

# Decision Notice



Decision 145/2012 Mr B and Aberdeenshire Council

Whether a request is vexatious

Reference No: 201101578

Decision Date: 31 August 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle

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## Summary

Mr B asked Aberdeenshire Council (the Council) for information contained in the 'personal files' of an ex-employee. The Council told Mr B that it did not hold the file for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA) because it held the file on the ex-employee's behalf. Dissatisfied with this response, Mr B applied to the Commissioner for a decision.

During the Commissioner's investigation, the Council argued that Mr B's request for information was vexatious and that, as a consequence, it was not required to comply with the request. The Commissioner agreed.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 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

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1. On 4 January 2011, Mr B wrote to the Council requesting the information contained in an ex-employee's 'personal files', which the Council had referred to in previous correspondence with Mr B.
2. The Council responded on 21 January 2011, advising Mr B that it did not hold the information he had requested.
3. On 8 February 2011, Mr B asked the Council to review its decision. Mr B advised the Council that he considered the files to be the property of the Council, and not of the ex-employee.
4. The Council notified Mr B of the outcome of its review on 8 March 2011. The Council upheld its initial response to Mr B, maintaining that it did not hold the files he had requested. The Council noted that section 3(2)(a)(i) of FOISA provides that information is not held by an authority if it is held by the authority on behalf of another person (in this case, the ex-employee).



5. On 28 August 2011, Mr B 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.
6. The application was validated by establishing that Mr B 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

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7. On 27 September 2011, 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. The Council was also asked to provide the Commissioner with the files withheld from Mr B.
8. The Council responded, providing the Commissioner with a copy of the files, along with an explanation of its position.
9. In further correspondence, the Council submitted that it also considered Mr B's request to be vexatious in terms of section 14(1) of FOISA.
10. The investigating officer contacted Mr B during the investigation, seeking his submissions on the matters to be considered in the case, including the Council's reliance on section 14(1) of FOISA.
11. All relevant submissions received from both the Council and Mr B will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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

### Section 14(1) – vexatious requests

13. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.



14. 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:
- it has the effect of harassing the public authority; and/or
  - it does not have a serious purpose or value; and/or
  - it is designed to cause disruption or annoyance to the public authority; and/or
  - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
15. The term "vexatious" must be applied to the request and not the requester, but an 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.
16. Notwithstanding the Commissioner's general approach is as set out in paragraph 14 above, she recognises that each case must be considered on its merits, and in all the circumstances of the case. She does not exclude the possibility that, in any given case, a request may not involve a significant burden, but one or more of the other listed factors may be of such significance that it would be appropriate to consider the request as vexatious in the absence of a significant burden. She also recognises that other factors may result in a request being vexatious.

#### *Submissions from the Council*

17. The Council provided background information outlining the long history between itself and Mr B. The Council submitted that Mr B has a perceived grievance, relating to a breach of grant conditions, which he has been pursuing for over twenty years, initially against its predecessor, Kincardine and Deeside District Council (KDDC), and an employee of KDDC who has since retired. It is the 'personal files' of this ex-employee that have been requested by Mr B in this case.
18. The Council advised the Commissioner that, over the last twenty years, Mr B has raised various actions against the KDDC and the named ex-employee and that each of these actions has been unsuccessful. The Council summarised these actions as follows:
- a. Mr B made a complaint to the Commissioner for Local Administration in Scotland (predecessor of the Scottish Public Services Ombudsman (SPSO)) which proved fruitless.
  - b. Mr B made further complaints to the SPSO and its predecessor organisations (by way of numerous applications to reopen the case) which were not successful.



