

Decision Notice



Decision 175/2011 Mr Allan Milligan and Glasgow City Council

Failure to respond

Reference No: 201100975
Decision Date: 19 August 2011

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

This decision considers whether Glasgow City Council (the Council) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to information request made by Mr Allan Milligan.

Background

1. On 21 February 2011, Mr Milligan emailed the Council requesting the following information: “a copy of correspondence dispatched to me, your reference GCC3349511.”
2. The Council did not respond to Mr Milligan’s request. On 1 April 2011, he wrote to the Council requesting a review on the grounds that it had failed to respond within the 20 working day period prescribed under FOISA.
3. Mr Milligan did not receive a response to his request for review. On 23 May 2011 wrote to the Commissioner’s office, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
4. The application was validated by establishing that Mr Milligan 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

5. On 2 June 2011 the Council was notified in writing that an application had been received from Mr Milligan and was invited to comment on the application. In particular it was asked to explain why it had failed to provide any response to the request detailed above.
6. The Council responded on 24 June 2011, indicating that it had no record of receiving Mr Milligan’s initial request, or subsequent request for review. During the investigation, further checks were carried out to establish whether the requests had been received by the Council.



7. Following these checks, the Council confirmed it had received Mr Milligan's initial request, and that it had logged and closed the matter on its systems under a code for a vexatious request. It also confirmed that Mr Milligan's request for review had been received.
8. In its submissions, the Council noted that this case is concerned with matters related to those considered in the Commissioner's *107/2011 Mr Allan Milligan and Glasgow City Council*¹. It referred the Commissioner to the submissions it made in that case which explained the history of its communications between Mr Milligan on the subject of parking restrictions in a particular area.
9. Decision 107/2011 considered three information requests that were made by Mr Milligan regarding these matters. The Council had argued in terms of section 16(5) of FOISA that having judged that the requests under consideration were vexatious, it was not obliged to give notice of this decision to Mr Milligan, having previously notified him (in July 2010) that it had found other substantially similar requests to be vexatious.
10. Section 16(5) of FOISA provides that where a request is judged to be vexatious for the purposes of section 14(1), the applicant need not be notified of this decision 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.
11. With respect to the request under consideration, the Council submitted (at that stage having identified no record of its receipt) that it would not have responded to this request, because it considered it to be vexatious and:
 - a. It had notified Mr Milligan in relation to previous and substantially similar requests that these were considered to be vexatious in July 2010, and
 - b. in the circumstances, it considered it would be unreasonable to expect it to serve another notice.

The Council therefore argued in terms of section 16(5) of FOISA that it was not obliged to provide any response to the request under consideration in this decision.
12. With respect to Mr Milligan's request for review, the Council noted the terms of *Decision 107/2011*. This had highlighted that even if section 16(5) is applicable to a request for information, there is no equivalent provision which could remove the obligation to provide some response following receipt of a requirement for review.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decisions.php>



13. The Council explained that following the issue of *Decision 107/2011*, it had modified its procedures, and that a response would be sent to Mr Milligan in relation to his request for review of 1 April 2011. It subsequently wrote to Mr Milligan on 4 July 2011, notifying him (in line with sections 21(8) and (9) of FOISA) that it had decided not to undertake a review of his request. The Council apologised for the delay in providing this response to Mr Milligan.

Commissioner's analysis and findings

14. The Commissioner has firstly considered whether the Council was required to provide any response to Mr Milligan's information request in terms of section 10(1) of FOISA.

Section 10(1) – Timescale for compliance

15. 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.
16. It is clear that the Council did not provide any response to Mr Milligan's request within the timescale specified in section 10(1). However, the Council indicated that it considered Mr Milligan's request of 21 February 2011 to be vexatious and it was entitled not to provide any response as a result of the application of section 16(5) of FOISA.

Section 16(5)

17. As noted above, section 16(5) of FOISA provides that, within the timescale required by section 10(1) of FOISA, a public authority which claims that section 14 applies in relation to a request, must give the applicant a notice which states that it so claims. However, it also provides 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.
18. The Commissioner's decision in this case will not reach any judgement as to whether the request under consideration is vexatious. For the purposes of this decision (which is concerned only with the question of whether the Council complied with the technical requirements of FOISA) it is sufficient to note that the Council has judged the request to be vexatious. The matter to be addressed by the Commissioner is whether, having reached the conclusion that section 14(1) was applicable, the Council was entitled not to give notice of that decision to Mr Milligan.
19. In order to reach a conclusion on the application of section 16(5) there are two separate tests which the Commissioner will now consider:



- 1) Has the Council given notice to Mr Milligan that section 14 of FOISA has been judged to apply to a previous identical or substantially similar request?
- 2) If yes, would it be unreasonable in all the circumstances to expect the Council to serve a further notice in relation to the request under consideration?

