

Decision Notice

Decision 219/2014: Mr Glen Cawthra and Orkney Islands Council

Information regarding specified route

Reference No: 201402012

Decision Date: 09 October 2014



Scottish Information
Commissioner

Summary

On 4 June 2014, Mr Cawthra asked Orkney islands Council (the Council) for information relating to a specified route over a period of 15 years. The Council provided Mr Cawthra with some information, but informed him that it was not obliged to comply with his request as the cost of doing so would be more than £600.

Following an investigation, the Commissioner concluded that there was insufficient evidence to allow her to accept the Council's cost estimate. She required the Council to give another response to Mr Cawthra's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance)

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 4 June 2014, Mr Cawthra requested information from the Council, including:
“... all information relevant to the Ronaldsvoe – Quoyangry and Burma Road, St Margarets Hope, South Ronaldsay. This to include all information such as personal notes, e mail and transcripts of telephone calls. I would also request the minutes of any meetings in which this subject was discussed or raised. All of this information to be within the last 15 years.”
2. On 4 July 2014, Mr Cawthra wrote to the Council, requesting a review on the basis that it had failed to respond to his request.
3. The Council notified Mr Cawthra of the outcome of its review on 18 July 2014. It provided Mr Cawthra with information in response to another, related request, but in relation to this request stated that it was unable to provide the information as the estimated cost of doing so was more than the sum of £600 prescribed for the purposes of section 12(1) of FOISA. It provided a breakdown of an estimate of £675.
4. The Council informed Mr Cawthra that it might be possible to bring the cost of responding within the £600 limit, for example, by reducing the 15 year search period requested.
5. Mr Cawthra asked the Council if it was possible for him to pay the £75 in excess of the £600 limit, or whether the Council could provide information if he reduced the period to 12 years.
6. On 30 July 2014, the Council informed Mr Cawthra that the payment of £75 was not an option, that reducing the period to 12 years would have a negligible impact and that it might be possible to respond to a new request for a period of 12 months. The Council also advised that a cost might be associated with such a new request.

7. On 12 August 2014, Mr Cawthra wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Cawthra stated he was dissatisfied with the outcome of the Council's review because he had sought information over a period of 15 years (which he reduced to 12 years), yet the Council only offered a 12 month period.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Cawthra made a request for information to a Scottish public authority and asked the authority to review its failure to respond to that request before applying to her for a decision. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 28 August 2014, the Council was notified in writing that an application had been received from Mr Cawthra and was invited to comment on this application. It was asked to provide evidence to justify its application of section 12(1) of FOISA.
10. The Council responded to the investigating officer with comments. It continued to apply section 12(1) of FOISA.

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 her by both Mr Cawthra and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 12(1) – Excessive cost of compliance

12. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should she find that the cost of responding to a request for that information exceeds this sum.

13. The projected costs 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, the authority reasonably estimates it is likely to incur in:

- locating
- retrieving, and
- providing

the information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

14. The public authority may not charge for the cost of determining:
 - whether it actually holds the information requested, or
 - whether or not it should provide the information.

15. In its response to Mr Cawthra's requirement for review, the Council explained that it would take a total of 45 hours to complete all the required tasks, at the maximum hourly charge of £15.
16. The Council broke this down as follows:
 - 4 hours - coordinating information gathering
 - 4 hours - "Khyber Pass" file copy and redaction
 - 8 hours - Legal file (1) copy and redaction
 - 2 hours - Legal file (2) copy and redaction
 - 5 Hours - Planning file copy and redaction;
 - 15 hours - email - collating 4 hours, printing 3 hours, remove duplicates 2 hours, redact personal information 3 hours, redact legal information 2 hours and copying 1 hour
 - 7 hours - locate historic files in external storage for further right of way evidence gathering exercises.
17. The investigating officer asked the Council to provide detailed calculations supporting its estimates. In particular, the Council was also informed that any apparently arbitrary application of a time to a specific task (for example, 7 hours to locate historic files) would need to be supported by evidence.
18. The investigating officer also suggested to the Council that it might be appropriate to carry out a sampling exercise to back up its estimate.
19. In its submission to the Commissioner, the Council maintained that it would take 45 hours to comply with Mr Cawthra's request. However, it now took the view that an Admin Assistant could carry out 23 hours of the work (at £12.88 per hour), the remaining 22 hours requiring senior staff at the maximum rate of £15.00 per hour. The revised cost was £626.24. No attempt was made to explain which elements of the previous breakdown of tasks would require which grades of staff.
20. The Council further stated that the subject matter of the request was very complex and had been the subject of other information requests and complaints to the Council. It noted that it related to rights of way, in relation to which it had statutory duties. The matter was described as controversial for the local community and the subject of legal advice.
21. The Council stated that it was confident its cost estimates were accurate, although it provided no further explanation or evidence in support of this assertion. It made no attempt to explain why locating information in external storage should take 7 hours. It confirmed that the costs did not include ascertaining what information it held, although it was less clear from the submissions that the costs did not include time required to determine whether or not information should be disclosed.
22. Given the submissions summarised above, the Commissioner does not believe she has the evidence required to accept that the cost of complying with the request would exceed £600. The revised cost is very close to the £600 limit. In the absence of clear explanation of this figure, and in particular
 - the lack of any correlation between the breakdown of grades in the Council's submissions to the Commissioner and the earlier breakdown of tasks provided in the review outcome, and

- the allocation of a considerable, largely unsubstantiated, period (7 hours) for locating files in external storage,

the Commissioner has no reliable basis for assessing whether the estimates provided can be considered reasonable. There may be questions of legal complexity and controversy attached to the information, but it does not necessarily follow that the cost of providing an appropriate response to the request should exceed £600.

23. Taking all of the circumstances into consideration, the Commissioner finds that the Council has failed to justify its application of section 12(1) of FOISA in this case. As a result, the Commissioner cannot accept that section 12(1) applies to the information requested by Mr Cawthra. She therefore requires the Council to respond to Mr Cawthra's request for information in accordance with Part 1 of FOISA (but other than in terms of section 12(1)).

Decision

The Commissioner finds that the Orkney Islands Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cawthra.

The Commissioner is not satisfied that the Council was entitled to refuse to comply with the request under section 12(1) of FOISA.

The Commissioner requires the Council to provide a new response to Mr Cawthra's requirement for review, other than in terms of section 12(1) of FOISA, by 24 November 2014.

Appeal

Should either Mr Cawthra 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

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.

Margaret Keyse
Head of Enforcement

9 October 2014

Appendix 1: 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.

...

- (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.

...

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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