

# Decision Notice



Decision 119/2013 Eighteen and Under and Dundee City Council

Correspondence and internal documents relating to a named charity

Reference No: 201202475

Decision Date: 25 June 2013

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 28 June 2012, Eighteen and Under asked Dundee City Council (the Council) for all information it held about the charity. After some delay and intervention by the Commissioner, the Council responded by providing some information, while withholding other information on the basis of substantial prejudice to the effective conduct of public affairs. The Council also considered part of the request to be repeated. During the investigation, further information was disclosed to Eighteen and Under. With regard to the remaining information, the Council also sought to rely on the exemption in section 36(1) of FOISA.

Following an investigation, the Commissioner did not accept that the request was repeated in any respect and required the Council to respond to the extent that it had not already. The Commissioner accepted the withholding of some information as legally privileged or on the basis of substantial prejudice to the effective conduct of public affairs. She also found that the Council failed to respond to the request and requirement for review within the relevant timescales.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b)(Effect of exemptions); 10(1)(a) (Time for compliance); 14(2) (Vexatious or repeated requests); 21(1) (Review by Scottish public authority); 30(b)(ii) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

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 28 June 2012, Eighteen and Under wrote to the Council requesting the following information:

*“...all information held by Dundee City Council (including but not limited to notes, memos, minutes of meetings, reviews, reports, internal and external correspondence) in relation to Eighteen and Under...”*

Eighteen and Under confirmed that they were not concerned with personal information.



2. The Council did not respond to this request.
3. On 16 August 2012, Eighteen and Under wrote to the Council, requesting a review on the basis that it had failed to respond.
4. After some delay and an application to the Commissioner, the Council responded to Eighteen and Under's request on 22 November 2012. The Council provided some information, but stated that the remainder was exempt under section 30(c) of FOISA. The Council also stated that, as Eighteen and Under had made a similar request in May 2009, it was treating this current request as seeking all information from that date.
5. On 29 November 2012, Eighteen and Under wrote to the Commissioner, stating they were 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 Eighteen and Under made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 22 January 2013, the Council provided a further response to Eighteen and Under. This supplied further documentation, which had previously been withheld. The Council informed Eighteen and Under that it now sought to rely on sections 30(b), 30(c) and 36(1) of FOISA to withhold the remaining information. Again, the Council referred to a previous request made by Eighteen and Under and confirmed that it was not providing information prior to the date of that previous request.
8. On 21 February 2013, the Council was notified in writing that an application had been received from Eighteen and Under and was asked to provide the Commissioner with any information withheld from them. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, 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 any provisions of FOISA it considered applicable to the information requested. The Council was also asked to provide evidence of the previous request made by Eighteen and Under and how it was dealt with.
10. During the investigation, further documentation, previously withheld, was provided to Eighteen and Under. The Council also identified and supplied missing attachments referred in the withheld information.



## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information, together with the relevant submissions made to her by both Eighteen and Under and the Council. She is satisfied that no matter of relevance has been overlooked.
12. Within their application to the Commissioner, Eighteen and Under did not accept the Council's application of exemptions and expressed concern that they had not been provided with information prior to May 2009.
13. As the Council applied section 36(1) to all of the remaining withheld documents, the Council's application of this exemption will be considered first.

### Section 36(1) – confidentiality

14. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in the course of which legal advice is sought or given.
15. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal adviser, such as a solicitor (including, in most cases, an in-house one) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
16. The Council stated that the information withheld comprised correspondence between the Council's in-house legal adviser and the relevant department and the Chief Executive on a matter involving Eighteen and Under.
17. Having considered the content of the withheld documents, the Commissioner is satisfied that in all but one case (document 67), it comprises communications with the legal professional identified, in the course of which legal advice was requested or provided, or relates to the consideration of such advice. With that one exception, the information meets the conditions set out in paragraph 15 above.
18. The exemption in section 36(1) is, however, a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information (other than that in document 67) is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



*Public interest test*

19. Eighteen and Under, in their submissions to the Commissioner, stated they believed that some of the information held by the Council was incorrect: they believed they had the right to correct this. They also highlighted that the Council had made decisions about the charity, resulting in instructions to other agencies: they believed they had a right to know the reasons behind these decisions.
20. The Council submitted that, should the information be provided to Eighteen and Under, it would become extremely difficult for in-house solicitors to continue in a manner which would allow a full and frank exchange of advice and information with the client officer. Should such information be released, then the in-house lawyer concerned would become circumspect in their advice that they would be hampered from carrying out their proper duty in the best interests of the local authority and the people of Dundee.
21. The Council acknowledged a general public interest in transparency and accountability, and in ensuring that there was scrutiny of the decision making process and effective oversight of public expenditure. However, it did not believe disclosure would serve these purposes. The Council concluded that the public interest in disclosing the information was outweighed by the public interest in maintaining the exemption.
22. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*<sup>1</sup>, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
23. Having considered the public interest arguments on both sides, and while not accepting the extent of the harm suggested by the Council, the Commissioner is not satisfied that, in this instance, the public interest in disclosure of the remaining withheld information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. Consequently, she accepts that the Council correctly withheld the information, with the exception of that document 67, to which it applied section 36(1) of FOISA.
24. As she is satisfied that section 36(1) was correctly applied to all of the withheld information, except that in document 67, she will not consider the application of other exemptions to this information. She must, however, do that in relation to document 67.

