

Decision Notice



Decision 125/2010 Richard Borrer and the Chief Constable of Fife Constabulary

Fees paid to named legal advisors for work in relation to specified actions

Reference No: 201000233
Decision Date: 14 July 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
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Summary

In two separate information requests, Mr Richard Borrer requested from the Chief Constable of Fife Constabulary (Fife Constabulary) information on the professional fees and expenses paid to named legal advisors for specified work. Fife Constabulary advised Mr Borrer that it did not hold this information. Following reviews of each request, Mr Borrer remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Fife Constabulary had dealt with Mr Borrer's requests for information partly in accordance with Part 1 of FOISA. In respect of the first request and the first part of the second request, the Commissioner found that, by issuing a notice in terms of section 17 of FOISA stating that it did not hold the information requested, Fife Constabulary had complied with FOISA.

However, in respect of the second part of the second request, the Commissioner found that Fife Constabulary failed to comply with section 17(1) of FOISA, because, although it did not hold this information, it did not clearly provide notice that it was not held. Since this decision makes the position on this point clear, the Commissioner does not require Fife Constabulary to take any action in response to this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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. This case is concerned with two separate, but related, requests for information. These are detailed in turn below.



Request 1 - 25 June 2009

2. On 25 June 2009, Mr Borrer wrote to Fife Constabulary requesting the professional fees and expenses paid by Fife Constabulary to a named firm of solicitors in respect of work carried out by a named partner, in representing Fife Constabulary in its defence of a particular Employment Tribunal action and Police Pensions Appeal action in each of the calendar years 2006, 2007, 2008 and 2009.
3. Mr Borrer's letter contained another request for information which is not under consideration in this decision.
4. Fife Constabulary responded by letter dated 24 July 2009. It declined to provide the information requested by Mr Borrer on the grounds that it was exempt from disclosure in terms of section 33(1)(b) of FOISA (Commercial interests and the economy).
5. On 3 August 2009, Mr Borrer wrote to Fife Constabulary requesting a review of its decision. In particular, Mr Borrer challenged Fife Constabulary's application of the exemption in section 33(1)(b).
6. Fife Constabulary notified Mr Borrer of the outcome of its review on 4 September 2009. Fife Constabulary now stated in terms of section 17 of FOISA that it did not hold the information requested.

Request 2 - 24 September 2009

7. On 24 September 2009, Mr Borrer wrote to Fife Constabulary requesting the following information:
 - (a) the amount of professional fees and expenses paid by Fife Constabulary to a named advocate, in respect of work carried out by him in representing Fife Constabulary in its defence of the Employment Tribunal referred to in request 1.
 - (b) the total cost of legal fees and expenses incurred by Fife Constabulary its defence of the same Employment Tribunal action.

In this decision, these requests will be referred to as requests 2a and 2b respectively.

8. Fife Constabulary responded by letter dated 26 October 2009. In relation to request 2a, it advised Mr Borrer in terms of section 17 of FOISA that it did not hold this specific information.
9. In relation to request 2b, Fife Constabulary advised that it could not provide accurate figures due to the way in which they may have been recorded. Fife Constabulary added that the work required to establish whether it held such figures, and whether they would be accurate, would impact on staff time and resources. It indicated that section 12 of FOISA (which applies where the projected cost of complying with a request would exceed £600) was applicable in this case.



10. On 9 November 2009, Mr Borrer wrote to Fife Constabulary requesting a review of its decision. In particular, he challenged Fife Constabulary's response, arguing that it must hold the information requested.
11. Fife Constabulary notified Mr Borrer of the outcome of its review, which was to maintain its previous decision, on 26 November 2009.

Application

12. On 29 January 2010, Mr Borrer wrote to the Commissioner, stating that he was dissatisfied with the outcome of Fife Constabulary's reviews in respect of requests 1 and 2 and applying for a decision in terms of section 47(1) of FOISA.
13. The application was validated by establishing that Mr Borrer had made his requests for information to a Scottish public authority and had 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

14. Fife Constabulary was notified in writing on 12 March 2010 that an application had been received from Mr Borrer, and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA).
15. In particular, Fife Constabulary was asked to confirm the basis upon which it was refusing Mr Borrer's requests, and to provide submissions to address the relevant matters. These questions included asking what steps Fife Constabulary had undertaken in order to establish whether the information sought by each of Mr Borrer's requests was held.
16. Fife Constabulary's response confirmed that its position in relation to each of the requests was that it did not hold the relevant information. It no longer wished to rely upon any other provision of FOISA in relation to any of the requests. Fife Constabulary provided comments and details of the searches carried out.
17. The investigating officer wrote to Mr Borrer on 5 May 2010 seeking his comments. Mr Borrer replied on 11 May 2010, and the investigating officer sought further comments from Fife Constabulary in the light of Mr Borrer's points.
18. The submissions received from Mr Borrer and Fife Constabulary are summarised where relevant below.



Commissioner's analysis and findings

19. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Borrer and Fife Constabulary and is satisfied that no matter of relevance has been overlooked.