- c. Mr B raised a civil action against KDDC in 1993 which was dismissed the following year following a legal debate. The Council noted that Mr B appealed this decision, but abandoned his appeal soon after.
  - d. Mr B made a personal claim against the named ex-employee, which was unsuccessful.
  - e. Mr B made a complaint to the Law Society of Scotland (LSS), alleging professional misconduct on the part of the named ex-employee, and this complaint was, according to the Council, to all intents and purposes dismissed in 1999.
  - f. Mr B made a handling complaint against the LSS, lodged with the Scottish Legal Services Ombudsman (SLSO) and disposed of by the SLSO in 2000, which found that the LSS had carried out a fair and thorough examination of all the evidence, and had acted reasonably and impartially.
  - g. Mr B made representations to the Director of Law and Administration at the Council, suggesting that the corpus of information which the Council inherited from KDDC was factually wrong and should be corrected.
19. The Council submitted that the representations made to its Director of Law and Administration (outlined in g. above) were carefully considered and a response was communicated to Mr B in March 2004. In this response, Mr B was advised that the Council considered the case to be closed; the matters that are the subject of his complaint took place nineteen years ago and, given that both his complaints and the court action he had raised had been unsuccessful, the Council did not consider it proper to expend any further resources on investigating the matter.
20. At this stage, the Council considered the matter to be closed as Mr B appeared to have exhausted all avenues for complaint. However, since FOISA came into force in 2005, Mr B has submitted five separate information requests to the Council (including the one under consideration), seeking old KDDC papers that the Council no longer holds and details of the Director of Law and Administration's review of his initial complaint.
21. The Council referred to the previous Commissioner's guidance on section 14 of FOISA<sup>1</sup>, which advises that a request may be considered vexatious where it would impose a significant burden on the public authority *and* meets at least one of four criteria. The Council has acknowledged that providing Mr B with the information he has requested would not impose a significant burden on the authority, nor would there be any cost considerations involved. However, the Council has submitted that there will be occasions where the existence of certain criteria will outweigh the requirement for a vexatious request to also be 'burdensome' and it has referred to previous decisions where the previous Commissioner took this view.
22. In particular, the Council referred to *Decision 227/2011 Mr John Graham and the Scottish Housing Regulator*.<sup>2</sup> The Council noted that many of the key arguments expounded in that decision are applicable in this case, and referred to several paragraphs in that decision, including paragraph 35, which is reproduced below:

<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp>

<sup>2</sup> <http://www.itspublicknowledge.info/UploadedFiles/Decision227-2011.pdf>



*"It is the Commissioner's view that the request under consideration is inextricably linked to the original complaint, which is the underlying grievance at the root of Mr Graham's correspondence with SHR. Accordingly, he considers it is appropriate to consider Mr Graham's request as a continuation of the longstanding correspondence between him and SHR and take account of the history and context of that correspondence in deciding whether Mr Graham's request should be viewed as vexatious".*

23. The Council commented that, in 2004, at the conclusion of the Director of Law and Administration's investigation into Mr B's complaint, he was classed as a persistent correspondent and was advised that any further letters about the same matters he had raised since 1985 would only be acknowledged, but not responded to, by the Council. The Council believes that Mr B is using FOISA to reopen and prolong dialogue about issues that have already been exhausted through all available channels.
24. The Council noted that the focus of matters of concern to Mr B has varied throughout his five FOI requests, but it believes that all of those communications ultimately stem from, and form a continuation of, his original complaint, and relate to his continued dissatisfaction with the handling of that complaint since it was initially dealt with. Accordingly, the Council considers it is appropriate to consider Mr B's current request as a continuation of the longstanding correspondence and to take account of the history and context of that correspondence in deciding whether the request should be viewed as vexatious.
25. The Council acknowledged that Mr B does not consider the matters he has raised to have been either resolved or closed; however, it argued that Mr B has already exhausted the complaints process with the Council, the SPSO, the LSS, the SLSO and the courts. The Council stated that none of these bodies have found in his favour, and it has previously advised Mr B that there is nothing further it can do to satisfy him in addressing his concerns.
26. The Council has argued that, in the circumstances, and given the content of the withheld information, it is unlikely that a resolution of Mr B's concerns would be brought any closer by the provision of a response to the request under consideration.
27. The Council noted that, during the investigation, it took steps to engage with Mr B in an effort to reduce the scope of his request and come to an agreed position. The Council contacted Mr B and advised him that much of the withheld information comprised correspondence between the named ex-employee and the LSS and, as it was the practice of the LSS to cross-copy correspondence to both parties involved in a dispute at that time, it considered it was likely that Mr B would already possess much of the requested information.
28. As a result, the Council provided Mr B with a detailed schedule that described each of the 52 documents contained in the 'personal files', and asked him to identify any documents from the schedule that he did not have, on the understanding that it would then provide him with copies of any missing documents outwith the mechanism of FOISA. The Council explained to Mr B that, as the withheld information contained the personal data of the named ex-employee and of Mr B himself, it could not lawfully disclose it under FOISA (which would have the effect of putting the information into the public domain), but that it was prepared to make the information available to him outwith the provisions of FOISA.



