

# Decision Notice



Decision 108/2010 Mr Mark Irvine and South Lanarkshire Council

Whether request vexatious

Reference No: 201000367  
Decision Date: 22 June 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Irvine requested from South Lanarkshire Council (the Council) information relative to the Convention of Scottish Local Authorities' Job Evaluation Scheme. The Council responded by stating that it considered Mr Irvine's request to be vexatious in terms of section 14(1) of FOISA. Following a review, which upheld the view that the request was vexatious, Mr Irvine remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Irvine's request for information in accordance with Part 1 of FOISA, on the basis that Mr Irvine's request was not vexatious in terms of section 14(1).

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement), and 14(1) (Vexatious or repeated requests).

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

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1. On 10 September 2009, Mr Irvine wrote to the Council requesting the following information:
  - a. What were South Lanarkshire Council's reasons for not adopting the nationally recommended COSLA (Gauge) Job Evaluation Scheme (JES)?
  - b. What was South Lanarkshire Council's share of the £250,000 costs of producing the nationally recommended COSLA JES?
  - c. Who were the creators or authors of South Lanarkshire Council's 555 Job Evaluation Scheme (JES)?
  - d. What payment did the creators/authors of South Lanarkshire Council's 555 JES receive for their time and expertise?
  - e. What credentials did the creators/authors possess for developing South Lanarkshire Council's 555 JES?



2. The Council responded on 8 October 2009, informing Mr Irvine that it considered the request to be vexatious in terms of section 14(1) of FOISA and therefore it was not obliged to comply with it. It presented arguments in support of this position.
3. On 6 November 2009, Mr Irvine wrote to the Council requesting a review of its decision, challenging the Council's arguments in support of section 14(1) of FOISA.
4. The Council notified Mr Irvine of the outcome of its review on 7 December 2009. This upheld the original decision in terms of section 14(1) of FOISA.
5. On 17 February 2010 Mr Irvine 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.
6. The application was validated by establishing that Mr Irvine 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

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7. On 8 March 2010, the investigating officer notified the Council in writing that an application had been received from Mr Irvine, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on section 14(1) of FOISA.
8. The Council responded on 29 March 2010 confirming reliance on section 14(1) of FOISA and expanded on its reasoning. The relevant submissions received from both the Council and Mr Irvine will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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

### Section 14(1) – Vexatious requests

10. Section 14(1) of FOISA does not oblige a Scottish public authority to comply with a request for information under section 1(1) (which confers a general entitlement to information held by such authorities) if the request is vexatious.



11. If the Council was correct in its application of section 14(1), it would be under no obligation to comply with Mr Irvine's request (although it would remain under an obligation to, for example, notify Mr Irvine that it was not complying with his request and why).

#### *Identity of applicant*

12. While acknowledging the Commissioner's view that requests under FOISA should be considered "applicant blind" and that neither the identity of the requestor nor their perceived reasoning for requesting the information should be considered, the Council advised that in this case it had (it believed correctly) taken account of the applicant's identity and the context of his request in reaching its decisions.
13. Having considered the decision of the Court of Session in the case of *Glasgow City Council and Dundee City Council v The Scottish Information Commissioner [2009] CSIH 73*<sup>1</sup>, and also that of the Information Tribunal in the case of *Mr J Welsh and the Information Commissioner (EA/2007/0088)*<sup>2</sup>, the Council suggested that, in order to determine if a request was vexatious, the appropriate question should be whether the information would be supplied if it were requested by another person, with the same history and background in relation to interactions (direct and indirect) with the Council as the requestor. If it would, the Council went on to suggest, the request should not be treated as vexatious. On this basis, the Council submitted that it would have refused Mr Irvine's request if submitted by any other person with the same history of interactions with the Council.
14. While the Commissioner's view is that the terms "vexatious" must be applied to the request and not the requestor, he also acknowledges (see his briefing on section 14<sup>3</sup>) that the applicant's identity, and the history of their dealings with a public authority, *may* be relevant in considering the nature and effect of the request and the surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a particular request represents a continuation of a pattern of behaviour it has deemed vexatious in another context and therefore refuse the request as vexatious. This may be the case particularly where all relevant information has already been disclosed to the applicant *or* where (the matter having been fully addressed already through the appropriate procedures of the authority) it is unlikely that additional information would inform or alter the applicant's situation, but it does not follow that such an applicant's requests should automatically be refused: each decision has to be based on its own facts and circumstances.

