

Decision Notice



Decision 046/2011 Calibre Recruitment and Scottish Water

Scottish Water Horizons board minutes

Reference No: 201001227

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Summary

Calibre Recruitment requested from Scottish Water all the board minutes for Scottish Water from April 2009 and for Scottish Water Horizons since its inception.

Scottish Water responded by publishing its minutes since April 2009 on its website and stating it would forward the minutes for Scottish Water Horizons in due course. As the Scottish Water Horizons minutes were not forthcoming Calibre Recruitment asked for a review. In response, Scottish Water indicated that it now considered the request to be vexatious in terms of section 14(1) of FOISA. Calibre Recruitment remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Scottish Water had failed to comply with Part 1 of FOISA, on the basis that Calibre Recruitment's request was not vexatious in terms of section 14(1). The Commissioner required Scottish Water to respond to Calibre Recruitment's request for information in terms of Part 1 of FOISA, other than in terms of section 14(1).

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement) and 14(1) (Vexatious or repeated requests)

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 16 February 2010, Calibre Recruitment wrote to Scottish Water requesting all board minutes for Scottish Water from April 2009 (as these were the last ones to appear on its website) and all the board minutes of Scottish Water Horizons since inception. Scottish Water Horizons is a fully owned subsidiary of Scottish Water, established to undertake Scottish Water's non-core commercial ventures.
2. Scottish Water responded on 9 March 2010 indicating that it had placed the requested Scottish Water minutes on its website and that it would print and forward the Scottish Water Horizons board minutes in due course.



3. On 15 April 2010, Calibre Recruitment wrote to Scottish Water requesting a review of its decision. In particular, Calibre Recruitment drew Scottish Water's attention to the fact that it had not yet received the Scottish Water Horizons board minutes.
4. Scottish Water did not respond to this request for review within 20 working days, and Calibre Recruitment made an application for decision by the Scottish Information Commissioner in relation to this failure. This resulted in the issue of *Decision 110/2010 Calibre Recruitment and Scottish Water*.
5. Scottish Water issued a response to Calibre Recruitment's request for review on 11 June 2010. This indicated that Scottish Water considered Calibre Recruitment's request to be vexatious within the terms of section 14(1) of FOISA. Scottish Water explained that it had reason to believe that in seeking information, Calibre Recruitment was acting in concert with another requester, Cal Solutions (Billingham) Ltd (CaL), which had made a series of requests which Scottish Water also considered to be vexatious.
6. Scottish Water indicated that, in the light of the perceived association between the two companies, it considered that Calibre Recruitment's request may be designed to cause disruption and annoyance. In any event, it maintained that the effect of the request, and the requests received from CaL, taken as a whole, had the effect of harassing Scottish Water.
7. On 14 June 2010, Calibre Recruitment wrote to the Commissioner, stating that it was dissatisfied with the outcome of Scottish Water's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Calibre Recruitment had made a request for information to a Scottish public authority and had 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

9. On 29 June 2010, Scottish Water was notified in writing that an application had been received from Calibre Recruitment and was invited to provide comments on the application (as required by section 49(3)(a) of FOISA), along with any evidence or arguments to support its view that Calibre Recruitment's request of 16 February 2010 was vexatious in terms of section 14(1) of FOISA.
10. Scottish Water provided its submissions in response to this request on 19 August 2010.
11. On 1 September 2010 Calibre Recruitment was asked to provide comments and submissions on the case, and these were received on 20 September 2010.
12. The submissions of both Scottish Water and Calibre Recruitment are considered, where relevant, 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 the submissions made to him by both Calibre Recruitment and Scottish Water and is satisfied that no matter of relevance has been overlooked.
14. Section 14(1) of FOISA states that section 1(1) (which confers a general entitlement to access information held by a Scottish public authority) does not oblige a public authority to comply with a request for information if the request is vexatious.
15. FOISA does not define the word "vexatious." However, the Commissioner's *general* approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) may be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
 - (a) it has the effect of harassing the public authority; and/or
 - (b) it does not have a serious purpose or value; and/or
 - (c) it is designed to cause disruption or annoyance to the public authority; and/or
 - (d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
16. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requestor, he also acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a particular request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.
17. In this case, Scottish Water has claimed that Calibre Recruitment's request should be considered vexatious in line with its approach to requests made by CaL, on the grounds that that the two companies are associated with one another, and Calibre Recruitment's request should be considered to have been made in concert with those made by CaL.
18. Scottish Water's handling of 60 of CaL's information requests was considered in the Commissioner's decision *212/2010 CaL Solutions (Billingham) Ltd and Scottish Water*. In that decision, the Commissioner found that each of the requests under consideration was vexatious for the purposes of section 14(1) of FOISA. The Commissioner concluded that each of the requests, when set within the context of CaL's wider correspondence and pattern of making information requests to Scottish Water, would impose a significant burden on Scottish Water. He also accepted that, whether this was intended or not, these requests collectively had the effect of causing disruption and annoyance, and of harassing Scottish Water and the staff dealing with the requests.



