

Decision Notice



Decision 270/2013 Stephen Magee and Glasgow City Council

Disposal of babies' ashes

Reference No: 201300893

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Scottish Information Commissioner

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Summary

On 14 January 2013, Mr Magee asked Glasgow City Council (the Council) for information about the disposal of babies' ashes at its crematoriums. The Council failed to respond and Mr Magee requested a review. The Council subsequently disclosed some information, but did not provide him with all the information he requested.

During the investigation, the Council submitted that the costs of supplying the information Mr Magee was seeking would exceed the £600 threshold in the relevant Fees Regulations and, therefore, the Council was not required to comply with the request. The Commissioner agreed with this conclusion. However, the Commissioner found that the Council had failed to provide Mr Magee with reasonable advice and assistance in making his request (as required by section 15(1) of FOISA), and had also failed to respond within the statutory timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1), (4) and (6) (General entitlement); 10(1)(a) (Time for compliance); 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 14 January 2013, Mr Magee wrote to the Council asking for information about the disposal of babies' ashes at crematoriums. This decision relates only to the parts of the Council's response which Mr Magee complained of, as well as his dissatisfaction with the time taken to issue a response.
2. Mr Magee asked for details of routine practice over the last five years. For each of the four age groups below, Mr Magee wanted to know "How many cremations this involved" and of those, "how many sets of ashes were returned to parents?":



- 1) pre-term babies;
 - 2) still-born full term babies;
 - 3) babies who have died at six months or less; and
 - 4) children older than six months at the time of death.
3. Mr Magee wrote to the Council on 13 February 2013, requesting a review as it had failed to provide any response to his initial request.
 4. The Council notified Mr Magee of the outcome of its review on 11 March 2013. It confirmed that it held information regarding the instruction for disposal of cremated remains on an individual file-by-file basis, but it contended it did not hold statistics on these instructions or any breakdown into the age categories Mr Magee stipulated in his request.
 5. The Council disclosed the total number of cremations in the last five years, for four age groups which were different from those stipulated by Mr Magee in his request.
 6. In relation to Mr Magee's request for information about the number of occasions on which ashes were returned to parents, the Council did not provide any information (although it gave some details about its procedures).
 7. The Council and Mr Magee entered into further correspondence to clarify the Council's review decision. On 14 March 2013, the Council confirmed that individual files would show whether the ashes were returned to parents. It also stated that it did not hold overall figures capable of showing the number of infant cremations which returned ashes, compared to those which did not. It stated that the only way the Council could obtain these figures would be to ask its database supplier to draft a script to gather this information.
 8. On 4 April 2013, Mr Magee 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. He complained he had received no response to his initial request, that it is a statutory requirement for the Council to hold the information he had asked for, and that he would be happy to receive individual files (redacted) from which he could collate the data for himself.
 9. The application was validated by establishing that Mr Magee 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. The case was then allocated to an investigating officer.



Investigation

10. On 8 May 2013, the Council was notified in writing that an application had been received from Mr Magee, 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. The Council was asked to comment in detail on how it had responded to parts of Mr Magee's request, and to explain the processes for counting (either manually or electronically) the instructions for disposal for the categories of cremations it holds.
11. On 16 May 2013, some statistical information was published about the number of cases where families had not received any ashes following the cremation of children aged up to 24 months.
12. Mr Magee indicated to the investigating officer that, although some information had been disclosed by the Council, he wished a determination on whether the Council had been right to refuse his request on the grounds that it did not hold the information in the form he had requested.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both Mr Magee and the Council. She is satisfied that no matter of relevance has been overlooked

What information was held?

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain restrictions in section 1(6) which are not applicable in this case. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

Age Group Categories

15. Mr Magee stated in his application that it is a statutory requirement to record the method of disposal of ashes and that the information about individual cases is held on file. He expected to be provided with the information he had stipulated in his request, including statistical information.



16. In its review decision letter, the Council explained that, for the five year period in question, it held over 20,000 individual files containing cremation records. It contended that, although it held information regarding the instruction for disposal of cremated remains on an individual file-by-file basis, it did not hold the statistical information Mr Magee had asked for, as it did not use the same age categories Mr Magee specified in his request.
17. The Council disclosed the total number of cremations in four age categories (which were not the ones Mr Magee had requested). These were:
 - i. “NVF” (Non-viable foetus),
 - ii. “Stillborn”
 - iii. “Baby”
 - iv. “Child” (1 – 15 years)
18. The Council also gave explanations of these categories in its response.
19. During the investigation, the Council further clarified that the age groups used in its review response are fixed search parameters within its cremation records database. It also clarified the exact number of files involved, i.e. that there are 21,592 individual paper files containing cremation records for the five years Mr Magee stipulated.
20. The Council also confirmed to the investigating officer that it wished to rely upon section 12 of FOISA (excessive cost of compliance) in relation to Mr Magee’s request.

Section 12(1) – excessive cost of compliance

21. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to a request for that information would exceed this sum.
22. The projected costs a Scottish public authority can take into account for a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) which the authority reasonably estimates it will incur in locating, retrieving, and providing the information requested in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 per hour. The authority may not charge for the cost of determining whether it actually holds the information, or whether or not it should provide the information.
23. The Council explained that the statistical analysis of the appropriate records would only take an estimated 3.8 staff hours to complete. The issue was the size of the search exercise that would need to be undertaken in order to identify the records required to produce the statistics Mr Magee required (a manual search of 21,592 paper records). The Council argued that the magnitude of the search was such that it made the cost of complying with the request prohibitive under section 12 of FOISA.



