

Decision Notice



Decision 103/2010 Ms Jane Saren and City of Edinburgh Council

Appointments to the Board of Lothian Buses plc

Reference No: 200901989
Decision Date: 18 June 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Ms Saren asked the City of Edinburgh Council (the Council) for information relating to the appointment and re-appointment of non-executive directors and the chairman of Lothian Buses plc.

The Council initially directed her to certain documents on its website and advised that this information was exempt from disclosure under section 25(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Ms Saren was not satisfied with this response. Following a review, the Council provided additional documents identified during a second search. Ms Saren remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that the Council had failed to comply in full with section 1(1) of FOISA in failing to identify and provide all information covered by the terms of Ms Saren's request. As the Council had identified and provided the remaining information during the course of the investigation, the Commissioner did not require the Council to take any further steps in relation to this matter.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 8(1) (Requesting information); 15(1) (Duty to provide advice and assistance) and 25(1) (Information otherwise accessible)

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



Background

1. On 15 May 2009, Ms Saren wrote to ask the Council for:
... information recorded in any format from 15 October 2008 onwards, in relation to Lothian Buses which mentions any of the following:
 - Jane Saren
 - Appointment of non-executive directors
 - Re-appointment of non-executive directors
 - Recruitment of non-executive directors
 - Appointment of chairman
 - Change of chairman
2. On 16 June 2009, the Council advised Ms Saren that it had identified three documents containing information relevant to her request. These consisted of two committee reports and one minute of a meeting of the Policy and Strategy Committee on 12 May 2009. It stated that these documents were available from the Council's website, and were therefore exempt from release under section 25(1) of FOISA. The Council provided details of how to find the documents on its website.
3. The Council also stated that section 1(3) of FOISA requires a person who requests information to provide sufficient information to allow the requested information to be identified and located. It stated that Ms Saren had not specified any particular document or the nature or class of document which would contain the information in which she was interested.
4. On 22 June 2009, Ms Saren requested a review of the response received from the Council. She was not satisfied that all relevant information had been identified in relation to her request, and gave examples of the types of information she was seeking. She reminded the Council that her request applied to all recorded information in any format and was not limited to documents.
5. On 23 July 2009, the Council issued its response to Ms Saren's request for review. It noted that Ms Saren had clarified that in addition to information recorded in formal reports and minutes, she also required information recorded in early drafts of reports, notes of meetings, notes used to compile reports, and emails and written correspondence. The Council advised that it did not hold any early drafts of reports, as its normal practice was to over-write draft reports. It advised that there were no notes of meetings, emails, written correspondence or other information held in recorded form that fell within the scope of her request, other than three documents which it listed.



6. The Council provided a copy of the three documents. These included a draft advert for the appointment of non-executive directors, and the role and job description of non-executive directors. Noting that they were undated, the Council stated that it was unable to determine whether these first two documents fell within the scope of her request. The remaining document was a letter from the Chief Executive of the Council to the Finance Director of Lothian Buses dated 12 July 2009. The Council stated that there was no information in this letter which was not also recorded in the Policy and Strategy Committee meeting minute of 12 May 2009 (see paragraph 2 above). The Council indicated that that as Ms Saren's request was for information recorded in any format, the non-release of this letter was not considered to have been a breach of FOISA.
7. On 16 November 2009, Ms Saren wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA. She outlined three reasons for dissatisfaction:
 - a) The Council had failed to deal properly with her initial request. She had provided sufficient specification of the information she sought to allow that information to be identified.
 - b) She believed that the Council continued to withhold information which fell within the scope of her request. She had had sight of correspondence between a senior officer of the Council and an elected member which strongly suggested that this was the case.
 - c) She did not accept that the Council held no notes whatsoever in relation to the drafting of reports for Committees.
8. The application was validated by establishing that Ms Saren 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 allocated to an investigating officer.

Investigation

9. On 3 December 2009, the investigating officer wrote to Ms Saren to ask for further details of the correspondence she had seen and which she believed suggested that further relevant information was held (paragraph 7 above). On 6 December 2009, Ms Saren explained that she was concerned to protect the source of her information about this correspondence. Ms Saren was advised that it would be difficult to make specific enquiries about the existence of such correspondence without disclosing details to the Council. It was agreed with her that the investigation of her case would start with general enquiries to the Council about the extent of the searches carried out in relation to her request
10. On 14 December 2009, the Council was notified in writing that an application had been received from Ms Saren and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA).