29. The Council advised the Commissioner that Mr B refused to accept this offer and, instead of participating in a process that would enable him to obtain the information he had requested, he made a counter-settlement option whereby he asked to inspect the material on Council premises and he also asked that a report on the whole matter was put before a committee of the Council. The Council argued that Mr B has been pursuing both these themes throughout his long correspondence and that they are not relevant to his current application.
30. The Council argued that Mr B's refusal of its offer to obtain any documents in the 'personal files' that he does not currently possess indicates that Mr B is not interested in resolving this current FOI request and would rather continue with his ongoing grievance. In conclusion, the Council argued that his current request has no serious purpose or value and, accordingly, should be considered vexatious.

#### *Submissions from Mr B*

31. Mr B has argued that his request is not vexatious and that he requires the withheld information to help him raise a new complaint with the Council against its former Director of Law and Administration. Mr B asserted that the Director of Law and Administration was charged with undertaking an investigation at the request of the Regional Assessor in 2003, and he requires all of the information considered by the Director (including all of the items in the 'personal files').
32. Mr B alleged that key documents relating to his original complaint, which he considers should be held by the Council, are 'missing'. Mr B noted that he requires these missing documents to be found and/or replaced. Mr B also alleged that the Council holds 'false information' relating to his complaint and that it continues to circulate this information within the Council. Mr B requires this 'false information' to be removed from the Council and replaced with correct information.
33. Mr B has argued that the Director of Law and Administration failed to submit a report of his investigation to the Council, and that the complaint he is intending to raise with the Council (and which, according to Mr B, relies on obtaining the information in the 'personal file') has never been considered by any court, the LSS or the LSO. With reference to the SPSO, Mr B has submitted that the SPSO did not reject the arguments he raised with them, but simply advised him that they were unable to investigate evidence used in a preceding Ombudsman's decision. Mr B understands this to be a statement of SPSO policy rather than a rejection of his argument.
34. Mr B disagreed with the Council's submissions that he is already in possession of much of the information he is seeking; he explained that some of the comments he has made to the Council (from which the Council has surmised he must have certain documents) is derived from 'careful logic'. Mr B submitted that he was unwilling to let the Council know what information he does or does not hold at present, until he knows what information is going to be released to him. In addition, Mr B stressed that, while he may have duplicate copies of some of the documents in the 'personal files', the information he is seeking is that held and used by the Council. Mr B noted that he is seeking the information contained in the specific copies held by the Council.