<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>



### **Section 30(b)(ii) – prejudice to effective conduct of public affairs**

25. In order to rely on this exemption, the Council must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
26. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit the free and frank exchange of views substantially. The inhibition must be substantial and therefore of real and demonstrable significance.
27. Each request should be considered on a case by case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
28. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, and is not simply a remote or hypothetical possibility.
29. Document 67 is an email exchange between the Chief Executive to the Director of Social Work concerning a point of view about child protection issues which the Council stated "... is put in frank terms in order that appropriate weight can be given to the issue." The Council argued that, without the ability to converse privately on these issues, there was a danger of communication being stifled to the extent that the true import of an email would be lost. It highlighted the risks to the effective discharge of its child protection functions should this happen.
30. Having considered the content of this exchange and terms of the exchange the Commissioner is satisfied that section 30(b)(ii) of FOISA was applied appropriately to this document.

#### *Public interest test*

31. Section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner is therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
32. The Council took the view that there was a strong public interest in maintaining the effective conduct of public affairs, taking account of the sensitive issues and key functions covered by the communication, and concluded that the public interest in disclosing the information was outweighed in this case by the public interest in maintaining the exemption.



33. Given the origin and nature of this exchange, the Commissioner recognises the strong public interest in ensuring that senior council employees are able to challenge and question the position of the departments concerned robustly. The Commissioner concludes that the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure in this case. Accordingly, she finds that the Council was correct to withhold the information contained in document 67.

#### **Repeated request – section 14(2)**

34. The Council did not provide any information to Eighteen and Under dating from before May 2009. It was the Council's view that, in this respect, the request was repeated, having complied with a similar request received in May 2009. The Council therefore sought to rely on section 14(2) of FOISA.
35. Section 14(2) states:
- 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.*
36. When considering section 14(2) of FOISA, the following points need to be considered:
- Whether Eighteen and Under's request of 27 May 2009 was identical or substantially similar to the request under consideration here;
  - Whether the Council complied with the earlier request and, if so,
  - Whether there was a reasonable period of time between the submission of the first request and the submission of the subsequent request.

#### *Was the previous request identical or substantially similar to the first?*

37. The Council supplied the Commissioner with a copy of Eighteen and Under's earlier request for information. This was made by a firm of solicitors on behalf of Eighteen and Under in May 2009, the terms of which were:
- "... a copy of all information held by Dundee City Council (including but not limited to notes, memos, minutes of meetings, review, reports, internal and external correspondence) in relation to the Council's decision to withdraw the provision of Fairer Scotland funding to our client..."*
38. Looking at the terms of these requests, the Commissioner does not accept that the requests are identical or "substantially similar". The request under consideration in this decision is considerably wider and is not limited by subject matter, i.e. the withdrawal of the provision of funding. There is nothing in the subsequent correspondence between Eighteen and Under and the Council which suggests that the withdrawal of funding was the requester's underlying concern here. Equally, there is nothing in the Council's response to this earlier request to suggest that it embraced all the information held by the Council in relation to Eighteen and Under.



39. The Commissioner therefore concludes that the Council was incorrect in its reliance on section 14(2) of FOISA in relation to information dating from prior to May 2009. The Commissioner therefore requires the Council to respond to Eighteen and Under in relation to that earlier information, otherwise than by section 14(2) of FOISA.

*Technical issues*

40. In their application to the Commissioner, Eighteen and Under expressed dissatisfaction at the time taken to respond to their request and requirement for review.
41. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information. This is subject to certain exceptions which are not relevant in this case.
42. The Commissioner finds that the Council failed to respond to Eighteen and Under's request for information within the 20 working days allowed by section 10(1) of FOISA.
43. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review. Again, this is subject to certain exceptions which are not relevant in this case.
44. As the Council did not provide a response to Eighteen and Under's requirement for review within 20 working days, the Commissioner finds that it failed to comply with section 21(1) of FOISA.





## DECISION

The Commissioner finds that Dundee City 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 Eighteen and Under.

The Commissioner finds that the Council was entitled to withhold information under sections 30(b)(ii) and section 36(1) to of FOISA.

However, in incorrectly applying on section 14(2) of FOISA to information held prior to May 2009, the Council failed to comply with Part 1.

The Commissioner also finds that, by failing to respond to the information request and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA, the Council failed to comply with Part 1.

The Commissioner requires the Council to provide Eighteen and Under with a response with regard to information held prior to May 2009, otherwise than under section 14(2), by 9 August 2013.

## Appeal

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Should either Eighteen and Under or Dundee City 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.

**Margaret Keyse**  
**Head of Enforcement**  
**25 June 2013**

Decision 119/2013  
Eighteen and Under  
and Dundee City Council





## 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.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 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

...



#### **14 Vexatious or repeated requests**

...

- (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.

#### **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.

...

#### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

#### **36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...