

Decision Notice



Decision 089/2013 Mr O and Scottish Borders Council

Funding of Central Borders Citizens' Advice Bureau

Reference No: 201202365
Decision Date: 15 May 2013

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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



Summary

On 10 September 2012, Mr O asked Scottish Borders Council (the Council) for information about the funding of Central Borders Citizens' Advice Bureau. The Council responded with some information. Following an investigation, the Commissioner found that the Council had largely complied with Mr O's request for information. She did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 20(3) (Requirement for review of refusal etc.); 47(2) (Application for decision by Commissioner)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices 1 and 2 form part of this decision.

Background

1. On 10 September 2012, Mr O wrote to the Council, using the pseudonym "Oysterman" and requesting information about the funding of Central Borders Citizens' Advice Bureau (CAB). Mr O's requests (A to Q) are reproduced in full in Appendix 2 to this decision.
2. On 12 September 2012, the Council told Mr O that until he provided a valid name the Council would not be able to deal with his requests. Mr O gave his name to the Council on the same day.
3. The Council provided Mr O with information in response to his requests on 11 and 15 October 2012.
4. On 16 October 2012, Mr O wrote to the Council, requesting a review of its decision.
5. The Council notified Mr O of the outcome of its review on 1 November 2012. The Council upheld its initial decision that it had responded to the requests in full, but to assist Mr O provided him with further information on certain points.



6. On 19 November 2012, Mr O 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.
7. The application was validated by establishing that Mr O made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.

Investigation

8. 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.
9. As Mr O's application to the Commissioner did not show any dissatisfaction with how the Council had dealt with the following requests, the Commissioner will not consider whether the Council complied with Part 1 of FOISA in responding to these requests:
 - Request C
 - Request D
 - Request M
 - Request N
 - Request O
 - Request Q.
10. In addition, the Commissioner's investigation cannot consider whether the Council complied with Part 1 of FOISA in responding to certain of the requests identified in Mr O's application, although the Council addressed these requests in its review. Mr O's requirement for review was quite specific as to the requests he was concerned about and did not refer to these requests. Consequently, having considered the requirements of sections 20(3) and 47(2) of FOISA, the Commissioner does not consider that Mr O could make a valid application to her in respect of the following requests:
 - Request B (however, Mr O's dissatisfaction in respect of this response is connected to the Council's response to request A, which the Commissioner will consider below)
 - Request F (similarly, request F is connected to request E, which the Commissioner will consider below)
 - Request H
 - Request I



11. Mr O expressed dissatisfaction, both at review and in his application to the Commissioner, as to how the Council had dealt with the following requests:
- Request A
 - Request E
 - Request G
 - Request J
 - Request K
 - Request L
 - Request P.
- The Commissioner's investigation will therefore consider whether the Council complied with Part 1 of FOISA in dealing with these requests.
12. The relevant submissions received from both the Council and Mr O will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Request A

14. Request A was for:
How much money have the Council donated to Central Borders Citizens' Advice Bureau?
15. The Council disclosed the amount of its 2011/12 funding. When, in his requirement for review, Mr O sought evidence of this sum the Council provided a copy of a payment instruction sheet. Mr O's questioned the "contradiction" between the sum originally provided and the instruction sheet.
16. The Council explained that the figure in the instruction sheet was a quarterly payment of £14,562 (not £4,562, as quoted by Mr O). The Council explained that this amount was sent to the CAB for each of the quarters in 2011/12, making a total payment of £58,248 as stated in its initial response. The information was extracted from its Financial Information System following a search.
17. However, the Council acknowledged that it only disclosed one instruction sheet, rather than multiple *sheets* (as its review outcome had indicated). It explained that this was a typing error.



18. In order to comply with section 1(1) in relation to any given request, an authority must take reasonable steps to identify and locate all information it holds and which falls within the scope of that request. In the absence of an applicable exemption or other relevant provision of Part 1 of FOISA, it must provide that information to the applicant. In this case, the Council supplied a figure to Mr O. Having considered the Council's explanations, the Commissioner accepts that the Council identified, located and provided the information it held falling within the scope of request A, and in doing so complied fully with section 1(1) of FOISA.

