

Decision Notice



Decision 084/2013 Mr Daniel McGinagle and Renfrewshire Council

Discretionary housing payment

Reference No: 201300069
Decision Date: 7 May 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
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Summary

On 21 October 2012, Mr McGinigle asked Renfrewshire Council (the Council) for information about its Discretionary Housing Payment (DHP) allocation. The Council provided provided certain information to Mr McGinigle and stated that it did not hold any further information.

Following an investigation, the Commissioner found that the Council had failed to identify and locate all of the relevant information it held. She also accepted that the additional information located by the Council could reasonably be obtained by McGinigle other than by making a request for it under FOISA. The additional information was provided to Mr McGinigle in any event and the Commissioner did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(2)(a) (Effect of exemptions); 17(1) (Information not held); 25(1) (Information otherwise accessible)

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 21 October 2012, Mr McGinigle wrote to the Council as follows:
The discretion of Renfrewshire Council's decision-makers is being fettered when it comes to making Discretionary Housing Payment [DHP] awards ... who, precisely, is doing this fettering and what has been the fettered DHP budget for every financial year since 2005/2006?
2. On 23 October 2012 Mr McGinigle clarified his request:



Both of your colleagues ... said that Renfrewshire Council contributed “nothing” to the DHP budget over the last few years (I know from your previous answers that that is not strictly true) however, that is the figure that I want (as well as the person or persons who have set that figure ... Example: Financial year 2009/2010 had a DWP [Department for Work and Pensions] budget contribution of £42,350.00 and an actual spend of £41,895.03 – what DHP spending limit was set for that financial year by Renfrewshire Council and who set that spending limit (I assume it was confirmed via a memorandum of some sort and I want a copy of that memorandum)?

3. On 1 November 2012, the Council provided Mr McGinigle with annual figures for DHP funding in its area.
4. On 1 November 2012, Mr McGinigle wrote to the Council, stating that its response had been a partial answer to his request and asking “who was doing the fettering of the DHP budgets and where are the relevant memorandums?”
5. The Council responded on 2 November 2012, stating that it did not know what Mr McGinigle meant by “fettering”. It informed Mr McGinigle that it held no memorandums falling within the scope of his request.
6. Mr McGinigle wrote to the Council on 5 November 2012, explaining what he meant by “fettering”. He quoted from the Department of Work and Pensions’ (the DWP) DHP Guide of March 2001 (“...which could not be fettered by financial considerations...”) and questioned the accuracy of the figures provided by the Council.
7. On 19 November 2012, the Council provided further information to Mr McGinigle and clarified the figures.
8. On 20 November 2012, Mr McGinigle wrote to the Council requesting a review of its decision. Mr McGinigle commented on the meaning of fettered (in the same terms as in paragraph 6 above) and stated that he did not believe it credible that the Council did not know “who set those DHP budgets”.
9. The Council notified Mr McGinigle of its review outcome on 18 December 2012. It understood Mr McGinigle’s request consisted of two matters: (i) who was responsible for “fettering” the Council’s discretion in respect of payment of DHP and (ii) seeking information on the DHP budget for each financial year since 2005-2006.
10. The Council stated that it had supplied Mr McGinigle with the DHP budgets for the financial years in question. The Council also explained that it had discretion to allocate funds up to 2.5 times the annual budget provided by the DWP. Any decision on its annual contribution would be as part of the determination of its base budget for the given year. Where there was no decision to allocate funds to DHP, there would be no documentation submitted as part of the budget process. Any decision on the allocation of additional funding to DHP would be made by the Council at its budget meeting, but the Council would not be asked to decide a negative (i.e. not to allocate funds to DHP).



11. The Council stated that it did not accept the premise of Mr McGinigle's request that discretion in relation to DHP payments had been "fettered". It did not consider that it held any information supporting this premise and concluded that it should have given Mr McGinigle notice to that effect.
12. On 8 January 2013, Mr McGinigle wrote to the Commissioner's office, 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.
13. The application was validated by establishing that Mr McGinigle 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

14. The investigating officer 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 explain the steps it had taken to identify and locate the requested information.
15. During the investigation, the Council informed the Commissioner that it had located further information which fell within the terms of Mr McGinigle's request. The Council disclosed this information to Mr McGinigle on 6 March 2013, while informing him that the information was also available on its website.
16. The relevant submissions received from both the Council and Mr McGinigle will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



Information held by the Council

18. Mr McGinigle's application to the Commissioner showed his dissatisfaction with the Council's claim that "nobody" set a DHP budget contribution before the financial year 2011/12. He commented that this still left two financial years - 2011/12 and 2012/13 - where "somebody" did set a DHP budget contribution. He was seeking the name of that "somebody" (including the appropriate accompanying Council documents which would explain the Council's DHP budget contribution-setting methodology).
19. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case.
20. During the investigation, the Council was asked to explain how it established whether it held information falling within the scope of the request. It was also asked to explain how its DHP contribution was decided upon, and in particular which department or individual had responsibility for the DHP budget.
21. Firstly, the Council noted that the applicant had been given an explanation of the operation of DHP and the interaction between DWP and Council contributions.
22. The Council went on to submit that decisions in relation to budget allocations were made by the full Council rather than by any particular individual. There were no officer recommendations made in respect of DHP allocations.
23. The Council explained how it had assessed whether it held any relevant information. It explained that individual applications for DHP were considered by its Finance and Corporate Services. Information was provided by the Finance and Internal Control team (within Finance and Corporate Services) and formed the basis of the initial reply to Mr McGinigle and clarification at review stage. In addition, the Council officers named by Mr McGinigle were contacted for comment. At review, the relevant department was asked about additional information - including the operational guidance provided to officers in relation to DHP - and any other relevant information which identified decisions regarding the overall allocation of a sum for DHP (rather than a decision in respect of an individual application).
24. The Council informed the Commissioner that an email was found, but it did not identify who had taken a decision to make the allocation, only that an amount was allocated: this was not considered to fall within the scope of Mr McGinigle's request. However, the email mentioned a budget decision, so the Council then searched its Minute database. A key word search for "Discretionary Housing Payment" within the Minute database could not locate any specific reference and it was not immediately apparent from a manual review of the records that there was a link between the 2011 Council Minute and the relevant DHP budget allocation. It was only with the benefit of the related Leadership Board papers (remembered by a member of the Council's staff) that the link was clearly established. (These documents are considered below, under section 25(1) of FOISA.)