11. The Council was asked how it established that it did not hold any additional recorded information covered by the terms of Ms Saren's request. The Council was asked to provide details of any searches or enquiries carried out in relation to emails or other correspondence mentioning the subjects listed in Ms Saren's request of 15 May 2009. It was asked to provide a brief explanation of any information management system or filing system it used, particularly in relation to senior officials' email or paper correspondence.
12. The Council was also asked whether any informal meetings took place between 15 October 2008 and 12 May 2009 in which the subjects referred to in Ms Saren's request were discussed. If so, the Council was asked which officials were involved and whether they had been contacted in relation to Ms Saren's information request.
13. The Council replied on 19 January 2010. It did not address all the questions raised in the letter of 3 December 2009, but explained that an additional search had been carried out using the key words included in Ms Saren's request. This had revealed another two documents (one email and one email string), which the Council was willing to release to Ms Saren. The Council commented that the single email did not relate to the focus of Ms Saren's request, but mentioned her as one of the recipients. The email string included several of the key words, but the Council did not consider it provided any information specifically referenced in Ms Saren's request which she would not already possess, or which was not already in the public domain.
14. The Council advised that information relating to the focus of Ms Saren's request would be held by the Chief Executive's Business Manager and the Contracts Manager, who was responsible for making the non-executive director recruitment arrangements. Both of these individuals had been consulted and had provided full access to the relevant files, including email. Together with the Chief Executive, they had confirmed that they were unaware of any further information relevant to Ms Saren's request, held in recorded form by the Council.
15. The Council commented on Ms Saren's assertion that she had knowledge of certain correspondence which had led her to believe that the Council was withholding information. The Council stated that it was unaware of the existence of such correspondence, and that it was unclear why Ms Saren had not made this known to the Council in order for it to ascertain whether such information existed. It undertook to look into this matter if further details could be provided.
16. The emails referred to in paragraph 13 above were sent to Ms Saren on 2 February 2010. The investigating officer asked Ms Saren whether she was satisfied by the extent of the search undertaken by the Council. She was advised that if further investigation were to be carried out in relation to the correspondence she knew to have existed, some additional details would be required to show why further enquiries on this point would be justified.
17. Ms Saren did not provide any further details of the correspondence in question.



Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Ms Saren and the Council and is satisfied that no matter of relevance has been overlooked.
19. Ms Saren's grounds for dissatisfaction with the Council's response can be summarised under two headings:
- a) she believed she had provided the Council with sufficient detail to permit identification of the information covered by her request;
 - b) the Council had failed to identify all information covered by her request.

These issues will be considered in turn in this decision notice.

Identification of information covered by Ms Saren's request

20. In its response to Ms Saren's request, the Council stated that section 1(3) of FOISA requires a person who requests information to provide sufficient information to allow the requested information to be identified and located. It noted that Ms Saren had not specified any particular document or the nature or class of document which would contain the information in which she was interested.
21. The rights under FOISA extend to information rather than documents, or copies of documents. The Commissioner has recently issued guidance¹ which explains this, and which also states:
- "Section 8 of FOISA provides that an applicant must describe the information requested. The purpose of this description, as section 1(3) makes clear, is to allow a public authority to identify and locate the information."
22. Section 1(3) provides that if the public authority requires further information in order to identify and locate the requested information, *and has told the applicant so (specifying what the requirement for further information is)*, it is not obliged to give the requested information until the further information has been received, provided the requirement is reasonable.
23. The Commissioner is satisfied that, in terms of section 8 of FOISA, Ms Saren's request clearly described the information she sought. He believes the Council misinterpreted section 1(3) of FOISA when responding to Ms Saren's request. Rather than requiring a requestor to provide sufficient information to allow the requested information to be identified and located, section 1(3) places the onus on the public authority to ask for further information from the applicant if this is required. The Commissioner considers that if the Council reasonably required further information from Ms Saren in order to identify and locate the information she had asked for, it should have asked her to provide such information. The Council did not do so.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/CourtofSessionGuidance2010/Validrequests.asp>



