group; and
  - (ii) retirement details, and terms of employment arranged for the Council's previous Chief Executive (Mr Gavin Whitfield) "including Golden Handshakes, Bonus, Pension, % paid in by Mr Whitfield and paid in by the Council (tax payer). Any other Council employment or director costs by partners or long arm contract firms of the Council".
2. The Council did not respond to this request.
3. On 15 February 2016, Mr Stewart wrote to the Council requesting a review of its decision on the basis that he had received no response from the Council within the statutory timescale. The Council did not respond to Mr Stewart's requirement for review.
4. On 18 May 2016, Mr Stewart applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Stewart stated that he was dissatisfied that he had not obtained a response or review from the Council.

## Investigation

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5. The application was accepted as valid. The Commissioner confirmed that Mr Stewart 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.
6. 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 answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested. Mr Stewart was also given the opportunity to comment.

## Commissioner's analysis and findings

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7. In coming to a decision on this matter, the Commissioner considered all relevant submissions, or parts of submissions, made to her by both Mr Stewart and the Council. She is satisfied that no matter of relevance has been overlooked.

### Section 16(5) - Refusal of request

8. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. It is a matter of fact that the Council did not provide a response to Mr Stewart's request of 2 December 2015 within 20 working days. The Council submitted that it was not required to do so, because section 16(5) of FOISA applied.
9. Section 16(5) relates to requests to which a Scottish public authority claims section 14 of FOISA applies: i.e. requests which are vexatious or repeated. In such cases, the authority is not obliged to give the applicant notice that section 14 applies, provided:
  - (a) it has given the applicant notice to that effect, in relation to a previous identical or substantially similar request; and
  - (b) it would, in all the circumstances, be unreasonable to expect it to serve a further such notice in relation to the current request.
10. The Council explained to the Commissioner that it considered Mr Stewart's request to be vexatious, in terms of section 14(1) of FOISA.
11. In this decision, the Commissioner need not decide whether the request under consideration is vexatious. She is concerned only with the question of whether the Council complied with the technical requirements of FOISA in how it handled it. The question is whether, in this case, the Council was correct to decide that it did not need to give Mr Stewart notice that section 14 applied to his request.
12. Section 16(5) can only be relied upon if two tests are met. The two tests which the Commissioner must consider here are:
  - (i) Has the Council, in relation to a previous identical or substantially similar request, given notice to Mr Stewart that section 14 of FOISA applies?
  - (ii) If so, would it be unreasonable in all the circumstances to expect the Council to serve a further notice in relation to the request under consideration?

13. The Council believed it had already provided Mr Stewart with such notice. It provided the Commissioner with a copy of Mr Stewart's request dated 28 October 2014 (and sent 30 October 2014) which included a request for the terms of the contract between the Mears Group and the Council. The Council provided a copy of its response of 20 November 2014, which cited both section 14(1) and (2) of FOISA, but specifically referred to the request as vexatious. It also provided a copy of its review response of 23 December 2014, which referred to section 21(8) of FOISA and informed Mr Stewart that the Council did not need to comply with a request for review as the original request or requirement for review was vexatious.
14. The Council suggested that the first part of Mr Stewart's request of 2 December 2015 was identical to that sent on 30 October 2014:

*"I request a copy of the terms of contract NLC has concerning The Mears Group in Partnership with North Lanarkshire Council".*
15. Additionally, the Council provided the Commissioner with a copy of a request which Mr Stewart made on 24 August 2013, for information on remuneration of senior officers. Mr Stewart had asked for the following information:

*"As in my letter to [named employee of the Council] for NLC review 24 May 2013 the FOI review asked I quote this information should include early retirement golden handshakes, Bonus payoffs returning to employment in NLC or for NLC, extra employment paid by the Council for example Director on other Boards (by numbers) or consultants for unquote 1. Mr Gavin Whitefield..."*
16. The Council provided the Commissioner with its response to this request (2 September 2013) and its review response of 12 September 2013. The Council's refusal cited section 14 of FOISA, and specifically referred to the requests as vexatious. The Council's review response referred to section 21(8) of FOISA and gave notice that the Council did not need to comply with a request for review if the original request or requirement for review was vexatious.
17. The Council suggested that the second part of the request of 2 December 2015 was substantially similar to that of 24 August 2013. Although not identical, both requests sought information about the remuneration of the same senior Council official.
18. As in *Decision 107/2011 - Mr Allan Milligan and Glasgow City Council*<sup>1</sup>, the Commissioner notes that the term "substantially similar", where applied to an information request, allows that a request might be expressed in different terms or seek slightly different information. She considers that substantially similar can only apply where a request seeks largely the same type or set of information that was sought in another request. The Commissioner accepts that in the circumstances of this case Mr Stewart had previously submitted substantially similar requests to the one under consideration here and that the Council had given Mr Stewart notice that it was not required to comply with these requests under section 14 of FOISA.
19. The Commissioner therefore finds that the first part of the test required by section 16(5) has been met, as the Council had previously given notice to Mr Stewart that section 14 of FOISA applied to identical or substantially similar requests.

