



Scottish Information
Commissioner

**Decision 205/2006 – Mr Robert J Scott and South
Lanarkshire Council**

*Communications between departments involved in a meeting
regarding factoring payments*

**Applicant: Mr Robert J Scott
Authority: South Lanarkshire Council
Case No: 200502619
Decision Date: 15 November 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 205/2006 – Mr Robert J Scott and South Lanarkshire Council

Request for communications between departments involved in a meeting regarding factoring payments – failure to comply within timeframe – some of the information requested not held

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 17 (Notice that information is not held); 20 (Requirement for review of refusal etc.); 21 (Review by Scottish public authority).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Scott requested disclosure of all communications between all departments involved in a meeting about with-holding factoring payments and all other meetings where a protest conducted by him was discussed. South Lanarkshire Council (the Council) failed to respond to Mr Scott's request within 20 working days. When it did respond the Council supplied copies of emails and factoring bills. Mr Scott was not satisfied with the Council's response and requested a review. The Council reviewed the request and subsequently released more information. Mr Scott, convinced that the Council's earlier failure to supply all information indicated that there was yet more information to be provided, applied to the Scottish Information Commissioner for a decision as to whether the Council had acted in accordance with the Freedom of Information (Scotland) Act 2002 (FOISA.)

After an investigation the Commissioner found that the Council failed to deal with Mr Scott's request for information in accordance with Part 1 of FOISA, in that it failed to respond to the request within the period specified in section 10(1) of FOISA and consequently failed to comply with section 1(1) of FOISA.

However, the Commissioner also found that the Council dealt with Mr Scott's request for review in accordance with section 21 of FOISA and that it was entitled to



conclude that it held no further information falling within the request for information and therefore that section 17 of FOISA applied.

Background

1. On 1 April 2005 Mr Scott applied to South Lanarkshire Council for the disclosure of all communications between all departments involved in a meeting about with-holding factoring payments and all other meetings where a protest conducted by Mr Scott was discussed.
2. On 26 April 2006 Mr Scott reminded the Council of his request and stated that the Council had failed to supply the information within the time stipulated in FOISA.
3. On 19 May 2005 Mr Scott wrote to the Council again, advising that the second 20 day period (the review period) was almost exhausted and that he still had received no response to his request.
4. On 17 June the Council responded, accepting that it had failed to respond within the 20 working day period and indicating that it had carried out a review of its handling of the request, detailing the outcome of that review.
5. In that review the Council indicated that it had failed to respond to Mr Scott's initial request due to an "administrative oversight" in that the request had been dealt with as a "business-as-usual" request rather than a formal request for information under FOISA.
6. The review also decided to release the information Mr Scott requested, namely disclosure of all communications between all departments involved in the meetings about him. The Council released a bundle of emails, letters and factoring bills.
7. On 18 June 2005 Mr Scott replied to the Council stating that he was dissatisfied with the information provided.
8. On 29 June 2005 the Council responded by supplying copies of a draft letter and an email, explaining the oversight.
9. On 14 September 2005 Mr Scott appealed to the Commissioner for a decision on the grounds that he believed that the Council had not supplied all the information (highlighting specific instances where he believed relevant information to be missing) and was dissatisfied with the way the Council had dealt with his initial request.



10. The case was allocated to an investigating officer. Mr Scott's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.

The Investigation

11. My investigating officer contacted the Council for its comments on the application (as required by section 49(3)(a) of FOISA) and for further information in relation to this case, in particular the information requested by Mr Scott. The Council responded on 18 October 2005.