Section 17 (Notice that information is not held)

20. Where a Scottish public authority receives a request for information which it does not hold, it must, in line with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information.
21. In the course of the investigation, Fife Constabulary maintained in respect of each request under consideration that it does not hold the information requested. With respect to requests 1 and 2a, this position was clearly communicated to Mr Borrer following a review.
22. With respect to request 2b, however, the response from Fife Constabulary was considerably less clear, indicating that it was not able to provide accurate figures due to the way in which these may have been recorded. It was stated that, because the information was not readily accessible, and so was neither easily identifiable nor held in a retrievable format, the cost of establishing whether any figures held would be accurate would be excessive.
23. In order to determine whether Fife Constabulary dealt with Mr Borrer's requests correctly, the Commissioner must be satisfied whether, at the time it received his requests, Fife Constabulary held any information which would fall within the scope of each relevant request.
24. Mr Borrer argued that Fife Constabulary should hold the information requested, as a publicly-funded body which should be able to account for its expenditure. He also questioned how effective auditing procedures could be carried out if the information was not held.
25. Mr Borrer provided to the investigating officer a copy letter from Fife Council outlining the arrangements, including payment, for providing legal services for Fife Constabulary by Fife Council. Mr Borrer criticised Fife Constabulary's submissions in the light of this letter, arguing that the sums paid to the named advocate should be held by it.
26. In its submissions, Fife Constabulary provided detail of the chronology of the matters under investigation and the searches which it had conducted, including search terms and staff involved.
27. Fife Constabulary also explained that it did not hold sufficiently detailed information to be able to satisfy Mr Borrer's requests. This arose from the relationship between Fife Constabulary and Fife Council and the accounting arrangements between these two public authorities applicable at the time.

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28. Fife Constabulary explained that Fife Council, as the police authority which provides various services to Fife Constabulary, was responsible for much of the legal work to which the requests in this case related. Where legal services were arranged through Fife Council, as in the cases underlying Mr Borrer's requests, the cost of these legal services was "recharged" from Fife Council to Fife Constabulary.
29. Fife Constabulary explained that the accounts which resulted from this recharging process, and the headings in these accounts, were general, and that such information as it did hold could not be "drilled down" for any further detail. Thus, Fife Constabulary maintained that only total costs rather than the specific figures about payments in respect of work undertaken by particular legal advisors for the specified work requested by Mr Borrer, were held. Fife Constabulary advised that the detailed information sought would instead be held by Fife Council. Fife Constabulary maintained that it had released all the information which it held in response to Mr Borrer's requests.
30. This recharging process, and the limitations on the accounting information held, were also the reason why Fife Constabulary could not be certain that the total cost of legal fees and expenses incurred by it in its defence of the Employment Tribunal action referred to in Mr Borrer's request was held by it or could be identified from the information which it held.
31. Fife Constabulary also provided further background information in response to the points made by Mr Borrer. In particular, it explained that the work undertaken by the named advocate would have been instructed by Fife Council instead of Fife Constabulary, and provided further background information as to the arrangements in place for the charging of this work to Fife Constabulary. It was explained that the invoices for this work were authorised by Fife Council Legal Services and retained by Fife Council but only charged against Fife Constabulary. The detailed information requested by Mr Borrer was not held by Fife Constabulary as a result.
32. Having considered the submissions made by both parties, and Fife Constabulary's explanation of the steps taken to ascertain that all relevant information had been identified and supplied to Mr Borrer, the Commissioner is satisfied that Fife Constabulary has carried out reasonable and sufficient searches to establish whether any relevant information is held.
33. The Commissioner has noted that, in response to a separate request not under consideration in this decision, Fife Constabulary provided to Mr Borrer, the total professional fees and expenses paid over three years by Fife Constabulary to the firm of solicitors named in request 1. Although he finds it surprising, the Commissioner has accepted on the balance of probabilities that Fife Constabulary does not (and did not at the time of Mr Borrer's requests) hold the other, more detailed, information requested by Mr Borrer.
34. The Commissioner has concluded with respect to request 1 that Fife Constabulary was correct to notify Mr Borrer in terms of section 17 of FOISA that it did not hold the requested information, and that Fife Constabulary therefore complied with Part 1 of FOISA in responding to Mr Borrer's request.
35. With respect to request 2, the Commissioner has concluded that Fife Constabulary only partly complied with Part 1 of FOISA.



36. He finds that Fife Constabulary correctly notified Mr Borrer that the information he requested by virtue of request 2a was not held.
37. However, Fife Constabulary's response to 2b was expressed in a manner that did not clearly notify Mr Borrer that the requested information actually was not held. Having confirmed during the investigation that the information requested in 2b was not held by Fife Constabulary, the Commissioner must conclude that the Council failed to comply with the requirements of section 17(1) of FOISA in respect to 2b.

DECISION

The Commissioner finds that the Chief Constable of Fife Constabulary (Fife Constabulary) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Borrer's information request of 25 June 2009 (request 1). He finds that Fife Constabulary was correct to notify Mr Borrer in terms of section 17(1) of FOISA that it did not hold the requested information.

The Commissioner finds that Fife Constabulary partially complied with Part 1 of FOISA in responding to Mr Borrer's information request of 24 September 2009 (request 2). He finds that in responding to request 2a, Fife Constabulary correctly notified Mr Borrer in terms of section 17(1) of FOISA that it did not hold the requested information.

However, the Commissioner found that Fife Constabulary failed to comply with Part 1 of FOISA in relation to information request 2b, by failing to comply with the requirements of section 17(1) of FOISA when responding to Mr Borrer.

Since this decision makes clear that Fife Constabulary does not hold the relevant information, the Commissioner does not require Fife Constabulary to take any action in relation to this breach in response to this decision.

Appeal

Should either Mr Borrer or Fife Constabulary 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 notice.

Margaret Keyse
Head of Enforcement
14 July 2010



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.

...

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.