

Decision Notice 165/2020

Records relating to a café

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 20200758



Scottish Information
Commissioner

Summary

The Council was asked for information relating to a specific café. The Council informed the Applicant that it considered the request to be vexatious, and so it was not obliged to respond.

The Commissioner investigated. During the investigation, the Council withdrew its reliance on section 14(1). The Commissioner found that the Council was not entitled to refuse to comply with the request on the basis that it was vexatious. He also found that the Council had failed to respond to the request for review within the required timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests); 21(1), (8)(b) and (9) (Review by Scottish public authority)

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 3 February 2020, the Applicant made a request for information to Glasgow City Council (the Council). The information requested was the Council records since and including 30 April 2019 related to a specific café premises. He provided details of what this should include.
2. The Council responded on 14 February 2020. It refused the request in terms of section 14(1) (Vexatious or repeated requests) of FOISA and informed the Applicant that it did not have to comply with requests that were vexatious. It provided reasons why it considered the request to be vexatious.
3. On 26 March 2020, the Applicant wrote to the Council, requesting a review of its decision as he disagreed that his request was vexatious. The Applicant included arguments in support of his view.
4. The Applicant emailed the Council on 1 April 2020, asking it to acknowledge receipt of his requirement for review.
5. On 28 June 2020, having received no response to his requirement for review, or to his email of 1 April 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA, on the basis of the Council's failure to respond to his request for review.
6. On 30 June 2020, the Council was informed that the Applicant had made a valid application. The following day, the Council contacted the Commissioner's office, stating it had not received the Applicant's requirement for review (this point is considered further below) and asking the Commissioner's office to forward a copy. This was sent to the Council on 1 July 2020.
7. The Council wrote to the Applicant on 10 July 2020. It apologised for the delay in responding, explaining it had not received his requirement for review. The Council confirmed it considered the request to be vexatious in terms of section 14(1) of FOISA, for the reasons set out in its initial response. It informed the Applicant that, under section 21(8)(b) (Review

by Scottish public authority) of FOISA, it was not obliged to comply with a requirement for review where it considered the request to be vexatious.

8. The Applicant subsequently withdrew his earlier application and, on 12 July 2020, wrote again to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant argued that the Council was not entitled to rely on section 14(1) of FOISA to refuse his request, for the reasons set out in his requirement for review. He also asked the Commissioner to investigate the Council's failure to respond to his requirement for review, and its claim that this had not been received.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
10. On 16 July 2020, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These focused on its justification for relying on section 14(1) of FOISA. The Council was also asked to explain why it failed to respond to the requirement for review within the statutory timescale set out in FOISA.
12. Both parties provided submissions on their respective positions. During the investigation, the Council confirmed that it no longer sought to rely on section 14(1) of FOISA.

Commissioner's analysis and findings

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

Section 14(1) – Vexatious requests

14. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
15. The Council initially refused to comply with the Applicant's request on the basis that it was vexatious. At review, it informed the Applicant that it was not obliged to comply with the requirement for review on the basis that the request was vexatious, citing section 21(8)(b) of FOISA. Section 21(8)(b) (read with section 21(9)) allows a Scottish public authority to decline to carry out a review, where it considers the request to have been one with which (by virtue of section 14) it was not obliged to comply.
16. As stated above, during the investigation, the Council informed the Commissioner that it wished to change its position. It submitted that it had taken into consideration two recent decisions issued by the Commissioner in respect of similar information requests, namely

Decision 113/2020¹ and *Decision 124/2020²*, which considered the cost of complying with those requests. Given the similarity of the request under consideration here to those which had been the subject of these recent decision notices, the Council confirmed it no longer wished to rely on section 14(1) of FOISA. It submitted that it now wished to apply section 12(1) (Excessive cost of compliance) to the request, as it believed full compliance with the request would exceed the cost limit set out in the Fee Regulations.

17. On 14 October 2020, the Council issued a revised review outcome to the Applicant, withdrawing its application of section 14(1) of FOISA and substituting a fresh decision.