Submissions from the Council

12. The Council stated that the failure to respond to Mr Scott's request within the 20 working days was due to an administrative oversight, whereby a member of staff treated the request as a "business-as-usual" request in a long chain of correspondence from him. The member of staff had not fully appreciated the significance of the request, nor of the consequences of failing to process the request in compliance with FOISA. This failure had been addressed through further training.
13. The Council added that as soon as the error had been detected it moved to act on the request and conducted a review in terms of section 21 of FOISA. The outcome of that review had been the decision to release all of the information Mr Scott had requested.
14. The failure to release the draft letter was identified as another oversight and the content of the draft was considered to be covered in subsequent correspondence with Mr Scott. This, the Council submitted, was explained in the letter of 29 June, providing a copy of that draft letter.
15. The Council advised that the failure to provide the email (a response from one member of staff to another) was due to the email not being identified as relevant to Mr Scott's request. Instead it was considered to be part of an ongoing series of correspondence between the Council and Mr Scott.
16. In relation to the 6 occasions where Mr Scott claimed correspondence should have been generated, the Council submitted that no information was held.



17. The Council stated that the alleged correspondence did not exist because it related to meetings that never happened or questions to which direct answers were not supplied. For example, where an email supplied to Mr Scott mentioned that two members of staff should have a “detailed chat”: as this “detailed chat” did not happen and therefore nothing was recorded, the Council could not supply any information. As such this information was not held, in terms of section 17 of FOISA.

Submissions from the applicant

18. Mr Scott confirmed that he was dissatisfied with:-
- the Council’s failure to respond to his request;
 - the Council’s response to the request for review;
 - the information supplied. He believed there was additional information in existence.

The Commissioner’s Analysis and Findings

19. I will consider each of Mr Scott’s points of dissatisfaction in turn

Section 10 – Time for compliance

20. It is clear from the events summarised in paragraphs 1 to 4 above that the Council failed to respond to Mr Scott’s request as required by Part 1 of FOISA.
21. Section 10 of FOISA stipulates that public authorities have 20 working days to respond to an applicant’s request.
22. The Council acknowledges that it failed to do so and I am satisfied, on the evidence presented to me, that the reason given for this failure – an administrative oversight due to the request not being identified as a formal FOI request – is genuine.
23. Paragraph 15 of the Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 , produced under section 60 of FOISA (the Section 60 Code), makes it clear that staff in public authorities should be familiar with FOISA, the associated Codes of Practice and any guidance on good practice issued by my Office, and that appropriate staff training should be provided.



24. However, I am satisfied that the Council has taken appropriate steps to ensure the likelihood of such an oversight will be a rare occurrence in future. I am further satisfied that once the error had been detected, appropriate action was taken in undertaking a review under section 21 of FOISA.
25. I am therefore satisfied that the Council need take no remedial action.

Section 21 – review by Scottish public authority

26. Mr Scott indicated that he was dissatisfied with the Council's response to his request for review.
27. It is clear from section 20 of FOISA that failure to comply with the time for compliance set by section 10 of FOISA, or inaction and failure to reach a decision, are valid grounds for requesting a review.
28. The Council's failure to respond within the 20 working day limit was therefore a valid ground for requesting a review.
29. Section 21 of FOISA sets out the review process.
30. Section 21(1) states that a request for review must be complied with within 20 working days of the receipt of that request for review.
31. Section 21(4)(c) states that the authority may reach a decision where the complaint is that no decision had been reached.
32. In responding to Mr Scott's request for review the Council satisfied both of these requirements and further satisfied section 21(5) in that it gave Mr Scott notice, in writing, of its decision and reasons for so doing. It also advised Mr Scott of his right to appeal to me and therefore complied with section 21(10) to that extent, although it did not advise him of his right of appeal to the Court of Session against my decision on a point of law.
33. I am therefore satisfied that the review process conducted by the Council was carried out in general compliance with section 21 of FOISA.
34. However, I am aware of the fact that Mr Scott's dissatisfaction with the review also stems from the Council's failure to supply 1) the draft letter and email; and 2) the 6 items mentioned in paragraph 44 below.
35. I shall deal with the matter of the draft letter and email in this section and address the matter of the other 6 items of correspondence in the following section: *section 17 – information not held*.