Request E

19. Request E was for:
Why were the councillors in [requests] C + D chosen and not a councillor from the Galashiels area? Despite the charity being in Galashiels?
20. Initially, the Council explained that appointments to outside bodies were made by agreement between the political groups within the Council and there were no records of how they reached their decisions. The proposals were then brought to the full Council meeting for approval.
21. In seeking a review, Mr O believed there was, or at least should be, a record of how councillors had reached the relevant decision.
22. On review, the Council supplied to Mr O minutes of its meeting of 24 May 2012, showing appointments to outside bodies. Mr O's application to the Commissioner questioned whether the Council held further records of the relevant discussions.
23. The Council was asked to explain how it established whether it held information falling within this request. The Council explained there were no searches carried out for the information and that Mr O had been given a full explanation in response to his request. It confirmed that there were no records of meetings of or between political groups within the Council, which were not minuted by a Council officer.
24. Having considered all of the relevant submissions, the Commissioner is satisfied with the explanations provided by the Council. In the circumstances, she accepts that (while there is a record of all external appointments made, as provided to Mr O) there would be no reasonable expectation that the Council should hold information on the reasons for each individual appointment. The Council notified Mr O appropriately that it held no relevant information, as required by section 17(1) of FOISA.

Request G

25. Request G was for:
How much of a stake does the Council have in this charitable company?
26. The Council explained (to Mr O and the Commissioner) that Central Borders CAB was a registered Scottish charity and a company limited by guarantee: this meant it was a not-for-profit organisation with no share capital.



27. Mr O questioned this, pointing out that the Council had a directorship and a vote in the CAB. He believed the Council had a quantifiable gain from the charity.
28. The Council confirmed that it held no information on a financial stake in the Central Borders CAB, for the reasons set out in paragraph 26 above. In effect, this was what it said to Mr O in responding to his information request and his requirement for review.
29. The Commissioner accepts as reasonable the Council's interpretation of Mr O's reference to a "stake" in the Central Borders CAB. She has confirmed (from the Companies House website) that it is indeed a company limited by guarantee with no share capital, so membership (or a seat on the board) would not be expected to bring with it any quantifiable financial benefit.
30. The Commissioner is satisfied, from the explanations given by the Council, that it is unlikely that the Council would hold any information falling within the scope of request G. In the circumstances, she accepts that the Council did not hold the information requested, and that it notified Mr O accordingly in terms of section 17(1) of FOISA.

Request J

31. Request J asked:
May the public be supplied with documentation detailing the fiscal activity between both the Council and the charity?
32. The Council referred to its response to request A, which it said addressed this request, in its responses to both Mr O and the Commissioner. It confirmed to the investigating officer that it carried out searches of payments under the contract between the Council and the CAB in its financial ledger and the information was provided.
33. The Commissioner has accepted this submission in respect of request A (see above). Her conclusions on that request address Mr O's concerns in respect of "contradictions" in the information provided by the Council. Mr O has referred to "other" fiscal activity, but has failed to give any indication of what this might be. Given that request A relates to *any* money given to the CAB by the Council, the Commissioner is not satisfied that it would be reasonable to find any difference between request A and request J.
34. In the circumstances, the Commissioner finds that the Council identified the information failing within the scope of this request, and supplied it to Mr O, and therefore complied fully with section 1(1) of FOISA in this respect.

Request K

35. Request K was for:
When the Council's funding of this charity was put out to tender by the Council in 2011, why was this charity granted the contract?
36. The Council stated that the CAB was awarded the contract after successfully being selected as the most economic operator in the tender process.



