

Decision Notice

Decision 198/2017: Mr Joseph Robinson and the Scottish Housing Regulator

Contract/tender issues

Reference No: 201701379

Decision Date: 30 November 2017



Summary

The SHR was asked for information on contractual/tender issues relating to a specific location and a specified housing association and contractor.

The SHR explained it did not hold some of the information asked for. It also estimated that complying with part of the request would cost more than £600 to fulfil (so it was not required to do so). The SHR disclosed some information, but withheld other information which it considered exempt from disclosure.

The Commissioner was satisfied that all information capable of addressing the request had been identified and that the SHR applied exemptions correctly to the information it was withholding. He was satisfied that estimated costs would exceed £600, but did not believe sufficient advice and assistance was provided with which to narrow this part of the request. There was also a breach of statutory timescales in conducting a review. For the reasons set out in this notice, the SHR was not required to take any action in respect of these breaches.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (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. Both Appendices form part of this decision.

Background

1. On 27 April 2017, Mr Robinson wrote to the Scottish Housing Regulator (the SHR), requesting information. The questions asked by Mr Robinson are reproduced in Appendix 2 to this decision: largely these relate to tendering and contractual issues, with reference to a specific location and a specified housing association and contractor. Having considered the questions together, the Commissioner is satisfied that they are sufficiently interrelated to form a single request for information for the purposes of section 1(1) of FOISA.
2. The SHR responded on 26 May 2017, disclosing information to Mr Robinson. For certain questions, it stated that it did not hold any information, giving notice in terms of section 17(1) of FOISA. For questions 1 and 2, the SHR stated that it was not obliged to comply with the request as the cost of doing so would exceed £600: it cited section 12(1) of FOISA. For other questions, the SHR withheld information under a number of exemptions in FOISA.
3. On 6 June 2017 Mr Robinson wrote to the SHR, requesting a review of its decision. He refused to accept that the £600 limit would be exceeded by complying with the request, submitting in addition that he had not been given sufficient advice and assistance to allow him to narrow the request. He was also dissatisfied with the SHR's conclusion that it held no information for certain parts of the request, and with the withholding of information under exemptions.

4. The SHR notified Mr Robinson of the outcome of its review on 28 July 2017, apologising for the delay in responding. Further information was disclosed. The SHR clarified, in relation to certain of Mr Robinson's questions, that the only relevant information it held was information disclosed to Mr Robinson already (for which it cited section 25 of FOISA): otherwise, it confirmed its application of section 17(1) of FOISA (Notice that information is not held). The SHR also upheld its original response for questions 1 and 2, that section 12(1) was engaged, but modified (in part) its application of exemptions to other information.
5. On 8 August 2017, Mr Robinson wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Robinson stated he was not satisfied that section 12(1) of FOISA applied, and also argued that the SHR had failed to provide him with adequate advice and assistance to fulfil its duty under section 15(1) of FOISA.
6. Mr Robinson was also dissatisfied with the SHR's conclusion that it did not hold other information, and with the SHR's application of exemptions. He asked the Commissioner to consider the SHR's failure to respond on time to his requirement for review.
7. It is also apparent that Mr Robinson is unhappy with the SHR's disclosure of information to him following the review, which he believes should have been disclosed in response to an earlier "subject access request" he made under the Data Protection Act 1998. As he appears to acknowledge, this is not a question the Commissioner can consider under FOISA.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Robinson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 11 August 2017, the SHR was notified in writing that Mr Robinson had made a valid application. The SHR was asked to send the Commissioner any information withheld from Mr Robinson. The SHR provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SHR was invited to comment on this application and answer specific questions, with reference to the searches it had conducted and the provisions of FOISA it considered applicable to the request.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Robinson and the SHR. He is satisfied that no matter of relevance has been overlooked.

Information held by the SHR

12. As indicated above, the Commissioner is satisfied that Mr Robinson made a single request for information. This will have implications for the application of section 12(1) of FOISA (considered below) but first the Commissioner considers it appropriate to consider Mr Robinson's for dissatisfaction in relation to information the SHR claims it does not (or did not, on receiving the request) hold. Before applying the cost limit in section 12(1) to a request, a Scottish public authority must be satisfied that it holds the information in question.