Draft letter and email



36. As indicated in paragraph 8, above, the Council responded to Mr Scott's dissatisfaction with the information received (in effect a request for review of its substantive decision in respect of his request), by supplying the draft letter and email.
37. The explanation provided by the Council for omitting the letter was that of an oversight due to poor records management. The draft should have been destroyed as its contents were covered in subsequent correspondence with Mr Scott. However, upon discovery of the draft, the information had been disclosed to Mr Scott.
38. I am satisfied by the evidence provided that the Council's explanation is credible and, in any event, the information was subsequently supplied to Mr Scott making the need for any remedial action redundant.
39. The explanation provided by the Council for omitting the email was that of a difference in interpretation regarding the relevance of the email to Mr Scott's request. The email had been considered by the Council to be relevant to an ongoing series of correspondence between it and Mr Scott regarding property and factoring matters, rather than to Mr Scott's request.
40. Having viewed the email in question I do not accept that the email should have caused a difficulty in perception. The email clearly does refer to an ongoing situation between the Council and Mr Scott. However, under the terms of Mr Scott's request it is my view that the email ought to have been considered relevant, and supplied as part of the package of correspondence supplied by the Council in its response of 17 June 2005.
41. I appreciate that differences of opinion as to which information is or is not relevant to a request will arise from time to time. My view is that, where there is any doubt to the relevance of a piece of information, it behoves the authority to either: interpret the request widely enough so as to cause as little detriment to the applicant as possible; or, contact the applicant to advise them that there is some ambiguity surrounding interpretation and clarify how the authority should proceed.
42. However, as the Council subsequently supplied the information to Mr Scott, I am satisfied that, once alerted to the omission, its response was adequate. I do not therefore require any remedial action.

Section 17 – information not held

43. Mr Scott's third point of appeal was that the information received on 17 June 2005 suggested that more information in relation to his request was held by the Council. Given that, when challenged to produce more information in response to his request, the Council provided the draft letter and email, Mr Scott was further convinced that all information had not been supplied.



44. The information in question surrounded six points:-
- i. a response to questions raised in an email of 7 April 2003;
 - ii. a recorded note or minute of a “detailed chat”, referred to in the above email;
 - iii. a response to questions raised in a draft letter;
 - iv. a response to an email seeking comments, dated 29 March 2005;
 - v. a briefing note referred to in an email, dated 7 July 2004;
 - vi. a response to a question raised in a memo, dated 24 February 2003.
45. In its response to my investigating officer’s queries the Council submitted that it did not hold the information, in terms of section 17 of FOISA. It provided details of the steps taken to trace any information it held in relation to Mr Scott’s request.
46. I shall take each item in turn.

Item i - a response to questions raised in an email of 7 April 2003

47. In this email two questions were asked about how the Council adopted a position. The sender queried whether the recipient wanted to have a “detailed chat” about how to respond to the issues.
48. The Council submitted that, as the “detailed chat” between the two correspondents never occurred, the Council held nothing that constituted a response to the issues raised by the questions asked in the email.
49. On the balance of probabilities, having viewed the evidence submitted by the Council, I am satisfied that no “detailed chat” took place and that nothing was recorded that answered the specific questions raised in the email. As such, the information is not held for the purposes of FOISA and I am satisfied that section 17 of FOISA applies in this instance.

Item ii - a recorded note or minute of a “detailed chat”

50. As discussed above, I am satisfied that no “detailed chat” took place between the two correspondents and that no note or minute of the meeting exists. As such, the information is not held for the purposes of FOISA and I am satisfied that section 17 of FOISA applies in this instance.

Item iii - a response to a question raised in a draft letter

51. The Council submitted that a question, raised at the foot of the draft letter supplied to Mr Scott on 29 June 2005, was never answered by the recipient of the email to which the draft was attached.



52. On the balance of probabilities, having viewed the evidence submitted by the Council, I am satisfied that the question raised was probably not answered and in any event was not answered directly by the recipient of the email. As such, the information is not held for the purposes of FOISA and I am satisfied that section 17 of FOISA applies in this instance.