24. The Council estimated that the projected cost of fulfilling Mr Magee's request was £1,421.61 (excluding statistical calculation and any redaction work thereafter). It outlined the three main steps in the process.
- 1) The initial interrogation of its database was required for the extraction and printing of the registers of cremation (Forms G and NVF Register). The Council allowed two seconds to check each of the 21,592 records, which gave a total time of 11.9 hours.
 - 2) A further interrogation of the physical registers of cremation (all 21,592 records) was required to assess the age category to which each record related. The Council allowed 15 seconds per record for this task (90 hours).
 - 3) Finally, having located the appropriate records, a final assessment of the details would incur staff resources at five seconds per record (estimating this would total 3.8 hours).

The total combined hours in this process was estimated at 105.7, for which the Council charged a grade 4 Administrative officer rate of £13.44 per hour. The final cost of fulfilling Mr Magee's request was estimated at £1421.61.

25. The Commissioner considers these projections to be reasonable, and notes that the staff rate used is appropriate (the maximum rate has not been charged). Even if the Council found it was able to process the search more quickly than first estimated above, for example in half the time estimated, the costs would still exceed £600.
26. The Commissioner is aware that, after refusing Mr Magee's request, the Council went on to produce statistics quantifying the numbers of cases where ashes were recovered/returned to parents, and that this statistical information was subsequently published. Although this information is similar to the information requested by Mr Magee, it was created some time after Mr Magee made his request. The Commissioner understands that the statistics which were published resulted from an Internal Audit which took Council staff 87.5 days to complete – if calculated in terms of a response to an FOI request, this would have cost the Council £9,187.50, well above the cost threshold in the Fees Regulations. In any event, in reaching a decision on Mr Magee's application, the Commissioner must consider how the Council responded to him in terms of the circumstances existing at the time he made his request and requirement for review.
27. On the basis of the submissions she has received, set out in detail above, the Commissioner accepts that compliance with Mr Magee's request would cost more than the £600 limit prescribed for the purposes of section 12(1) of FOISA. She will now consider what advice the Council gave, or could have given, to assist Mr Magee in narrowing his request to bring it under the £600 limit.

Section 15 – the duty to advise and assist

28. Section 15(1) of FOISA requires a Scottish public authority, so far as 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.



29. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish public authorities under FOISA and the EIRs (the Section 60 code) provides¹ (at 1.9):
- “Where the cost of responding to a request made under FOISA will exceed the upper cost limit of £600 or the burden of responding to a request under the EIRs would be manifestly unreasonable (and so the authority is not obliged to comply), the authority may again consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly.”
30. Section 15(2) of FOISA states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms with the Section 60 code, is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
31. The Council considered that it had provided Mr Magee with reasonable advice and assistance. It had provided statistics for the nearest possible age groups to those specified in Mr Magee's request for the period specified in his request.
32. The Commissioner notes that, in this case, the Council did not claim section 12 of FOISA until it presented its submissions to her. It informed Mr Magee that it held information regarding the instruction for disposal of cremated remains on a file-by-file basis, but did not hold the statistics he had requested. The Council did not explain to Mr Magee why it would incur excessive costs in extracting the information he had requested from the files, or what process it would have to go through in order to provide the information.
33. The Commissioner notes that Mr Magee asked for five years' worth of data. It is often possible to reduce the cost of complying with such requests by specifying a shorter time period and so bringing it within the £600 limit. For example, the Council might have considered showing what each year's worth of information would cost to supply, in case Mr Magee was willing to narrow his request to any particular year.
34. In the Commissioner's view, the Council should have given specific advice to Mr Magee on how to bring his request within the £600 limit. The Council could have provided him with information about the process it would follow to extract the information from its records, the rates at which it would calculate its charges, and the average estimated cost for each year's data. This would have allowed Mr Magee to better understand the issues the Council faced in producing the statistics he sought.
35. In all the circumstances, the Commissioner concludes the Council failed to comply fully with the duty under section 15(1) of FOISA to provide Mr Magee with reasonable advice and assistance in relation to his request. In view of the background information provided in this decision, which explains how the relevant information is held by the Council, and noting that information very similar to that requested by Mr Magee was subsequently disclosed for publication in May 2013, the Commissioner does not require the Council to take any further action in respect to this failure.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



36. The Commissioner would also observe that if the Council had explained more fully the processes and the estimated costs involved, it may well have resulted either in Mr Magee submitting a different request which was capable of being complied with, or in the Council avoiding an appeal to the Commissioner.

Timescales

37. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt to comply with the request, subject to exceptions which are not relevant to this case.
38. In his application, Mr Magee complained that there was no substantive response from the Council to his request within the statutory timeframe.
39. The Commissioner finds that the Council failed to respond to Mr Magee's request within 20 working days, as required in section 10(1) of FOISA.

DECISION

The Commissioner finds that Glasgow 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 Mr Magee (parts 2 – 5 of his request of 14 January 2013).

The Commissioner finds that the Council was not obliged to comply with Mr Magee's information request, given that section 12(1) of FOISA applied.

However, the Commissioner also finds that the Council failed to provide reasonable advice and assistance to Mr Magee on how his request might be reduced in scope, and therefore failed to comply with section 15(1) of FOISA. She also found that the Council failed to respond to the request within 20 working days as required in section 10(1) of FOISA.

The Commissioner does not require the Council to take any action in respect of these failures in response to Mr Magee's application.



Appeal

Should either Mr Magee or Glasgow 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
26 November 2013



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.

....

- (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.

...

- (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

...

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.