13. In his application, Mr Robinson submitted that further information (for certain parts of his request) was held and should have been located during searches. He did not believe it was consistent with the SHR's role, or other correspondence he had received from the SHR, to conclude that there was no further information.
14. The SHR considered the correspondence cited by Mr Robinson to be consistent with the level of contact it had with the housing association in question. It did not believe the correspondence justified a conclusion that further information should be held. The SHR was satisfied that its searches, as described below, were capable of addressing Mr Robinson's requests, being robust and comprehensive and covering all locations where any relevant material would have been stored.

Searches

15. The SHR described the systems searched, as follows:
 - the "G: drive", a legacy document storage system (historic electronic files going back to the late 1990s);
 - eDRM, an electronic records system (which, since 2012, has been the new corporate system and, until recently, held regulatory records);
 - "Insight", a newer and bespoke SharePoint-based electronic management system (storing new regulatory records since February 2016);
 - staff "local" storage areas, on individual computers in the workplace (approximately 85% of staff – both regulatory divisions and the chief executive – were involved in these searches, it explained, comprising all staff who could have any potentially relevant material on their computers: they were required to confirm if nothing relevant was found, as well as flagging up anything that was identified);
 - scanned paper files – a separate search, of records predating the establishment of any electronic recording system.
16. The SHR provided evidence of the instructions given to staff. It further explained that it carried out a manual review of the paper files for the housing association and (another housing association), also reviewing all files on the housing association which were held on the "Insight" system. It identified the keywords used in searching the eDRM system and the "G: drive".

Conclusions

17. The issue here is what information the SHR actually held at the time it received Mr Robinson's request and requirement for review. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in some cases, more information) is not held.
18. Having considered all relevant submissions, subject to his consideration of section 12(1) below, the Commissioner is satisfied that the SHR took adequate and proportionate steps to establish whether it held information that fell within the of Mr Robinson's request. In reaching this conclusion, the Commissioner has noted the list of data systems searched and the search methods deployed.

Section 12 (Excessive costs of compliance)

19. The SHR considered that section 12(1) of FOISA was engaged in respect of Mr Robinson's questions 1 and 2 (see Appendix 2).
20. Section 12(1) provides that a Scottish public authority is not obliged to comply with an information request where it estimates that the cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations (currently £600). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum. If the £600 limit would be exceeded by complying with part of a request, then section 12(1) applies to the whole request.
21. The relevant provisions of the Fees Regulations – in particular regulation 3, setting out the costs which may be taken into account – are set out in Appendix 1.
22. The SHR believed the £600 threshold would be exceeded if it were to attempt to gather the information it held, estimating the total cost in fulfilling these parts of the request at £912.50.
23. The SHR stated that a single search would address both questions 1 and 2. The lowest grade of staff it considered appropriate for the required searches and any necessary redactions was B3 (salary midpoint £37,353). In other words, the maximum hourly rate of £15 would apply. It identified the relevant records as over six years of correspondence with the housing association.
24. The SHR's estimate was based on the following methodology:
 - (i) Manually review SHR paper files/older scanned PDFs, to identify documents potentially within scope. An electronic search for key words in older scanned PDFs was not possible, due to the way they were originally scanned and were now held. The SHR estimated this would take 18.5 hours at £15 per hour = £277.50
 - (ii) Review all eRDM files and those on "Insight". This was estimated to take eight hours at £15 per hour = £120
 - (iii) Staff would need to conduct checks on their own computers for records of emails and telephone calls. This would take 14 hours at £15 per hour = £210
 - (iv) Based on experience of similar work, and the scope of this request, the SHR estimated it would take 12 hours to redact information (£180 at £15 per hour)
 - (v) The SHR also estimated five hours for photocopying (£75 at £15 per hour). A charge of 10p per sheet would be applied in addition to the staff time, for an estimated 500 sheets (i.e. approx. £50). The full estimated charge for photocopying was therefore £125.
25. The addition of the sub-totals listed above comes to a total figure of £912.50. It considered the estimate to be a conservative one and confirmed that it did not include costs for reviewing files on the "G: drive", other than the scanned PDFs.
26. The investigating officer asked for more detail on the scale of the material involved, to ascertain whether the numbers of hours stated above were reasonable. SHR provided the following details of the systems involved:

System	Number of Files	Approximate Dates
eRDM	c. 135 files	April 2012 to February 2016
Paper Files	c. 50 sheets of correspondence, various lengths	March 2012 to February 2013
Insight	c. 55 files	February 2016 to April 2017
G: Drive (Scanned PDFs)	c. 850 sheets of correspondence	January 2010 to May 2013
G: Drive (other files)	c. 450 electronic files	c. 1998 – 2017 (some files also held in eDRM)
Staff Personal Files	Considered difficult to quantify	Relevant material should be saved in corporate systems, but some might still be in personal files

27. The SHR was also asked by the investigating officer to undertake a sampling/test exercise, which it conducted in two parts, one for scanned PDF files and another for files stored in its eRDM.

Test 1 – scanned PDFs

28. The SHR indicated that these PDFs were created from paper files some time ago and were not entirely straightforward to work with. It confirmed that, once scanned, the paper copies were destroyed, so only electronic versions existed at the time of Mr Robinson’s request.

29. The method used in this test was to

- navigate to the “G: drive” [a computer network drive],
- locate a relevant folder, then identify a file within it. This was done at random for the purposes of the test.
- Open up the file chosen, and review.
- Record what information, if any, was in scope.
- Using this method, the SHR processed eight pages within 15 minutes.

30. Based on the rate of progress identified in this test (eight pages in one quarter of an hour), to process the 850 sheets held as scanned PDFs would likely take in the region of 26 hours. Any necessary redaction would be additional, the SHR submitted: on occasion, the PDFs would need to be sorted into the right order and copied as single-sided documents before redaction could be done.

Test 2 – the eRDM Files

31. The same methodology as used in test 1 (above) was repeated for the eRDM system. The SHR processed seven different eDRM files in 15 minutes, so it submitted that the rate of processing for this type of file was no quicker than for the scanned PDFs.

32. Following these tests, the SHR made some changes to its original estimates for photocopying, confirming on further consideration that the work could be done in around two hours rather than five. It also accepted that the actual photocopying could be done by administrative grade staff, at approximately £12 per hour, although the copied documents would still require to be checked by the B3 grade staff.

Commissioner's conclusions on section 12

33. It is readily apparent that the slight reduction in photocopying costs has made no real difference to the overall total, bearing in mind that the number of documents involved appears (on the basis of the SHR's more detailed submission) to be closer to 900 than the original estimate of 500. The sampling exercise for the PDFs also suggests that this element of the work would take somewhat longer than the original estimate. Overall, it is apparent from the estimates provided how extensive the required work would be, given the volume and number of disparate systems requiring to be searched and, in some cases, the way in which documents are held there.
34. Taking into account all the circumstances here, the Commissioner is satisfied that the estimates provided by the SRH are reasonable. The Commissioner is satisfied that these elements of Mr Robinson's request could not have been responded to within the £600 limit. In other words, the request could not have been responded to within that limit
35. Consequently, the Commissioner is satisfied that the SHR was not obliged, by virtue of section 12(1) of FOISA, to comply with Mr Robinson's request.

Section 15 - Duty to provide advice and assistance

36. 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 has made, or proposes to make, a request for information to it. This duty has particular relevance to the application of section 12(1) of FOISA: where the cost limit applies, the authority should provide advice and assistance to allow the applicant to narrow the scope of their request to bring it within the limit.
37. In his application, Mr Robinson acknowledged that the SHR did give some help but did not believe it was sufficiently detailed to allow him to know how to narrow his request.
38. The SHR suggested in its correspondence with Mr Robinson that he specify a particular subject matter. In its submissions, it acknowledged that it did not give him the detail of its calculations at the time of responding and more detailed breakdowns (as considered above) would have assisted Mr Robinson in understanding how to narrow his request. The SHR acknowledged, therefore, that it could – and should – have gone further in advising and assisting Mr Robinson.
39. The Commissioner agrees with the SHR's analysis of the situation, as communicated in its submissions. It would appear that understanding the way in which the various records are held would offer the most useful insight into where the costs lie. Clearly, for example, there are issues relating to the scanned PDFs which make them more difficult (and therefore costly) to search and process. Questions 1 and 2, as drafted by Mr Robinson, are not limited to any particular timeframe, but a greater awareness of the different recording systems might prompt him to consider specifying a timeframe. Certainly, it is something he could discuss with the SHR. With this in mind, the Commissioner agrees that a breakdown of the costs, including descriptions of the systems involved, should have been provided to Mr Robinson in fulfilment of the Council's duty under section 15(1) of FOISA.

