



# Decision Notice 140/2022

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## Annual General Meetings and Management Committee Meetings

**Applicant:** The Applicant

**Authority:** Govan Housing Association Ltd

**Case Ref:** 202101096

### Summary

The Applicant asked the Authority about the purpose of its Annual General Meeting (AGM), the role of shareholders, any special measures invoked for staging an AGM in an “observation only” capacity and copies of the minutes of Management Committee meetings held in 2021. The Authority provided some information, but the Applicant believed further information was held which had not been disclosed. The Commissioner investigated and found that the Authority did hold further information falling within the scope of the requests. He required the Authority to provide a revised review outcome to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 14(2) (Vexatious or repeated requests); 47(1) and (2) (Application for decision by Commissioner)

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 30 July 2021, the Applicant made four requests for information to the Authority as follows:

*What is the purpose of [the Authority's] Annual General Meeting (AGM) and what role do shareholders play before, during and after the AGM? [Request 1]*

*How many registered shareholders does [the Authority] have? [Request 2]*

*What special measures, if any, [has the Authority] invoked for staging an AGM with stakeholders in an "observation only" capacity? [Request 3]*

*Also, can you please email me copies of the minutes of all [the Authority's] Management Committee Meetings held in 2021. The last published minute on the [Authority's] website is dated February 2021, almost half a year old. I understand there is no need for a formal FOI for this information? [Request 4]*

2. The Authority responded to requests 1, 2 and 3 on 12 August 2021 as follows:
  - for request 1, it directed the Applicant to its Rules which, it stated, fully explained the purpose of the AGM and the role of shareholders. It informed the Applicant that the Rules could be found on its website, but that it could send a paper copy if the Applicant preferred;
  - for request 2, it disclosed the number of shareholding members;
  - for request 3, it explained that holding an AGM with observation only capacity was in line with prior practice observed when conducting large events virtually. Members had been given the opportunity to ask questions and vote on relevant matters prior to the AGM and the results of the votes would be advised at the AGM; and
  - for request 4, it did not provide a response.
3. On 12 August 2021, the Applicant wrote to the Authority requesting a review of its decision for requests 1 and 3 as he was dissatisfied that it had failed to answer these requests. He also requested a review of the Authority's failure to respond to request 4.
4. The Authority notified the Applicant of the outcome of its review on 19 August 2021:
  - for requests 1 and 3, it directed the Applicant to its original responses and to the papers provided with the notice of the AGM which set out all the recorded information held and which it considered relevant for shareholder participation in the AGM and to the Applicant's information request. On the basis that it had already provided the relevant information, the Authority considered these to be repeated requests in terms of section 14(2) of FOISA to which, it stated, it was not obliged to respond; and
  - for request 4, the Authority directed the Applicant to the relevant page of its website which, it stated, was regularly updated with the minutes of meetings of the Management Committee in accordance with its Publication Scheme.
5. On 5 August 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because it had refused to disclose the information requested.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 29 November 2021, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focussed on whether the Authority held any further information falling within the scope of requests 1, 3 and 4. The Authority was also asked to explain why it considered requests 1 and 3 to be repeated requests in terms of section 14(2) of FOISA.

## **Commissioner's analysis and findings**

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Section 14(2) of FOISA - Repeated request***

10. Section 14(2) of FOISA provides that, where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar, unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.
11. For section 14(2) to apply, therefore, the following needs to be considered:
  - (i) whether the Applicant's previous requests were identical or substantially similar to the requests under consideration here;
  - (ii) whether the Authority had complied with the previous requests; and, if so
  - (iii) whether there was a reasonable period of time between the making of the original requests and the making of the subsequent requests.
12. The Authority was asked to explain why, in response to the Applicant's requirement for review for requests 1 and 3, it considered that section 14(2) applied.
13. In response, the Authority confirmed that it was no longer relying on section 14(2) for requests 1 and 3. It now recognised that the "second request" was a request for review and that it had made an error in treating these as new (repeated) requests. The Authority submitted that, going forward, it would ensure that the request/review process was clarified and communicated to all staff involved in FOI matters so that similar matters were handled correctly in future.
14. Having considered the Authority's submissions on this, the Commissioner is satisfied that the requests in question were, in fact, requirements for review, and not repeated requests. In light of this, it is not necessary for him to consider the tests for the application of section 14(2) of FOISA. He welcomes the steps being taken by the Authority to clarify its procedures for handling requests for reviews going forward.
15. However, as the Commissioner does not accept that requests 1 and 3 were repeated requests, he has no option but to find that the Authority was not entitled to rely on section 14(2) at review stage for these requests and that it breached Part 1 of FOISA by refusing them on that basis.
16. The Commissioner therefore requires the Authority to respond to requests 1 and 3, otherwise than in terms of section 14(2) of FOISA.