The Commissioner's view

18. In light of the Council's change of position, as a result of which it no longer considers section 14(1) of FOISA applicable to the request, the Commissioner must conclude that the Council was not entitled to refuse to comply with the Applicant's request on the basis that section 14(1) applied. He also finds, therefore, that section 21(8)(b) of FOISA did not apply and that the Council was obliged to comply with the Applicant's requirement for review. Given that the Council has now issued a revised review outcome, otherwise than in terms of section 14(1) of FOISA, he does not require the Council to take any further action in this regard.
19. If the Applicant remains dissatisfied with the revised review outcome, he has the option to submit a new application to the Commissioner.

Section 21(1) – Review by Scottish public authority

20. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
21. In his application to the Commissioner, the Applicant was dissatisfied that the Council had failed to provide him with a review outcome, and with its claim that it had not received his request for review. As noted above, the Commissioner has found that the Council was not permitted to decline to carry out a review under section 21(8)(b) of FOISA – and even if that provision had applied, section 21(9) still obliged the Council to respond to the requirement for review in some form (i.e. by notifying the Applicant that it considered a provision of section 21(8) to be applicable).
22. In its submissions to the Commissioner, the Council maintained that it had no record of having received either the Applicant's request for review of 26 March 2020, or his subsequent email of 1 April 2020. It submitted that, following notification of the Applicant's earlier application to the Commissioner (based on its failure to respond to the requirement for review), it had carried out searches of the relevant mailboxes, but these showed no record of containing either email.
23. The Council confirmed that IT logs of incoming emails were retained for only 90 days, and so it was not possible to carry out any further checks to ascertain whether the emails had been received by the Council.
24. The Commissioner has considered the submissions from both parties. He has reviewed the copies of the Applicant's requirement for review dated 26 March 2020 and his subsequent

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000138.aspx>

² <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000294.aspx>

email of 1 April 2020. He also notes the Council's position is that these communications were not received, evidenced by searches of the relevant mailboxes (to which these emails were sent) in support of its view.

25. It is apparent, from the copy of the requirement for review provided to the Commissioner, that the email address to which this was sent replicates exactly that set out in the Council's initial response of 14 February 2020, where it explained how, when and where to make a requirement for review, if dissatisfied with its response.
26. It is also apparent, from the Applicant's subsequent email of 1 April 2020, that this was not only sent to the same email address as his requirement for review, but it was also copied to the email address used to submit his original request – which the Council clearly received, given that it issued a response to that request on 14 February 2020.
27. The Commissioner has also taken into account the Council's submissions and the evidence of the results of searches carried out in August 2020, noting that IT logs of incoming mail are only retained for 90 days. In the Commissioner's view, these are not sufficient evidence that the Council did not receive either of the Applicant's emails.
28. On the balance of probabilities, having considered all relevant submissions, the Commissioner finds that the Applicant submitted a valid requirement for review within the timescale prescribed in FOISA, and must presume that the requirement for review was received by the Council on the same date as it was sent, even if it was not identified and acted upon.
29. The Commissioner must conclude, therefore, that the Council failed to provide a response to the Applicant's requirement for review dated 26 March 2020 within 20 working days, as required by section 21(1) of FOISA. As a result, it failed to comply with section 21(1).
30. As the Council responded to the Applicant's requirement for review on 10 July 2020, apologising for its failure to respond within statutory timescales, the Commissioner does not require it to take any further action in relation to this failure.

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 responding to the information request made by the Applicant.

The Commissioner finds that the Council was not entitled to refuse to comply with the request on the basis that it was vexatious. In doing so, it failed to comply with section 1(1) of FOISA.

The Commissioner also finds that section 21(8)(b) of FOISA did not apply and that the Council was obliged to carry out a review

The Commissioner further finds that the Council failed to respond to the Applicant's requirement for review within the required statutory timescale and that, by so doing, it breached section 21(1) of FOISA.

Given that the Council responded to the requirement for review, and has subsequently issued a revised review outcome otherwise than in terms of section 14(1) of FOISA, the Commissioner does not require the Council to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant 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.

Margaret Keyse
Head of Enforcement

10 December 2020

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.

...

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.

...

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-

...

- (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.

...

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