#### *Whether a request is vexatious*

15. FOISA does not define the word "vexatious." The Commissioner's general approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
  - (a) it has the effect of harassing the public authority; and/or

<sup>1</sup> <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

<sup>2</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i125/Welsh.pdf>

<sup>3</sup> <http://www.itpublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



- (b) it does not have a serious purpose or value; and/or
- (c) it is designed to cause disruption or annoyance to the public authority; and/or
- (d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

### *Significant burden*

16. The Commissioner in his briefing has indicated that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources away from its core operations. However, if the expense involved in dealing with a request is the only consideration involved, the authority should consider the application of section 12 of FOISA (excessive cost of compliance).
17. In considering significant burden, the Council submitted that the resources in its Personnel Service were fully occupied between operational issues and the handling of equal pay claims. It considered that answering Mr Irvine's request would require a search for records created 13/14 years previously, which would require to be carried out by someone knowledgeable in the history of the adoption of the Single Status Agreement: it had only one employee with sufficient knowledge to undertake that search, and that person was also involved in the preparation of its cases in relation to equal pay. Consequently, dealing with the requests would involve the diversion of resources from dealing with operational matters and equal pay claims, to the potential detriment of the Council.
18. While appreciating that the Commissioner would not consider the fact that staff were simply busy on other duties as relevant in these circumstances, the Council contended that these requests were designed to require it to divert its resources from dealing with the operational matters and in particular equal pay claims.
19. The Council accepted that the Commissioner might not be willing to accept that dealing with the request would impose a significant burden on the Council, in which case it understood that it would follow from the Commissioner's guidance that the request would not be vexatious. It submitted, however, that a significant burden should not be a prerequisite for a vexatious request, referring to two recent decisions of the Information Commissioner which appeared to have prompted the (UK) Information Commissioner to amend his guidance on this point. One of these was the *Welsh* decision referred to above, the other being *Mr David Gowers and the Information Commissioner and the London Borough of Camden (EA/2007/0114)*<sup>4</sup>. The Council noted that this latter decision, in particular, "urged caution" in placing too much emphasis on whether a request imposed a significant burden on the public authority: this might be a relevant factor but should not be regarded as an essential requirement in every case.

<sup>4</sup> [http://www.informationtribunal.gov.uk/Documents/decisions/Determination\\_Gowers\\_Final\\_website\\_updated.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/Determination_Gowers_Final_website_updated.pdf)



20. In this particular case, the Commissioner has taken account of all the Council's submissions on this question but is not satisfied that responding to Mr Irvine's request would impose a significant burden on the Council. In fact, he has not been provided with evidence of any substance as to the level of burden that would be involved in responding. While, like all Scottish public authorities, the Council is no doubt subject to a considerable volume of other demands on its time and resources, the Commissioner is not persuaded that that dealing with this particular request would demand a disproportionate amount of the Council's time or divert an unreasonable proportion of its resources away from core operations.
21. On the Council's second point, the Commissioner would simply point out he states in his briefing that his *general* approach to the question of whether a request is vexatious is that he will require a significant burden on the public authority. This does not exclude the possibility that, in any given case, one or more of the other listed criteria may be of such overwhelming significance that it would be appropriate to consider the request vexatious in the absence of a significant burden. In the circumstances, the Commissioner will go on to consider the other submissions made by the Council as to why the request should be treated as vexatious.

*Disruption, annoyance and/or harassment*

22. The Council accepted that, on the face of it, Mr Irvine's request did not appear to be vexatious until the identity of the requestor and the context of the request was considered. In this case, it maintained that the requests were designed to cause disruption or annoyance rather than to access information. Referring to the Commissioner's guidance again, it noted the potential relevance to this determination of prior knowledge of, and documented interactions with, the requestor.
23. The Council submitted that Mr Irvine was part of a campaign against it in relation to equal pay claims, referring to his internet activity and his connections with a solicitor representing a number of claimants against the Council in relation to such claims (indicated by the Council as totalling approximately 2000). The Council contended that Mr Irvine was using the FOI legislation to "vex" it in relation to these claims, rather than to obtain information. It suggested that Mr Irvine was using his blog as a means of publicising progress with these claims and applying pressure on the Council in relation to them, and that it was evident from the blog that his information requests were part of a related campaign. While acknowledging that there was nothing inherently wrong with seeking information to further a campaign, the Council inferred from the timing of Mr Irvine's request that his intention in making the request was to disrupt its preparations for an employment tribunal case in relation to equal pay. It also suggested that he had encouraged others to submit information requests in the same terms as his own.
24. In his request for review, Mr Irvine accepted that he carried out consultancy work for the solicitor identified by the Council, amongst other clients, but maintained that he was not involved in the employment tribunal proceedings.