35. By way of example, Mr B referred to 'item 1' as described in the schedule of documents provided to him by the Council. Mr B commented that the version of 'item 1' held by the Council might be an original document or could have 'copy' stamped on it. He notes that the Council's version might have a 'date received' stamp on it, it could be redacted, damaged, have an accompanying memorandum or indeed it might have no distinguishing characteristics at all and that, in itself, would provide him with information that he considers useful. Mr B stated that all of this information should be captured by the terms of his request, and he intimated that whether or not he possesses his own copy of 'item 1' (or any of the other 52 documents contained in the 'personal files') should not be taken into account, as it is the Council's copies that contain the information he is seeking.
36. Mr B also challenged the terms of the Council's offer of settlement. He stated that the Council did not state that it was going to disclose documents to him, but, instead, offered to consider what documents *could* be disclosed to him on a personal basis. Mr B argued that he has an entitlement to obtain information under FOISA, and he considers disclosure under FOISA (to him and the wider world) to be more 'correct' than accepting information outwith FOISA, which would, in Mr B's view, have the effect of concealing the issues involved.
37. Mr B noted the content of *Decision 227/2011 Mr John Graham and the Scottish Housing Regulator*, referred to above, but dismissed it as irrelevant, arguing that every application to the Commissioner is different. Mr B submitted that he has stated a consistent case and that all of the information he is requesting is essential to establish the proper understanding with all departments of the Council to the relevance of the query raised by the Regional Assessor.
38. Mr B provided detailed submissions related to the new complaint (and the grounds for the complaint) he intends to make to the Council once he has received the information he has requested. Mr B also provided detailed submissions outlining his initial complaint to the Council and the outstanding issues that he considers to be unresolved. Mr B commented that the Council's elected representatives require to be made aware of the 'failings' that have occurred within certain departments over the years. Mr B noted that, as officials have 'refused' to report his concerns, he requires the exact details to report to the Chief Executive of the Council, and that this is the reason for his information request.
39. Mr B acknowledged that this current request is part of a series of ongoing communications he has had with the Council over many years, and he conceded that he is continually going over the same ground. Mr B added that he will stop communicating with the Council when the missing papers are either found or replaced and the 'false' information held by the Council has been corrected.

*Can the request be seen as a continuation of previous correspondence?*





40. The Commissioner recognises that Mr B's request may not appear to be vexatious, when viewed in isolation. However, she is aware that, in some cases, the vexatious nature of a request will only emerge after considering the request in context. In this case, the Council has argued that it is appropriate to consider the request as a continuation of the longstanding correspondence and to take account of the history and context of that correspondence in deciding whether this request is vexatious. The Council has submitted that Mr B's request serves no serious purpose or value and that it should be considered vexatious.
41. In her deliberations, the Commissioner has considered the First Tier Tribunal (Information Rights) ruling *EA/2011/0079 Alan Dransfield and the Information Commissioner*<sup>3</sup>. In paragraph 36 of this ruling, the Tribunal draws a distinction between prolonged correspondence on a single issue, and ongoing correspondence on a variety of different issues, and the relevance of these two types of correspondence when considering whether an information request is vexatious. The Tribunal considered that prolonged correspondence on a single subject is a 'valid' consideration, while considering correspondence on a variety of issues risks crossing the line from treating the request as vexatious, to treating the requester as vexatious. (Although the Tribunal case was decided in relation to the Freedom of Information Act 2000, and not FOISA, the Commissioner considers that the comments of the Tribunal are equally valid in relation to this current application.)
42. Given the content of the request under consideration in this decision, and the comments received from Mr B and from the Council, the Commissioner is of the view that the nature and purpose of Mr B's request is such that it can only be seen as a continuation of the correspondence between him and the Council over the past twenty years.
43. Although the focus of the matters of concern to Mr B has, in his own words, 'evolved' over the course of those communications, the Commissioner considers that all of those communications ultimately stem from and form a continuation of the original complaint put to the Council, and relate to his continued dissatisfaction with the handling of that complaint over the period since. It is clear from Mr B's comments on this case, that the purpose of his request was to assist him in pursuing his complaints, which he believes have never been properly addressed.
44. It is the Commissioner's view that the request under consideration is inextricably linked to that original complaint, which is the underlying grievance at the root of Mr B's correspondence with the Council. Accordingly, she considers it is appropriate to consider Mr B's request as a continuation of the longstanding correspondence between him and the Council and to take account of the history and context of that correspondence in deciding whether Mr B's request should be viewed as vexatious.

*Would the request impose a significant burden on the Council?*

<sup>3</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i573/20110920%20Decision%20EA20110079.pdf>



45. The Commissioner considers that Mr B's request, considered in isolation, would not impose a burden on the Council. The Council has acknowledged this fact in its submissions. The Commissioner also notes that the information being requested was easily identified and located by the Council and that compliance with the request would not incur significant costs on the part of the authority.