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<sup>1</sup> [http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2011/201100487\\_201100488.aspx](http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2011/201100487_201100488.aspx)

20. The second test is whether it would be unreasonable in all the circumstances to expect the Council to serve a further notice in relation to the request under consideration.
21. The Council commented that it has responded to a large number of requests from Mr Stewart in the past and has either provided the information or directed him to where it is publicly available. Despite this, Mr Stewart has continued to make requests on the same subjects, even when the information has previously been provided. The Council now considers these requests are not serious endeavours to obtain information, but part of a pattern of behaviour in which Mr Stewart vents his anger against the Council by making a large number of information requests.
22. The Council was aware that a considerable time had passed between its responses of 20 November 2014 and 2 September 2013, and Mr Stewart's request of 2 December 2015. However, it stated that, in the intervening period, Mr Stewart had continued to make multiple identical or substantially similar information requests, even though a "vexatious" decision had already been issued. The Council believed that Mr Stewart was now simply ignoring previous refusal notices, and that it was unreasonable for it to issue any further such notices. The Council wrote to Mr Stewart on 5 June 2015 to warn him that it would not respond to requests that were identical or substantially similar to his previous request that had already been deemed vexatious.
23. The Commissioner invited Mr Stewart to comment on this on 28 July 2016. He responded on 4 August 2016, but his response did not address why it would be reasonable in all the circumstances to expect the Council to serve a further notice in relation to the request under consideration.
24. The Commissioner notes that the information which Mr Stewart requested is likely to have remained largely unchanged during the time between his requests. Mr Stewart has not put forward any suggestion or evidence to show that the information is likely to have changed, or that there has been any material change in circumstance.
25. The Commissioner also notes that the Council wrote to Mr Stewart a relatively short time before he made his request of 2 December 2015, to draw to his attention that the Council thought it unreasonable for him to expect it to respond to requests it had previously refused as vexatious. Mr Stewart had therefore been alerted to the Council's concern that his requests had become vexatious.
26. The Commissioner is satisfied that the Council alerted Mr Stewart to the fact that that further requests on the same or similar topics would not receive any response. Having alerted him to that, the Commissioner is of the view that the Council's decision not to issue a refusal notice in response to this request was not unreasonable, thus meeting the second part of the test.
27. The Commissioner therefore concludes that the Council was entitled to rely upon section 16(5) of FOISA and, consequently, was not required to issue a response to Mr Stewart's request of 2 December 2015.
28. The Commissioner will go on to consider the Council's approach to Mr Stewart's requirement for a review.

### **Section 21 - Review by Scottish Public Authority**

29. The Council did not respond to Mr Stewart's requirement for review dated 15 February 2016.
30. Section 21(1) of FOISA gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.

31. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
32. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done in relation to section 21(4) and a statement of its reasons. Section 21(8), however, provides that a public authority is not obliged to comply with a requirement for review where that requirement itself is vexatious, or where it is not required to comply with the request because it is vexatious by virtue of section 14(1).
33. Where an authority relies on section 21(8), section 21(9) states that it must give the applicant notice of this within 20 working days.
34. In this case, the Council could have responded to Mr Stewart's request for review either in terms of:
  - (i) section 21(4)(c) and (5), by issuing a response to Mr Stewart's request for information where none had been supplied before, or
  - (ii) sections 21(8) and (9), notifying Mr Stewart that it did not intend to conduct a review, because his request (and/or the requirements for review) were considered to be vexatious.
35. Since the Council did neither of these things within the timescale required by section 21(1), the Commissioner must conclude that the Council failed to comply with the requirements of section 21 of FOISA.
36. As stated in *Decision 107/2011* and more recently in *Decision 130/2014 - Mr Christopher Quinn and the Assessor for Lanarkshire Valuation Joint Board*<sup>2</sup>, section 21 contains no equivalent to section 16(5) (that the authority does not, subject to meeting the tests in 16(5), have to respond to a request). The result is that the authority is obliged to respond to a requirement for review, even where it has previously concluded that it was not obliged to respond to the related request by virtue of section 16(5).
37. The remainder of section 21 sets out the requirements to be followed by a Scottish public authority in responding to a requirement for review. The Commissioner requires the Council to respond in accordance with these requirements.

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201401078.aspx>

## Decision

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The Commissioner finds that North Lanarkshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Stewart.

The Commissioner finds that the Council:

- (i) correctly relied upon section 16(5) of FOISA and was not obliged to respond to Mr Stewart's request for information of 2 December 2015 within the timescale required by section 10(1).
- (ii) failed to give Mr Stewart notice that it was not required to comply with his requirement for review, and so failed to comply with section 21(9) of FOISA, and, consequently, section 21(1) of FOISA.

The Commissioner requires the Council to:

- give notice to Mr Stewart that section 21(8) is applicable as required by section 21(9); or
- respond otherwise to Mr Stewart's requirement for review.

The Commissioner requires the Council to undertake either action by **28 October 2016**.

## Appeal

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Should either Mr Stewart 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.

## Enforcement

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

**Rosemary Agnew**  
**Scottish Information Commissioner**

**12 September 2016**

### 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.

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

#### 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.
- (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.

#### 16 Refusal of request

...

...

- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if-
- (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and
- (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.

....



## 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
- (a) the requirement is vexatious; or
  - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.

...

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