Item iv - a response to an email seeking comments

53. In this email of 29 March 2005 a request was made by a member of staff for comments on an ongoing issue in relation to Mr Scott.
54. In its submission to me the Council stated that the only response was an email, dated 31 March 2005. This had been considered for exemption under section 34(4) (Court proceedings) but had been released to Mr Scott as part of the original package of emails.
55. I am satisfied with the evidence the Council has provided that the email dated 31 March 2005 was the only response to the request for comments. As such, I am satisfied that no further information in relation to this point is held for the purposes of FOISA and that section 17 of FOISA applies in this instance.

Item v - a briefing note referred to in an email

56. In this email of 7 July 2004 the sender requested that the recipient work on a joint briefing note outlining the issues in relation to an ongoing situation regarding the Council and Mr Scott.
57. In its submission the Council stated that the email dated 8 July 2004 contained a memo which was the briefing note. This was prepared on 24 February 2003 but was submitted by the member of staff as the joint briefing note, mentioned above.
58. Having viewed both the email dated 8 July 2004 and the attached memo, dated 24 February 2003, I am satisfied that the memo does constitute the response to the request for a joint briefing note. I have seen no evidence to indicate that there were any other responses. As such, I am satisfied that no further information in relation to this point is held for the purposes of FOISA and that section 17 of FOISA applies in this instance.

Item vi - a response to a question raised in a memo, dated 24 February 2003

59. In this memo two questions were raised relating to an ongoing situation involving Mr Scott and the Council.



60. In its submission the Council stated that the memo was prepared in February 2003 as a way of outlining the situation with Mr Scott from the Council's perspective. Within that memo there were various facts asserted and points raised, some in the form of questions.
61. The Council continued that it was, in fact, the email of 7 April 2003 that constituted the response to the questions raised in the memo but that this response was merely to ask more questions – the very ones raised in item i, above. As such, there was no clear or direct response to the questions raised in the memo, only further questions.
62. Taken together, the memo of 24 February and the email of 7 April 2003 constitute a set of questions and responses to those questions. Although the questions are not directly answered I am satisfied that no further information in relation to this point is held for the purposes of FOISA and that section 17 of FOISA applies in this instance.
63. I am satisfied by the evidence supplied to me by the Council that, in each of the points, listed i – vi above, no further information is held by the Council and therefore that section 17 of FOISA applies to Mr Scott's request.

Decision

I find that South Lanarkshire Council failed to deal with Mr Scott's request for information in accordance with Part 1 of FOISA, in that it failed to respond to Mr Scott's request within the period specified in section 10(1) of FOISA and consequently failed to comply with section 1(1) of FOISA. In dealing with Mr Scott's request for review, however, the Council complied generally with section 21 of FOISA.

I also find that South Lanarkshire Council dealt with Mr Scott's request for information in accordance with Part 1 of FOISA, being entitled to conclude by the end of the process that no further information was held falling within the scope of the request and therefore that section 17 of FOISA applied to the request.

I do not require the Council to take any action in consequence of my decision.



Appeal

Should either Mr Scott or South Lanarkshire Council wish to appeal against my 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
15 November 2006



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.

10 Time for compliance

- (1) ... a Scottish public authority receiving a request for which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
- (a) ... the receipt by the authority of the request.

17 Notice that information is not held

- (1) Where –
- (a) a Scottish public authority receives a request which would require it either –
- (i) to comply with section 1(1) ... if it held the information to which the request relates; but
- (b) the authority does not hold that information, it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of the Act may require the authority to review its actions and decisions in relation to that request.
- (9) In subsection (1), the reference to “actions” and “decisions” includes inaction and failure to reach a decision.

21 Review by Scottish public authority

- (1) ... a Scottish public authority receiving a requirement for review must ... comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- (4) The authority may, as respects the request for information to which the requirement relates –
- (c) reach a decision, where the complaint is that no decision has been reached.



- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and its reasons for so doing.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.