*Are any other "vexatious" factors in evidence?*

46. Although the Commissioner has concluded that Mr B's request would not impose a significant burden on the Council, she will now go on to consider whether any of the other factors outlined in paragraph 14 above are relevant. As noted above, the Commissioner does not exclude the possibility that, in any given case, a request may not involve a significant burden, but one or more of the other listed factors may be of such overwhelming significance that it would be appropriate to consider the request vexatious in the absence of a significant burden.
47. The Commissioner has considered whether any of the other factors listed in paragraph 14 above could be identified in this case, e.g. whether it could be shown that Mr B's request lacked serious purpose or value, was designed to cause disruption or annoyance to the authority, had the effect of harassing the authority and/or would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
48. The Commissioner accepts that it was reasonable in the circumstances for the Council to conclude that, in relation to this particular information request, FOISA was being used by Mr B primarily to continue extended dialogue in relation to his complaints with the Council, on which it considers the matters have been addressed fully and nothing more can be added.
49. The Commissioner appreciates that Mr B does not consider those matters to have been either resolved or closed. However, she notes that Mr B has exhausted the complaints process with the Council, the LSS, the courts and various Ombudsman and Commissioners, in relation to the matter. The Council advised Mr B in 2004 that there was nothing further it could do to satisfy him in addressing his issues.
50. In the circumstances, it appears unlikely that resolution of Mr B's concerns would be brought any closer by the provision of a response to the request under consideration, and the Commissioner accepts that doing so would have the effect of prolonging yet further correspondence on matters which have been exhaustively addressed.



51. The Commissioner notes Mr B's stated intention to raise a new complaint with the Council. Mr B has argued that he requires all of the information he has requested to accurately specify a complaint to the Chief Executive of the Council. The Commissioner has considered the terms of this potential new complaint, and the contents of the withheld information. Although she acknowledges Mr B is of the view he needs it, she is satisfied that withholding the information from him will not prevent him from raising this new complaint with the Council. It is the Commissioner's view that Mr B could submit his new complaint without having full access to all of the withheld information, as he could make it clear to the Council that he believes the relevant documents that support his complaint lie in the 'personal files' that it holds, and the Chief Executive of the Council could interrogate the withheld documents when considering Mr B's new complaint, if it considered appropriate to so do.
52. The Commissioner also notes that the Council provided Mr B with a detailed schedule of the documents currently being withheld, and that he has his own copies of some of those documents. She further notes that Mr B is not satisfied that he has 'true' copies as illustrated by his comments regarding the 'soft' information that exists in the Council's own copies of the documents he is seeking (e.g. date stamps, attached memoranda or indeed no marks or distinguishing features at all). While she agrees that a lack of information (e.g. no distinguishing features) could, by itself, convey information to Mr B, she does not consider these arguments to be persuasive, or relevant, in this case. She also notes the judgment of the Court of Session in the case of *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73<sup>4</sup>, which makes it clear that FOISA provides a right of access to information as opposed to documents.
53. Under the circumstances, and having considered the submissions made by both parties, the Commissioner considers that Mr B's information request is lacking in purpose or value and has had the effect of harassing the Council

### Conclusion

54. Having considered the circumstances of this case carefully, the Commissioner accepts that Mr B's request for information was properly viewed in the context of his ongoing correspondence with the Council and lacked serious purpose or value and that the Council was entitled to consider Mr B's request as vexatious in terms of section 14(1) of FOISA (and to refuse to comply with it on that basis).
55. Given this conclusion, the Commissioner is not required to go on to consider whether the information is held by the Council in terms of section 3(2)(a)(i) of FOISA.

<sup>4</sup> <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



## **DECISION**

The Commissioner finds that Aberdeenshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr B.

## **Appeal**

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Should either Mr B or Aberdeenshire 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**31 August 2012**



## Appendix

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### 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.

##### 3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held –

(a) by an authority otherwise than –

(i) on behalf of another person;

...

##### 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.

...