***Whether the Authority held any further information falling within scope of requests 1, 3 and 4***

17. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
18. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).
19. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority and falls within the scope of the original request.
20. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and his application, in which he provides reasons why he considers the Authority should hold further information falling within the scope of requests 1, 3 and 4.

***Request 1 – the Authority's submissions***

21. In his application to the Commissioner, the Applicant was dissatisfied that the Authority had failed to disclose the information requested.
22. In its initial submissions to the Commissioner, the Authority believed the information requested was available in its Rules. It confirmed that it had not sent the Applicant a paper copy of the Rules.
23. To establish precisely what information was held, falling within the scope of this request, the Authority was asked to provide the Commissioner with a copy of the Rules which were in place at the time of the Applicant's request. It was also asked to explain any searches for any further recorded information that might be held elsewhere.
24. In response, the Authority provided the Commissioner with a copy of the Rules (approved September 2020) and a link to where, on its website, they were published. It explained which sections therein it considered related to "AGM purpose" and "role of shareholder" (as specified in the Applicant's request). The Authority confirmed that all the information requested was contained in the Rules and so no further searches were considered necessary.
25. In the Authority's view, it was satisfied that it had provided the Applicant with all the information requested (i.e. the Rules). It submitted that, while its response of 12 August 2021 was brief, it was factually correct, and the additional explanation now provided expanded on those same facts to allow more clarity.

***The Commissioner's views – request 1***

26. The Commissioner has considered all relevant submissions and the terms of the request.

27. The Commissioner notes that the Authority's review outcome referred the Applicant to its initial response of 12 August 2021, in which it directed the Applicant to its Rules which explained the purpose of the AGM and the role of shareholders. He further notes that, while the Authority stated that the Rules could be found on its website, it neither provided the Applicant with a copy of those Rules, nor a link to where, on its website, the Rules were published.
28. It is evident to the Commissioner, from examination of the Rules, that certain of this information (i.e. those sections described by the Authority as relating to "purpose of AGM" and "role of shareholder") falls within the scope of the request. He considers that it would also have been helpful for the Authority to have advised the Applicant of those specific sections, in the Rules, containing the information it considered to be relevant to the request.
29. In the Commissioner's view, this is a matter which the Authority should have addressed by the close of the Authority's review (i.e. its response of 19 August 2021) at the latest. It is clear that, in respect of this information, the Authority failed to take adequate steps to provide it to the Applicant, or to issue a response in terms of any relevant provision or exemption in FOISA, when it issued its review outcome. In this respect, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.
30. The Commissioner therefore requires the Authority to carry out a further review, and provide the Applicant with a revised review outcome in respect of the information considered to fall within the scope of request 1, either disclosing that information or providing a response in terms of any relevant provision or exemption in FOISA (but excluding section 14(2)).
31. In doing so, the Commissioner would expect the Authority to set out clearly which sections, in the Rules, contain the information relevant to the request.

#### *Request 3 – the Authority's submissions*

32. In his application to the Commissioner, the Applicant was dissatisfied that the Authority had failed to disclose the information requested.
33. In its initial submissions to the Commissioner, the Authority stated that it believed the information requested was available in the paperwork previously sent to the Applicant in his invitation to attend the AGM.
34. To establish precisely what information was held, falling within the scope of the request, the Authority was asked by the Investigating Officer to provide a copy of the papers sent to the Applicant with the notice of the AGM which, the Authority claimed, contained the relevant information requested. It was also asked to explain any searches for any further information that might be held elsewhere.
35. In response, the Authority provided the Commissioner with a copy of the AGM papers sent to the Applicant. These included two letters: one dated 28 July 2021 which advised that the meeting would be held virtually and inviting members to submit questions and appoint a proxy to speak on their behalf, and the other - dated 25 August 2021 - confirming the joining instructions for attending the AGM virtually.
36. The Authority submitted that the special measures referred to in the request would be the holding of the AGM virtually (due to the continuing COVID-19 situation) and the need for members to appoint a proxy from an approved list who could ask questions on behalf of members. It explained that, due to technical limitations, members could attend as observers only, and only those designated could speak on behalf of others.