24. The Commissioner notes that Ms Saren asked for “information recorded in any format” which mentioned the subjects she listed. He takes the view that in expecting Ms Saren to identify particular documents or classes of document containing the information she sought, the Council misinterpreted section 1(3) of FOISA, and failed to consider its duty under section 15(1) of FOISA to provide reasonable advice and assistance to a person who proposes to make, or has made, a request for information.
25. The Commissioner believes it is unreasonable to expect every applicant to be able to identify the precise documents containing the information they need, or to have sufficient knowledge of the public authority’s information holdings to identify the classes of documents which might contain it. Rather, the public authority should be able to advise the applicant on the range of information which could potentially fall within their request, and, where necessary, help the applicant to refine the terms of their request. If the Council genuinely believed Ms Saren had failed to make clear what information she sought, the Commissioner considers that under section 15(1) of FOISA it had a duty to provide her with reasonable advice and assistance to frame her request.
26. Section 1(1) of FOISA gives a general right of access to all recorded information held by Scottish public authorities. It would have been reasonable for the Council to expect to search widely for information in response to a request which had been broadly framed (“information recorded in any format”), and unreasonable to expect Ms Saren to have more knowledge of the Council's information holdings (i.e. specific documents or classes of document) than was available to the officers responsible for responding to her request.

Adequacy of searches carried out in response to Ms Saren’s request

27. The Commissioner has made enquiries about the extent of the searches carried out by the Council to identify information covered by the terms of Ms Saren’s request. He notes that in reviewing its response to Ms Saren’s request, the Council appears to have widened its initial search to include the types of document mentioned in her request for review, and that this search produced one additional letter and two undated documents relating to the recruitment of non-executive directors. He notes that a further search carried out during the investigation of Ms Saren’s case identified one additional email and an additional string of emails.
28. The Council considered that, although Ms Saren was mentioned as a recipient of the single email retrieved during the final search, it did not relate to the focus of Ms Saren’s request.
29. The Commissioner notes that Ms Saren asked for recorded information which “mentions” certain key subjects. He considers that the information in the email falls within the scope of Ms Saren’s request, as expressed, and that its disclosure should have been considered when the Council first responded to her request.
30. The Council considered that the string of emails retrieved during the final search did not provide any information specifically referenced in Ms Saren’s request which she would not already possess, or which was not already in the public domain.



31. The Commissioner considers that the information in the string of emails falls within the scope of Ms Saren's request, and that the Council should have identified this information and considered its disclosure when responding to her request. If the Council had reason to believe that Ms Saren was already in possession of all or some of the information in the emails, it was open to the Council to apply the exemption in section 25(1) of FOISA, which exempts information which is otherwise accessible to the applicant, and to issue an appropriate refusal notice in accordance with section 16 of FOISA. Information which is already in the public domain would likewise be exempt from disclosure under section 25(1).
32. In failing to provide the information in the emails or to issue a refusal notice, the Council failed to comply with section 1(1) of FOISA, which states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority (unless the provisions listed in section 1(6) apply).
33. The Commissioner has concluded that the initial searches carried out by the Council were insufficient to identify all information covered by the terms of Ms Saren's request, as each subsequent search revealed further relevant information.
34. The Commissioner is satisfied that the Council has now completed internal enquiries and searches of its records which would reasonably be expected to retrieve information covered by the terms of Ms Saren's request, by using the keywords specified in her request and consulting the officials likely to hold information relating to her request. In the Commissioner's view, however, such a search should have been carried out at the time Ms Saren made her request (or, at the latest, in response to her request for review).
35. The Commissioner notes that Ms Saren believes that the Council continues to hold additional information which would fall within the scope of her request, but which has not been retrieved by the searches carried out so far. However, in the absence of further detail to inform inquiries, the Commissioner has concluded that the available evidence shows the Council has now carried out searches and enquiries which would reasonably be expected to identify information covered by her request, and he does not require any further action from the Council on this point.

DECISION

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply in full with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Saren. While the Council correctly identified and provided her with some information, it failed to identify and provide other information which was also covered by her request, and so failed to comply in full with section 1(1) of FOISA.

As the Council has now identified and provided the remaining information, the Commissioner does not require it to take further steps in relation to this failure.



Appeal

Should either Ms Saren or City of Edinburgh 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 notice.

Margaret Keyse
Head of Enforcement
18 June 2010



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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-
- (a) is 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) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.

...



15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...