

Decision Notice

Decision 158/2016: Mr Roy Mackay and Scottish Borders Council

Whether request was vexatious

Reference No: 201600079

Decision Date: 12 July 2016



Scottish Information
Commissioner

Summary

On 25 May 2016, Mr Mackay asked Scottish Borders Council (the Council) for information relating to the Council's actions under the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001.

The Council did not respond to the request. Following a review, the Council informed Mr Mackay that it considered his requests to be vexatious. Mr Mackay remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that, whether intentional or not, Mr Mackay's request had the effect of harassing the Council, and it was entitled to refuse to comply with the request on the grounds that it was vexatious.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 25 May 2015, Mr Mackay made a request for information to the Council. The information requested related to the appointment of panel members under the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (the Regulations). He referred to a report which was to be considered at the Council's Executive Committee meeting the following day¹, and quoted a statement in paragraph 4.1 of the report which indicated that letters had been sent to individuals on the list of Curators ad Litem. The letter asked the individuals to provide an outline of their knowledge and experience of adoption law and processes, if they wished to remain appointed. Mr Mackay requested:
 - (i) Any information which showed that the persons with whom the Council corresponded "...were - at the relevant time - already properly appointed under these Regulations as members of the 'Panel' and could therefore "remain appointed"."
 - (ii) With reference to the people identified above, all recorded information, including but not limited to: a) their name, b) the date of their then current appointment to the Panel; c) the date when their then current term of appointment to the Panel was due to expire; d) the Council's consultation with the Sheriff Principal regarding their then current appointment to the Panel; and e) letters notifying them of their then current appointment to the Panel.

¹ Report by the Council's Service Director Regulatory Services, agenda item 11 for the Council's Executive Committee meeting of 26 May 2015.

- (iii) "All recorded information the Council holds relating directly or indirectly to the following statement at 3.1 in the aforementioned report: "[...] that the Council is required to establish a panel of persons from whom Curators and Reporting Officers may be appointed by the Court", where [the Council] has otherwise at any time in the past 5 years informed anyone...that under these Regulations... the Council has less than an imperative obligation to "...establish a panel of persons from whom Curators and Reporting Officers may be appointed by the Court", etc."
2. The Council did not respond to this request.
 3. On 23 June 2016, Mr Mackay wrote to the Council requesting a review of its decision on the basis that it had failed to respond to his request.
 4. The Council notified Mr Mackay of the outcome of its review on 13 July 2015. The Council considered Mr Mackay's request to be vexatious in terms of section 14(1) of FOISA, and concluded that it was not required to comply with the request.
 5. On 12 January 2016, Mr Mackay applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of Council's review, because he did not consider his request to be vexatious.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Mackay made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 3 February 2016, the Council was notified in writing that Mr Mackay had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Mackay and the Council. She is satisfied that no matter of relevance has been overlooked.
10. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
11. The Commissioner has published guidance on the application of section 14(1)² of FOISA. This states:

There is no definition of "vexatious" in FOISA. The Scottish Parliament acknowledged that the term "vexatious" was well-established in law and opted to give the Commissioner latitude to interpret that term in accordance with this background, in order that the interpretation might evolve over time in light of experience and precedent.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

12. In the Commissioner's view, there is no single formula or definitive set of criteria that allows a formulaic approach to determining whether a request is vexatious, and each request must be considered on the merits of the case, supported by evidence and clear evaluation and reasoning. In its submissions, the Council referred to the factors that the Commissioner considers to be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious. These are documented within the Commissioner's briefing on section 14 of FOISA, so she will not repeat them here.
13. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requester, she also acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering whether a request is vexatious.

The Council's submissions

14. The Council stated that the issue of its compliance with the Regulations and other related issues have been exhaustively explored as a result of Mr Mackay's previous requests, complaints and by an investigation commissioned by the Council. It was the Council's view that his requests are primarily a means of extending the dialogue about these issues and have the effect of harassing the Council and its staff.
15. The Council provided the Commissioner with a detailed history of its dealing with Mr Mackay in relation to the subject matter of his requests. It explained that Mr Mackay had an underlying complaint with the Council, ongoing since 2013. The Council described how it had attempted to address Mr Mackay's longstanding concerns that its practice, in relation to Curators ad Litem, did not comply with the corresponding Regulations.
16. The Council provided submissions on each part of Mr Mackay's request, as listed above.

Part (i)

17. The Council took the view that the substance of what Mr Mackay was asking for was the process for appointing persons [to the panel] at an earlier point and whether they were already properly appointed when the letters for renewal of their appointment were sent out in 2013. The Council explained that this request restated elements of five of Mr Mackay's previous requests. It provided reference numbers for those earlier requests and a summary of its previous responses.
18. The Council stated that the information it holds was provided in response to these earlier requests. Mr Mackay was later advised that no further records were held in respect of his query.
19. The Council argued that Mr Mackay's continued requests are effectively seeking to prove a negative, i.e. that there are no such records. The effect of seeking records once more is simply to prolong the dialogue between him and the Council. Asking for the information in a repeated fashion has reached the stage where the Council considers it an extended campaign, to expose what Mr Mackay perceives as wrongdoing, to the point where his behaviour (in the Council's view) can be described as obsessive.

Part (ii)

20. The Council submitted that although Mr Mackay's request referred to a 2015 report, he was effectively seeking information about the Panel members appointed in 2011, their letters notifying them of their appointment and the consultation carried out with the Sheriff Principal.