19. Scottish Water's submission is, in essence, that the request under consideration in this case, although made by another company, forms part of that same group of requests and so should also be considered to be vexatious.

Scottish Water's submissions

20. Scottish Water's submissions explained its reasons for it believing that Calibre Recruitment was working in concert with CaL. It highlighted that Calibre Recruitment's request was made after similar information was disclosed to CaL under a contractual obligation rather than through FOISA. It explained that the information released to CaL was protected by a confidentiality clause, and it suggested that CaL arranged to have a similar request submitted by Calibre Recruitment under FOISA so that if the information was to be disclosed it would be disclosed into the public domain.
21. Scottish Water stated that the request from Calibre Recruitment could only be considered as part of the "relentless flow of requests" from CaL, and designed to overcome a restriction on the use of information disclosed to CaL in pursuit of Scottish Water's contractual obligations.
22. With respect to the burden caused by the particular request under consideration, Scottish Water submitted that Scottish Water Horizon's board minutes contained commercially sensitive information and that if they were to be released it would be in a heavily redacted format. It argued that with more than 20 sets of board minutes requiring redaction that Calibre Recruitment's request alone would place a significant burden on the legal team's financial and human resources.
23. Scottish Water argued that since (it considered) Calibre Recruitment's request was made as a direct result of CaL not being able to obtain the information without the restrictions of a confidentiality clause, the request lacked serious purpose or value. Rather, Scottish Water claimed, Calibre Recruitment's request was made for tactical reasons.
24. It submitted further that, since it believed Calibre Recruitment was acting in concert with CaL, Calibre Recruitment's request formed part of the requests that it believed had been made to cause serious disruption and annoyance. Scottish Water maintained that the nature, type, language, number and timing of the requests received from CaL pointed to them being designed to cause serious disruption and annoyance and that no reasonable person would consider that these were genuine requests for information. Scottish Water went on to say that, in any case, a disproportionate amount of human and financial resources would have to be diverted from their core function to process Calibre Recruitment's request alone.
25. Scottish Water submitted that even if they were not intended to be so, the requests made by CaL and Calibre Recruitment had the effect of harassing Scottish Water and overwhelmed its staff.



26. Scottish Water finally indicated that, even if the above comments were rejected, its view was that the volume of information to be retrieved, the human and financial resources required to do so and the disproportionate diversion of resources away from core functions in responding to the requests of Calibre Recruitment in tandem with CaL would be manifestly unreasonable and disproportionate and therefore vexatious.

Calibre Recruitment's submissions

27. Calibre Recruitment submitted that its request for information was not designed to cause disruption or annoyance to Scottish Water and it did have a serious purpose. It highlighted that the language and tone of the request was polite and amicable, no impolite or abusive terms were used and that only one very simple question was asked strictly in line with the freedom of information process. Therefore, Calibre Recruitment submitted, it could not see how the request could have the effect of harassing Scottish Water.
28. Calibre Recruitment maintained that no reasonable person would consider the request or the way in which it was asked to be manifestly unreasonable or disproportionate and it did not accept that the request could be considered to place a significant burden on the public authority. Calibre Recruitment went on to state that its relationship with CaL was irrelevant as the request was made under its own statutory rights and met all the relevant tests.