37. Mr O's requirement for review asked the Council to provide him with documentation to evidence the conclusion that the CAB was the most economic operator in the tender process. In response, the Council confirmed that it had already answered this request fully. To be helpful, in relation to this and other requests on the award of the contract, it provided a copy of the invitation to tender.
38. During the investigation, the Council confirmed its view that it believed its interpretation of Mr O's request to have been reasonable in the circumstances.
39. The Commissioner accepts the Council's position in this respect. Depending on the circumstances, it may be reasonable to interpret the question *why* as seeking to elicit recorded information on an authority's reasons for reaching a particular decision. The basic reason for this particular decision appears to have been provided by the Council and does not appear to be disputed by Mr O. What he is now seeking is any documentary evidence of that conclusion held by the Council. In the Commissioner's opinion, that would be stretching a reasonable interpretation of the simple question *why* too far. She does not believe the Council should reasonably have been expected to conclude that was what Mr O was seeking from the request he made.
40. The Commissioner notes that Mr O sought the relevant documentary evidence in his request for review. She considers that to have been a new request for information. Clearly, it is too late to pursue the Council's handling of that further request now (Mr O did not seek a review at the time), but Mr O could still make another new request for the information. The Commissioner understands that he has obtained elements of it already, as a result of a separate request: she also understands that the Council considers other elements to be exempt from disclosure under section 36 of FOISA.

Request L

41. Request L was for:
What other corporate and/or charitable bodies competed for the contract?
42. The Council initially responded to the effect that the contract opportunity was advertised as an open tender on the Public Contracts Scotland Portal and by advertising in this manner all suppliers, including other charitable bodies, had an opportunity to bid for the service. Mr O questioned this at review: he believed the Council must have a record of the bidders. The Council's review outcome upheld the original response.
43. During the investigation, the Council confirmed that there were no other bidders.
44. The Commissioner is of the view that this should have been stated to Mr O initially or at review. Accordingly, the Commissioner finds that in this respect the Council failed to comply fully with section 17(1) of FOISA, by failing to give Mr O notice that it held no relevant information. As Mr O will be aware of this on receipt of this decision, the Commissioner requires no action from the Council in this respect.

Request P



45. Request P asked:
In what way did the Council think public money would benefit this charity, despite the charity's well known fiscal deficiencies?
46. The Council responded that this was not a request for recorded information and therefore was not a valid request under FOISA. In seeking a review, Mr O sought legislative authority for the Council's assertion and asked the Council to explain "in what way it thinks my tax pounds and the tax pounds of the community were best spent in this charity that [has] a poor fiscal record".
47. At review, the Council upheld its decision that the request was not valid.
48. In its submission, the Council confirmed its view that this was a question and not a request for recorded information.
49. Mr O's requests have been considered carefully by the Commissioner to determine what information he could reasonably be considered to have been seeking. This request is – as the Council submits – a question. While (as indicated above in relation to request K) a question might reasonably be interpreted as a request for recorded information, the Commissioner does not find that to be a reasonable interpretation of request P. This question is more in the nature of a challenge, containing a clear assumption that the questioner does not agree with the decision reached by the Council on its use of public money. On the face of it, it appears to be intended to start (or continue) a debate on the matter, rather than extract information.
50. Authorities should, however, be mindful of Lord Reed's comments in *Glasgow City Council v The Scottish Information Commissioner* [2009] CSIH 73¹. Lord Reed commented [at paragraph 45]:
"... there will also be cases where requests are made by individuals who cannot be expected to express themselves with precision. Allowance has to be made for that possibility in the application of the Act; and that is reflected, in particular, in the duty placed upon public authorities by section 15 of the Act to provide advice and assistance to a person who proposes to make, or has made, a request for information."
51. Lord Reed continued (in the above case):
"If there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15. That is reflected in the Code of Practice issued by Scottish Ministers under section 60 of the Act, in particular at paragraph 20.² The importance of giving appropriate assistance to persons who have difficulty describing the information which they desire is not however inconsistent with the necessity of identifying precisely what that information is."

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

² This is a reference to the version of the Section 60 Code in force at the time of the judgment. Now see paragraph 1.4 of the Section 60 Code dated December 2010.