21. The Council stated that some of this information was disclosed in response to an earlier request, at which point Mr Mackay received the letters to solicitors and their responses and it was explained that no further information was held. In response to a complaint dated 28 January 2014, the Council reiterated that there were no further records to share.
22. The Council confirmed to the Commissioner that Mr Mackay has received all the information the Council holds and further requests will not change this position. It submitted that its comments relating to the harassing effect of part (i) apply equally to this part.

Part (iii)

23. The Council explained that there have been numerous letters to and from Mr Mackay over the course of three years. The Council acknowledged that it may be that, with various employees, officers and elected members dealing with correspondence to and from Mr Mackay, the obligations of the Council have been couched in different terms in different letters. However, considering the correspondence as a whole, it is clear that the position of the Council has been that there is an obligation to establish a Panel of Curators. This, the Council argued, is evident from the content of its responses to Mr Mackay's previous requests.
24. The Council consequently argued that there was no serious purpose or value to Mr Mackay receiving this information, when the overall position of the Council was clear and where he has already received a voluminous amount of correspondence previously which stated what was understood to be the position. The Council believed the purpose of Mr Mackay's correspondence was to prolong dialogue.

Mr Mackay's submissions

Parts (i) and (ii) of the request

25. Mr Mackay confirmed that part (i) of his request sought all recorded information upon which the claim that existing panel members could "remain appointed" was based. Mr Mackay claims that, as a result of previous enquiries, it was clear that there was no evidence to support such appointments having been made, during a certain period. He had previously requested such information (in 2013), but the Council claimed it did not hold it, a position accepted by the Commissioner in *Decision 068/2014 [Roy Mackay and Scottish Borders Council](#)*.³ Mr Mackay believed the statement in paragraph 4.1 of the report raised the possibility that the Council may have unearthed recorded information to support its claim, and that it was entirely appropriate for him to request it, or for the Council to confirm that it did not hold any such records (which, in his view, would demonstrate the inaccuracy of the statement in paragraph 4.1 of the report).
26. Mr Mackay argued that this was an entirely legitimate and proper use of FOISA for a serious purpose. Part (ii) of his request to establish the details of any proper appointments in the event that the Council now held recorded information which it previously claimed it did not hold.

Part (iii)

27. Mr Mackay pointed to the statement in paragraph 3.1 of the report which says that the Council is required to establish a panel of persons from whom Curators and Reporting

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2014/201302799.aspx>

Officers may be appointed by the Court. He explained that the Council's Chief Executive had appeared to infer precisely the opposite in a letter summarising the main findings from the investigation carried out for the Council by the City of Edinburgh Council. He stated that the Chief Executive had used the legal term "may", which implied that the Regulations imposed no statutory obligation on the Council. He explained that this part of his request sought to establish whether "the same contradictory claim" had been made to others, possibly including elected members or Council officers.

28. Mr Mackay stated that the purpose of this request was to clarify some of what he considered to be inconsistency and contradiction; he did not believe his request to be vexatious.

The Commissioner's findings

29. FOISA does not require the requester to state why they want information. However, there are occasions where the intention behind a request cannot, in the whole circumstances of the case, be disregarded. If the intention behind a request is evidently to cause disruption or annoyance to the authority, rather than to access the information that is the subject of the request, the request may be vexatious. To that end the history of the requester's dealings with an authority may be relevant.
30. An authority could reasonably conclude that a particular request represents the continuation of a pattern of behaviours which it has deemed vexatious in another context. This may arise where a requester has an on-going grievance against a public authority, or could be described as conducting an extended campaign, for example to expose wrongdoing, to the point that his or her behaviour can be described as obsessive.
31. Requests may also be deemed vexatious if:
- (i) There is no additional information that can be provided because all relevant information has already been disclosed; or
 - (ii) It is unlikely that the additional information would shed light on, or alter the requester's situation (because the subject in question has already been thoroughly addressed through the relevant complaints or appeals procedure).
32. Even if a requester did not intend to cause inconvenience or expense, if the request has the effect of harassing the public authority and/or its staff, it may be deemed vexatious when considered from the perspective of a reasonable person.
33. The Commissioner has considered, in detail, the arguments and explanations presented by both parties. The Commissioner has taken account of the ongoing nature of Mr Mackay's complaints and requests, and concludes that it is reasonable for the Council to take account of its history of dealings with the requester.
34. It is clear from the submissions provided by both parties that Mr Mackay has an ongoing grievance with the Council and these requests form part of his attempt to reveal wrongdoing on the part of the Council in relation to its obligations under the Regulations.
35. Mr Mackay explained that the purpose behind part of his request was to clarify "ambiguity" surrounding the Council's previous responses to him.
36. The Commissioner is conscious that the ambiguity referred to stems from Mr Mackay's interpretation of the Council's responses. The Council's view is that its position remains unchanged.

37. It is clear to the Commissioner that the responding to this request would not alter the situation for Mr Mackay. She has considered in detail the ongoing nature of the disagreement between these parties and the information that has already been provided to Mr Mackay as result of earlier requests and complaints. Whether or not it was Mr Mackay's intention, the Commissioner concludes that the request, which covers concerns which have already been responded to, has had the effect of harassing the Council. She acknowledges that Mr Mackay may not have had this intention, when he made the request.
38. The Commissioner has accepted the Council's conclusion that this request is vexatious. She finds that the Council was not obliged to comply with Mr Mackay's request of 25 May 2015, on the grounds that it was vexatious and section 14(1) of FOISA applied.

Decision

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

Appeal

Should either Mr Mackay or Scottish Borders Council wish to appeal against this decision, they have the right to 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

12 July 2016

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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info