Previous notice that section 14(1) was applicable

20. The Council has provided copies of four letters that were sent to the Council by Mr Milligan dated 30 June and 6 July 2010.
21. The Council issued its response to these requests in a single letter on 29 July 2010. This indicated that the Council considered these requests were vexatious in terms of section 14(1) of FOISA, and so the Council was not obliged to respond to the requests.
22. Having confirmed that the Council has previously given notice to Mr Milligan that requests he had submitted to the Council had been judged to be vexatious, the Commissioner must next consider whether the requests under consideration in this case are identical or substantially similar to those previously judged to be vexatious.
23. As in *Decision 107/2011*, the Commissioner would note that the term "substantially similar", where applied to an information request, allows that a request might be expressed in different terms or seek somewhat different information. However, he considers that this term can only be found to be applicable where a request seeks largely the same type or set of information that was sought in another request. He does not consider that a request seeking different information on the same subject matter as previous requests can properly be found to be substantially similar to those previous requests.
24. When looking at this issue, the Council requested that the Commissioner does not simply make a comparison of Mr Milligan's request of 21 February 2011 with content of the previous requests of 30 June and 6 July 2010. It commented that these letters were the latest in a series of communications on parking related matters and were effectively the straw that broke the camel's back.
25. The Commissioner has considered whether he should consider the question of the similarity of the request under consideration to previous requests in the wider context of Mr Milligan's requests and communications with the Council. However, he is unable to do so.
26. He recognises that the history and pattern of communications and request-making might be a relevant consideration when determining whether a new request is vexatious. However the test of whether a request is vexatious is separate, and quite different from that determining whether section 16(5) removes the obligation to give notice of that decision. The test in section 16(5) requires consideration of whether a request is identical or substantially similar, only to requests that have previously been refused on the grounds that they were vexatious.



27. The Commissioner has therefore limited his consideration of the similarity test in section 16(5) of FOISA only to consider the similarity of the request under consideration to those previously determined by the Council to be vexatious.
28. The request under consideration in this decision sought
 - a copy of correspondence dispatched to me, your reference GCC3349511.”
29. The requests made on 30 June and 6 July 2010 requested the following:
 - Details of a pay and display bay as prescribed in the Traffic Signs Regulations and General Directions.
 - The section, subsection etc. contained in the Road Traffic Act 1991 as amended to which the Council was referring [when reference had been made to this Act in previous correspondence].
 - Do Council employees enjoy an exemption from criminal prosecutions if they submit false statements and/or lie to the Parking Adjudicator?
30. It is clear that the request under consideration is not identical to any of those previously refused.
31. The Council contended that the information request under consideration in this case is substantially similar as the requests dealt with in the notice of 29 July, in that they all stem from the Council's enforcement of parking enforcement. It has noted that its file with the reference GCC3349511 contains information solely in relation to Mr Milligan's complaints regarding the Council's enforcement of parking restrictions.
32. The Commissioner has considered this point, and he recognises that by requesting correspondence from the file relating to his complaints, the general subject matter of Mr Milligan's request is the same as in those previously refused on the grounds that they were vexatious. However, the Commissioner is unable to accept that this makes the request under consideration substantially similar to those requests. The requests of 30 June and 6 July sought specific types of information which would be quite distinct from correspondence dispatched to Mr Milligan under the specified reference.
33. The Commissioner would also note that, while it may be that the request in this case could be considered to be substantially similar to other requests previously made, but not refused on the grounds that they were vexatious, this is not a relevant consideration for the purposes of section 16(5) of FOISA.
34. The Commissioner therefore concludes that section 16(5) of FOISA did not remove the obligation for the Council to issue a response to Mr Milligan's request for information. Given that this request seeks quite different information (albeit in continuation of Mr Milligan's ongoing correspondence on a similar subject matter), the Commissioner concludes that the Council remained obliged to provide a response, either by providing the information, or by indicating the reasons for its conclusion that it was not obliged to do so.



35. Since the Council failed to issue any response to Mr Milligan's information request, the Commissioner therefore finds that the Council failed to comply with section 10(1) of FOISA.

Section 21 – Review by Scottish Public Authority

36. The Council did not respond to Mr Milligan's request for review dated 1 April 2011 until 4 July 2011.
37. 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.
38. 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.
39. The Commissioner's view is that, where no response has been made to an information request, the first two options are unavailable to the authority, and so the only appropriate review outcome in a case such as this is for the authority to reach a decision where none has been reached before, in line with section 21(4)(c) of FOISA.
40. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
41. Section 21(8), however, provides that a public authority is not obliged to comply with a requirement for review in cases where the requirement itself is vexatious, or where the request is one with which, the authority is not required to comply, because it is vexatious by virtue of section 14(1).
42. Where an authority judges that section 21(8) is applicable, section 21(9) states that it must give the applicant notice of this within the 20 working day period allowed by section 21(1).
43. In this case, the Council could have responded to Mr Milligan's request for review either:
- a. in terms of section 21(4)(c) and (5), by issuing a response to Mr Milligan's requests for information where none had been supplied before, or
 - b. in terms of sections 21(8) and (9), by indicating that the Council did not intend to conduct a review, because the requests (and/or the requirements for review) were considered to be vexatious.
44. Since it 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, within the timescale specified in section 21(1).



45. Given that the Council has now responded to Mr Milligan's requirement for review, the Commissioner does not require the Council to take any further action in this case.
46. The Commissioner also notes that the Council has amended its review procedures in light of the Commissioner's comments in *Decision 107/2011*, to recognise that there are no circumstances in which the obligations in section 21 of FOISA are disappplied.

DECISION

The Commissioner finds that Glasgow City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Milligan, in particular by failing to respond to his requests for information and requirements for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA.

For the reasons set out above in this decision, the Commissioner does not require the Council to take any action in response to this decision. However, the breaches identified above have been noted and may be taken into account in determining whether any future action should be taken in respect of the Council under the Commissioner's Enforcement Strategy.

Appeal

Should either Mr Milligan or the 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.

Claire Sigsworth
Deputy Head of Enforcement
19 August 2011



Appendix

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.

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.

...

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.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

...