52. In this case, the Commissioner is not satisfied that the Council should have identified Mr O, in this case, as a person requiring assistance in describing the information he was seeking. The majority of his requests are expressed reasonably clearly and the Commissioner does not believe a need for advice or assistance should have been identified in respect of this one. In all the circumstances, bearing in mind Mr O's familiarity with the FOI process, she does not consider the Council's handling of the initial request to have been unreasonable. Insofar as the slightly rephrased version contained in Mr O's requirement for review could have been interpreted as a valid request for recorded information, the Commissioner does not see how it could be distinguished in any significant respect from request K (dealt with above).
53. The Commissioner notes that, in his requirement for review, Mr O asked the Council to "cite the legislation to justify that assertion". This may not have been answered directly, but it is difficult in the circumstances to see what more (apart perhaps from referring to the definition of "information" in section 73 of FOISA: "...information recorded in any form") it might have said on this point. The Commissioner understands Mr O to be aware that FOISA only applies to recorded information, and she would not generally think it necessary to explain that any decision as to whether a request is seeking recorded information must be a matter of judgement for the authority. (This last point may, however, be a matter requiring some further explanation in Mr O's particular circumstances – while not finding a specific failure in complying with section 15, the Commissioner will take this up with the Council.)

DECISION

Decision 089/2013
Mr O
and Scottish Borders Council



The Commissioner finds that, in respect of the matters specified in the application, Scottish Borders Council (the Council) largely complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr O.

The Commissioner finds that, in respect of the majority of Mr O's requests, in accordance with section 1(1) of FOISA, the Council identified and located any information it held and which fell within the scope of those requests. Where it did not hold the requested information, it correctly relied on section 17 of FOISA in respect of the relevant request.

However, in respect of one request (request L), the Commissioner finds that the Council failed to comply fully with Part 1 of FOISA by failing to provide Mr O with a notice in terms of section 17(1) of FOISA that the information requested was not held. Given that this decision notice identifies that information is not held for this request, the Commissioner does not require the Council to take any action in respect of this failure in response to Mr O's application.

Appeal

Should either Mr O or Scottish Borders 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
15 May 2013



Appendix 1

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.

...

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.

...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



...

20 Requirement for review of refusal etc.

...

- (3) A requirement for review must-
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify-
 - (i) the request for information to which the requirement for review relates; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

47 Application for decision by Commissioner

...

- (2) An application under subsection (1) must—
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify—
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...



Appendix 2

Information requests of 10 September 2012

- A) How much money have the Council donated to Central Borders Citizens' Advice Bureau?
- B) How much of this money was derived from tax collection?
- C) In what way was the ex-councillor Carolyn Riddell-Carre chosen by the Council to represent the Council on the charity's board of directors?
- D) In what way was the current councillor Michelle Ballantyne chosen by the Council to represent the Council on the charity's board of directors?
- E) Why were the councillors in C + D chosen and not a councillor from the Galashiels area? Despite the charity being in Galashiels?
- F) Why were the councillors in C + D chosen when both are from the Scottish Conservative Party? And in what way does this promote democratic diversity?
- G) How much of a stake does the Council have in this charitable company?
- H) Do the council quantify a profit from their business with this charity?
- I) Does this charitable company receive a quantifiable profit from the Council?
- J) May the public be supplied with documentation detailing the fiscal activity between both the Council and the charity?
- K) When the Council's funding of this charity was put out to tender by the Council in 2011, why was this charity granted the contract?
- L) What other corporate and/or charitable bodies competed for the contract?
- M) When do the council plan to review their tender/contract to this charity?
- N) Has the public raised any issue or objection with this charity to the Council, or to the Council concerning the Council's donations to the charity?
- O) How may a member of the public object or challenge the charity's bid to receive further contract/tender/donation?
- P) In what way did the Council think public money would benefit this charity, despite the charity's well known fiscal deficiencies?



- Q) How may a member of the public complain to the Council in regards the Council granting contract/giving donation to this charity?