40. Consequently, the Commissioner does not accept that the SHR complied fully with its duty under section 15(1) of FOISA, in not providing a breakdown of its calculations which explained how the relevant records were held. Given the calculations and explanations set out above, however, the Commissioner does not require the SHR to provide any further advice to Mr Robinson on how to narrow his request.

Timescales

41. In his application, Mr Robinson submitted that the SHR failed to comply within the required timescale for carrying out his review.
42. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt of the requirement. The SHR responded to Mr Robinson's requirement for review three weeks (15 working days) outwith the prescribed timescale. In doing so, the Commissioner finds that the SHR breached the requirements of section 21(1) of FOISA.
43. Responding to requests under FOISA or the EIRs is a statutory function. This was a significant delay. The SHR accepted that the statutory deadline by which Mr Robinson should have received a response to his requirement for review was not met, acknowledging that this could be explained but not excused.
44. The SHR referred to the apology it had provided to Mr Robinson when informing him of the delay and again when it issued its response letter. It also confirmed that it had initiated an internal review of its handling of FOI requests, with a view to ensuring timescales were, as far as possible, complied with in future.
45. The Commissioner welcomes the SHR's actions in response to this failure.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Housing Regulator (the SHR) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Robinson. He is satisfied that it took adequate steps to satisfy itself that it held the information requested, but also that it was correct in concluding that section 12(1) of FOISA applied to the request.

However, the Commissioner also finds that the Council failed to comply with Part 1 by:

- (i) failing to provide adequate advice and assistance, as required by section 15(1) of FOISA, as to the how Mr Robinson might narrow his questions 1 and 2 to bring the request within the cost limit, and
- (ii) failing to comply with section 21(1) of FOISA, by not conducting a review within the statutory timescale required.

For the reasons set out in this decision notice, the Commissioner does not require the SHR to take further action in respect of these failures, in response to Mr Robinson's application.

Appeal

Should either Mr Robinson or the SHR 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

30 November 2017

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.

...

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.

Appendix 2: Mr Robinson's request

- 1) All record of points of contact between the Housing Regulator and Southside Housing Association [SHA] since 2011 till present and the recorded content of these points of contact.
- 2) All recorded records of telephone calls and e-mails from or to SHA that the Regulator has.
- 3) All records the Housing Regulator has regarding tendering issues connected to Berryknowes Road.
- 4) All advice sought by Southside Housing Association from the Housing Regulator regarding Berryknowes Road and any advice given out by the Regulator regarding the same by the Regulator.
- 5) All dates and mode of contact by any employee of the Regulator relating to or directly correlated to the same.
- 6) All the dates and copies of any information sent by any outside body, whether that be from individuals or organisations relating to Berryknowes Road. I understand there may be a need for redacting certain information.
- 7) The first date that the Housing Regulator was made aware of any tendering Issues or corruption allegations against Southside Housing Association.
- 8) All knowledge and records the Housing Regulator holds regarding 104 Berryknowes Road.
- 9) All knowledge and records the regulator has of any contract or tender issue and any discrepancies in tender documents between [named contractor] and SHA.
- 10) Do you have knowledge of any possible or probable incidents which could point to criminality regarding any tenders or tender awards specifically regarding SHA and [named contractor]?
- 11) Do you [have] any recorded data where it is clear that there have been serious breaches of tendering processes?
- 12) Has any employee of the Housing Regulator examined or had access to any reports regarding 100-104 Berryknowes Road? If the answer to this is yes, please provide a comprehensive answer and all data you have.
- 13) Have you been made aware of any tendering or other serious Issues concerning SHA and any other contractor? Please provide all information you have on this.
- 14) Are you aware of or do you have any information recorded regarding contractual or tendering or funding issues at Mossheights Ave. Please provide this information in full and include all dates including the point where first contact was made and by whom.

Scottish Information Commissioner

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