37. The Authority confirmed that all of the relevant information was contained in the AGM pack sent to members and, in light of this, it considered no further searches were necessary. In the Authority's view, it was satisfied that it had provided the Applicant with all of the information requested. It submitted that, while its response of 12 August 2021 was brief, it was factually correct, and the additional explanation now provided expanded on those same facts to give further clarity.
38. Following the Investigating Officer's consideration of the letters and the AGM papers issued to the Applicant, the Authority was asked whether any further information concerning the "special measures" for holding an AGM in an observation only capacity was recorded elsewhere and, if so, to provide evidence of this and explain what consideration was given to providing any such information to the Applicant in response to his request.
39. In response, the Authority confirmed that additional information regarding invoking measures for holding an AGM virtually was held in the *SFHA COVID-19 Briefing – Practical Governance Advice – 15 July 2020*. It submitted that this material had been provided to the Authority, in its capacity as a Registered Social Landlord (RSL), by the Scottish Federation of Housing Associations (SFHA) and was therefore not publicly available. As this document provided guidance to RSLs, it was not issued to members. The Authority also confirmed that no subsequent guidance on virtual attendance at AGMs in 2021 had been issued by the SFHA.
40. The Authority further submitted that the *Supporting Guidance to the SFHA Model Rules 2020* (which, it stated, was on the SFHA website and available only to members) set out an optional amendment for RSLs to make provisions to permanently allow for virtual attendance at AGMs moving forward. It confirmed that it had updated its Rules to allow for virtual attendance at AGMs, following approval at a Special Management Committee Meeting held on 24 September 2020.
41. The Authority confirmed that it now considered certain information in the documents referred to in paragraphs 39 and 40 above also fell within the scope of the Applicant's request.

#### *The Commissioner's views – request 3*

42. The Commissioner has considered all relevant submissions and the terms of the request.
43. The Commissioner notes that the Authority's review outcome referred the Applicant to its initial response of 12 August 2021, in which it directed the Applicant to the papers provided with the notice of the AGM which, it believed, contained all of the information relevant to shareholder participation in the AGM and to his information request. However, as the letter of 25 August 2021 (referred to in paragraph 35 above) post-dates the Applicant's request, the Commissioner cannot consider this information as part of his investigation.
44. However, in relation to the letter of 28 July 2021, while the Commissioner notes that the Applicant had already been sent a copy at the material time, the Authority failed to provide the Applicant either with that information in response to his request or, alternatively, a response in terms of any relevant provision in FOISA (for example section 25 (Information otherwise accessible)).
45. It is evident to the Commissioner, from the submissions provided during the investigation, that the Authority holds further information relating to special measures invoked for staging an AGM in an observation only capacity, specifically some information in the two SFHA guidance documents mentioned above, the minutes of the Special Management Committee meeting held on 24 September 2020 and the updated Rules. Having examined these

documents, he considers that some of this information clearly falls within the scope of the Applicant's request.

46. In the Commissioner's view, it is evident that, in respect of this information, the Authority failed to take steps to provide it to the Applicant, or to issue a response in terms of any relevant provision or exemption in FOISA, when it issued its review outcome on 19 August 2021. In this respect, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.
47. The Commissioner therefore requires the Authority to carry out a further review, and provide the Applicant with a revised review outcome in respect of the further information considered to fall within the scope of the request, either disclosing that information or providing a response in terms of any relevant provision or exemption in FOISA (but excluding section 14(2)).
48. In doing so, the Commissioner would expect the Authority to clearly set out which sections, in these documents, contain the information relevant to the request.