25. Mr McGinigle's request referred to the Council's discretion being "fettered", in the sense of being restrained or checked. The Council explained to Mr McGinigle that it did not hold any information which supported the premise that its discretion in respect of DHP was fettered at any time in the period identified in Mr McGinigle's request.
26. The Council was asked if its response to Mr McGinigle would have been any different had he has phrased his request differently, not using the word "fettered" but simply asking for information relating to the Council's DHP contribution for the relevant years. That is, was the use of the word "fettered" material to identifying whether any information was held?
27. The Council replied that removal of the word "fettered" changed the focus of the request. Mr McGinigle had defined the term "fettered" for the Council in the initial request and subsequent correspondence. He had made clear he was asking about restrictions being placed on the decision-making process and specifically asked for his request to be considered on that basis. Consequently, the Council was of the view that the use of the word was material to consideration of the request. Indeed, due to the emphatic position taken by Mr McGinigle, the Council believed that it would be wholly artificial to deal with the request as if the term had not been used.
28. The Commissioner accepts this as a reasonable position in the circumstances. Mr McGinigle clearly believes that the Council has fettered its discretion in making (or not making) DHP allocations and that would appear to be central to his request. Clearly, the Council does not share that view. It might be argued that it could not reasonably be expected to do so. In any event, it is not for the Commissioner to determine whether it has. On the other hand, it is reasonable for her to conclude that if the Council does not accept Mr McGinigle's premise, it can hardly be expected to hold information confirming that the "fettering" has been taking place and who has been doing it.
29. Nevertheless, the information identified, located and provided during the investigation appears to be of some relevance to Mr McGinigle's request, as the Council itself acknowledges. In failing to identify, locate and provide this information earlier, the Commissioner must find that the Council failed to deal with the request wholly in accordance with section 1(1) of FOISA. The Commissioner also accepts that by the end of the investigation, reasonable and proportionate searches had been carried out: it is now reasonable for the Council to conclude that it did not hold any further information covered by the request.

Section 25(1) – information otherwise accessible

30. Section 25(1) of FOISA provides that information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
31. During the investigation, the Council located information which fell within the scope of Mr McGinigle's request. The Council stated that this information was in the public domain at the time of the request and therefore that section 25(1) of FOISA applied. This information was contained in the following documents:



- *Minute of Special Meeting of Renfrewshire Council* held on 16 January 2012 (at page 772 (decision j))
 - *Minute of Meeting of Renfrewshire Council* held on 17 February 2011 (at pages 99-100);
 - *Minute of Meeting of the Leadership Board* held on 23 March 2011 (one of the decisions was to use money allocated to the Anti-Poverty Strategy to enhance DHP)
 - *Report by Chief Executive: Renfrewshire Anti-Poverty Strategy and Welfare Reform Update* to Leadership Board on 23 March 2011 (recommendation to use money allocated to the Anti-Poverty Strategy to enhance DHP).
32. The Council commented that while these documents were in the public domain (on its website), they would have had to be brought to Mr McGinigle's attention. As indicated above, a key word search for "Discretionary Housing Payment" within the Council's database of Minutes could not locate any specific reference to a DHP contribution. It was only with the benefit of the Leadership Board report that the Council located these entries in the minutes.
33. The investigating officer verified that these documents were accessible on the Council's website, as the Council submitted. The Commissioner is therefore satisfied that the information could reasonably be obtained by the applicant other than by requesting it under section 1(1) of FOISA. Therefore, she must accept that it is exempt under section 25(1) of FOISA).
34. As acknowledged by the Council, Mr McGinigle may have had difficulty locating this information without further assistance from the Council. However, in this case the information was provided to Mr McGinigle (in hard copy) during the investigation.

DECISION

The Commissioner finds that Renfrewshire 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 McGinigle.

The Commissioner finds that the Council failed to comply fully with Part 1 (and in particular section 1(1)) of FOISA in responding to Mr McGinigle's request, by failing to identify and locate all of the information it held and which was covered by the terms of the request.

The Commissioner also accepts that section 25 of FOISA applies (and applied, at the time the Council dealt with the request) to the additional information, which was provided to Mr McGinigle during the investigation in any event. She does not, therefore, require the Council to take any action.

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and Renfrewshire Council



Appeal

Should either Mr McGinle or Renfrewshire 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
7 May 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.

2 Effect of exemptions

- ...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- (a) section 25;
- ...

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.

...

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...