The Commissioner's findings

29. In a number of previous decisions, the Commissioner has accepted that a request which, when considered in isolation, would not appear to be manifestly unreasonable or to have the effect of harassing a public authority, should be considered to be vexatious when considered in a wider context of long-standing, voluminous and persistent correspondence and information requests on similar matters.
30. The case put forward by Scottish Water in this case is similar to that considered in those decisions. However, it is most unusual, because the history of correspondence and requests that has been highlighted by Scottish Water as giving rise to the vexatiousness of the request under consideration concerns a different requestor, with which it is claimed that Calibre Recruitment is acting in concert.
31. As noted above, in decision 212/2010, the Commissioner considered a series of 60 requests made by CaL solutions and accepted Scottish Water's contention that each was vexatious for the purposes of section 14(1) of FOISA when considered in the context of CaL's ongoing pattern of making numerous requests for information to Scottish Water. If Calibre Recruitment's request is found also to be part of that pattern, then a case could be made that the request under consideration in this decision is also vexatious.



32. The Commissioner is aware that there are connections between Calibre Recruitment and CaL. However, he has noted that Scottish Water's claims that Calibre Recruitment's request was made to assist CaL in obtaining information, or as part of a wider series of requests designed to harass and disrupt Scottish Water are based on presumptions. Calibre Recruitment has argued strongly that it was aiming to use its own rights for its own purposes when requesting information from Scottish Water.
33. The Commissioner does not consider there is sufficient evidence available regarding the motivation for Calibre Recruitment's request for information to find that it forms part of CaL's series of requests for information. In reaching this conclusion, he notes that Calibre Recruitment's request is, so far as he is aware, an isolated request, and that company has no pattern of request-making or other correspondence with Scottish Water on matters related to those raised by CaL.
34. Having concluded that Calibre Recruitment's request should not be considered to form part of CaL's series of requests, the Commissioner has gone on to consider whether this request, considered alone, should be considered to be vexatious in terms of section 14(1) of FOISA.
35. The Commissioner first considers whether the request under consideration would impose a significant burden on Scottish Water. As recognised in *Decision 108/2010 Mr Mark Irvine and South Lanarkshire Council*, the Commissioner's general approach to the question of whether a request is vexatious is that it will require a significant burden on the public authority. This does not exclude the possibility that, in any given case, one or more of the other listed criteria may be of such overwhelming significance that it would be appropriate to consider the request vexatious in the absence of significant burden.
36. In the Commissioner's briefing on section 14 of FOISA¹, he has indicated that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its core operations.
37. The Commissioner does not accept that a single request covering 20 sets of board minutes can be construed as involving a significant burden. He notes that many organisations' board minutes are published as a matter of course on their websites and as part of their publication schemes. He also notes that Scottish Water's initial response to Calibre Recruitment advised that it would print and forward the minutes in due course. At this point, it is clear that the burden of dealing with this request in isolation was not considered to be significant or manifestly unreasonable. In fact, Scottish Water gave every indication that the minutes would indeed be disclosed to Calibre Recruitment.
38. For similar reasons, the Commissioner is also unable to accept that Calibre Recruitment's request has the effect of harassing the public authority, does not have a serious purpose or value, is designed to cause disruption or annoyance to the public authority or would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&sID=2591>



39. The Commissioner considers that in general and in the absence of compelling evidence to the contrary, a request for minutes that will provide evidence of an authority's decision making and governance (as it can be assumed will be the case of any board minutes) will be one that has genuine purpose and value and is otherwise reasonably made.
40. Having rejected the argument that Calibre Recruitment's request should be considered as part of the series of requests made by CaL, the Commissioner is not persuaded that it is vexatious.
41. For the reasons given above, the Commissioner therefore finds that Scottish Water was not entitled to refuse to comply with Calibre Recruitment's request under section 14(1) of FOISA. He therefore requires Scottish Water to comply with the request, either by providing the information requested or, if it considers that the information is exempt information, by issuing a refusal notice in terms of section 16 of FOISA (or by dealing with it in some other way which is permitted by Part 1 of FOISA).

DECISION

The Commissioner finds that Scottish Water failed to comply with Part 1 (and in particular section 1(1)) of FOISA in refusing to comply with Calibre Recruitment's request for information under section 14(1) of FOISA. The Commissioner requires Scottish Water to respond to Calibre Recruitment's request for information in terms of Part 1 of FOISA, other than in terms of section 14(1), by 25 April 2011.

Appeal

Should either Calibre Recruitment or Scottish Water 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.

Kevin Dunion
Scottish Information Commissioner
9 March 2011



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.

...

- (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.

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