25. The Commissioner has considered all the submissions made by the Council on this point, including the information drawn to his attention regarding Mr Irvine's overall activity on equal pay matters. While his blog is undoubtedly critical of the Council, it is also critical of a number of other local authorities and of trade unions active in the public sector. South Lanarkshire Council does not appear to be selected for particular criticism. It is also clear from the blog that he encourages equal pay claims and in this connection promotes the services of the solicitors identified by the Council, but the Commissioner does not consider these points to be indicative of an intention to disrupt, annoy or harass. Having considered the terms of all this published information, he is unable to concur with the Council's conclusion that Mr Irvine's request was designed to cause disruption or annoyance to, and/or have the effect of harassing, the Council. Equally, he does not accept that such a conclusion follows reasonably from the timing of the request, whether taken by itself or in conjunction with the other factors cited by the Council: given the timing described by the Council, that could hardly in any event have been the intended effect of taking the matter to review and thereafter to an application to the Commissioner.

*No serious purpose or value*

26. The Council indicated that it was uncertain as to whether responding to these requests would have any serious purpose or value, suggesting that it was clear from his blog that he had predetermined the outcome of the request (i.e. that it would advance the case against the Council in some way). It drew the Commissioner's attention to a previous decision involving Mr Irvine, in which he appeared to have drawn a negative inference from a determination that the Council did not hold certain information. Consequently, it believed that the same prejudged position would be applied by Mr Irvine regardless of how it responded to the request.
27. The Commissioner's guidance on this issue is clear to the effect that public authorities should not reach this conclusion lightly. Even if a public authority thinks that a request lacks serious purpose or value, the applicant might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. Furthermore, the applicant is not obliged to share his/her motives for seeking the information with the public authority. The inclusion of this criterion simply recognises that some requests may be so obviously lacking in serious purpose or value that they can only be seen as vexatious. The Commissioner finds it difficult to arrive at this as an inevitable conclusion from the submission of this particular request by Mr Irvine, given his evident serious interest in the matters to which it relates.
28. Based on the arguments provided by the Council, the Commissioner cannot come to the conclusion that the requests by Mr Irvine had no serious purpose or value.

*Manifestly unreasonable or disproportionate*

29. Taking all of its arguments into consideration, the Council suggested that Mr Irvine's request was unreasonable or disproportionate, given the effect that dealing with it would have on the Council. It suggested that the Commissioner consider the time and resources that would be required to process the request, and the impact that this would have on the Council's core operations (particularly in relation to dealing with equal pay claims).



30. In considering what is manifestly unreasonable or disproportionate, it will sometimes be necessary to consider the effect of dealing with the request on a public authority, in terms of the time and resources required to process the request and its impact on the authority's core operations. Even if an applicant does not intend a request to be vexatious, it is possible that dealing with that request will impose demands which can be considered manifestly unreasonable or disproportionate. The nature and effect of the request, rather than the intentions of the applicant, can therefore be taken into account in certain circumstances.
31. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as the "Section 60 Code") makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious, stating that the power to refuse to respond to a request on the grounds contained in section 14(1) should be used sparingly and should not be abused simply to avoid dealing with a request for information.
32. In responding to Mr Irvine's request for review on 7 December 2009, the Council informed him that the request was deemed vexatious due to the additional work and disruption it would cause to staff preparing for the ongoing employment hearings on equal pay referred to earlier in this decision. The Council also suggested that it could be inferred from the circumstances that the request was an attempt to obtain information for solicitors involved in the hearing, in advance of the evidence hearings. The Council consider that this could be viewed as being manifestly unreasonable or disproportionate.
33. Having considered the submissions received from the Council, the Commissioner cannot accept that the Council has established that the information request by Mr Irvine was manifestly unreasonable or disproportionate. In particular, he does not accept the inference drawn by the Council on Mr Irvine's purpose as being relevant to this question. Consequently, having considered all the Council's submissions, he concludes that the requests for information submitted by Mr Irvine could not be deemed vexatious in terms of section 14(1) of FOISA, under any of the heads the Council has argued.

## DECISION

The Commissioner finds that South Lanarkshire Council failed to comply with Part 1 (and in particular section 1(1)) of FOISA in refusing to comply with Mr Irvine's request for information under section 14(1) of FOISA. The Commissioner requires South Lanarkshire Council to respond to Mr Irvine's request for information in terms of Part 1 of FOISA, other than in terms of section 14(1), by 8 August 2010.





## **Appeal**

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Should either Mr Irvine or South Lanarkshire 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**22 June 2010**



## Appendix

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### 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.

##### 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.

...