#### *Request 4 – the Authority's submissions*

49. In his application to the Commissioner, the Applicant was dissatisfied that the Authority had failed to disclose all of the information requested (i.e. certain minutes of Management Committee meetings which were not published or available via the link provided by the Authority).
50. In its initial submissions to the Commissioner, the Authority believed the information requested was available on its website.
51. To establish what information was held, the Investigating Officer asked the Authority to confirm the dates of all the Management Committee meetings held within the period set out in the request, and also the corresponding dates when these minutes were published online. The Authority provided this information in its submissions to the Commissioner.
52. The Authority explained that the minutes of one meeting (held on 24 June 2021) were not available for publication until after it had issued its review outcome, as these were still in draft form at that time. While it was normal practice for minutes to be approved at the subsequent meeting, no meetings had been held in July, and so these had not been approved until the next meeting which was held on 26 August 2021 (i.e. after it had issued its review outcome). The Authority submitted it ought to have applied section 27(1) (Information intended for future publication) of FOISA for this information, and accepted this was an error on its part.
53. The Authority further explained that its custom and practice was not to publish minutes of Special Meetings to members, or to the public, as these tended to be of a confidential nature. Having reviewed the minutes of the Special Meeting held on 4 March 2021, the Authority submitted it would have applied section 36 (Confidentiality) of FOISA for this information, and recognised that this was an omission in its response to the Applicant.

#### *The Commissioner's views – request 4*

54. The Commissioner has considered all relevant submissions and the terms of the request.
55. He notes that, at the date of receipt of the Applicant's request, the Authority held the minutes of six Management Committee meetings (one of which was in draft form) plus one Special Meeting. However, when it issued its review outcome, only five Management Committee meetings were accessible via the link provided to the Applicant. The Commissioner also

notes that the Authority's review outcome made no reference to the other two minutes (the draft minute of the Management Committee meeting held on 24 June 2021 and the minute of the Special Meeting held on 4 March 2021).

56. The Commissioner notes the Authority's position regarding its usual practice in relation to the publication of draft minutes and Special Meeting minutes. However, he would point out that there is a clear difference between whether or not information is held by an Authority, or whether or not it is published.
57. It is evident that this information (i.e. the draft minute and the Special Meeting minute) should have been identified as falling within scope of the Applicant's request by the close of the Authority's review (i.e. its response of 19 August 2021) at the latest. In the Commissioner's view, this is a matter which the Authority should have addressed at that time. It is clear that, in respect of this information, the Authority failed to take adequate steps to either provide it to the Applicant, or to issue a response in terms of any relevant provision or exemption in FOISA, when it issued its review outcome. In this respect, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.
58. The Commissioner therefore requires the Authority to carry out a further review, and provide the Applicant with a revised review outcome in respect of this further information, either disclosing the information or providing a response in terms of any relevant provision or exemption in FOISA.

## **Action required by the Authority**

59. In line with this Decision Notice, the Commissioner requires the Authority to carry out a review and provide the Applicant with a FOISA-compliant revised review outcome:
  - for each of requests 1 and 3, either disclosing the further information held, falling within the scope of these requests, or providing a response in terms of any relevant provision or exemption in FOISA (but excluding section 14(2)). In doing so, he would expect the Authority to clearly set out which sections, in these documents, contain the information relevant to each request; and
  - for request 4, either disclosing the further information held, falling within the scope of this request or providing a response in terms of any relevant provision or exemption in FOISA.

## **Decision**

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by the Applicant.

The Commissioner finds that the Authority was not entitled to consider requests 1 and 3 to be repeated in terms of section 14(2) of FOISA, and so failed to comply with Part 1 of FOISA in that respect.

He further finds that the Authority breached section 1(1) of FOISA by failing to identify all relevant information falling within the scope of requests 1, 3 and 4.



The Commissioner therefore requires the Authority to carry out a further review and provide the Application with a FOISA-compliant revised review outcome as follows:

- for each of requests 1 and 3, either disclosing the further information held falling within the scope of these requests, or providing a response in terms of any relevant provision or exemption in FOISA (but excluding section 14(2)). In doing so, he would expect the Authority to clearly set out which sections, in these documents, contain the information relevant to each request; and
- for request 4, either disclosing the further information held falling within the scope of the request (or a response in terms of any relevant provision or exemption in FOISA)

by **26 January 2023**.

## **Appeal**

Should either the Applicant or the Authority 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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**12 December 2022**

## Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”  
...
- (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.

#### 14 Vexatious or repeated requests

- ...
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;

- (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
- (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...