

# Decision Notice



Decision 150/2010 Mr David Brown and Aberdeenshire Council

Information relating to a single status appeal

Reference No: 200902026

Decision Date: 25 August 2010

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**Kevin Dunion**

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## Summary

Mr David Brown (Mr Brown) requested from Aberdeenshire Council (the Council) all material relating to a single status appeal. The Council released some information, but advised Mr Brown that it did not hold some of the information. Following a review, Mr Brown remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council complied with Part 1 of FOISA in advising Mr Brown that it did not hold the information in question. The Commissioner found, in line with section 1(4) of FOISA, that the Council held the information when it received the information request from Mr Brown, but that by the time the information request was processed, the information had been destroyed. The Commissioner also found, in terms of section 1(5) of FOISA, that it had not been reasonably practicable for the Council to have prevented such destruction.

However, the Commissioner considered that the Council had failed to comply with its duty under section 15(1) of FOISA to provide reasonable advice and assistance to Mr Brown by failing to explain why it had not been reasonably practicable to prevent the destruction of information after he had made a request for it. The Commissioner also made some suggestions as to future training of appeal panels on freedom of information.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1), (4), (5) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Information not held) and 65 (Offence of altering etc. records with intent to prevent disclosure)

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 18 September 2009, Mr Brown attended a single status appeal as an employee of the Council and, at the end of the appeal hearing, handed a freedom of information request to the Appeal Panel in a sealed envelope. His information request was for all material relating to the decision outcome of the formal appeal, to include the notes made both at the hearing and subsequently as a consequence of it.



2. The Council responded on 15 October 2009. The letter from the Council stated that it had received Mr Brown's request on 21 September 2009. The Council released some information to Mr Brown but advised him that other information (specifically, the notes made at the hearing) had been destroyed on the day of the hearing.
3. On 21 October 2009, Mr Brown wrote to the Council requesting a review of its decision. Mr Brown stated that he had particularly wished to see the notes made by the panel during the course of the formal appeal. He also stated that he felt the Council had disregarded the spirit and letter of FOISA in destroying the handwritten notes after the Panel hearing.
4. The Council notified Mr Brown of the outcome of its review on 17 November 2009, which was to uphold its original decision that all the relevant information held by it had been provided to Mr Brown.
5. On 20 November 2009, Mr Brown 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 Brown 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. The investigating officer subsequently 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. In particular, the Council was asked for details of the appeal panel hearing proceedings and its document destruction processes and about the searches it carried out for the information.
8. Mr Brown was also asked by the investigating officer for his comments and for his recollections of the events of the day of the appeal hearing.
9. Both the Council and Mr Brown provided their submissions on their recollections of the events of the appeal hearing in question.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr Brown and the Council and is satisfied that no matter of relevance has been overlooked.



11. The Commissioner must firstly consider whether the Council held the handwritten notes made by the panel at the time of Mr Brown's information request. If he finds that these notes were held at that time, then he will go on to consider whether it was reasonably practicable to prevent the destruction of the notes at the end of the appeal hearing.
12. In order to determine whether the Council dealt with Mr Brown's request correctly, the Commissioner must be satisfied as to whether the Council held any information which would fall within the scope of his request. In this case Mr Brown is appealing to the Commissioner on the grounds that the Council did not provide him with the handwritten notes made by the panel members on the day of the formal appeal, which he believes were held by the Council at the time of his request.
13. In terms of section 1(1) of FOISA, a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority (although this right is subject to restrictions set out in section 1(6) of FOISA).
14. Section 1(4) makes it clear that the information to be given by the authority is that held by it at the time the request is received, except for (subject to section 1(5)) any amendment or deletion which would have been made, regardless of the receipt of the request, between the time the request is received and the time it gives the information.
15. Section 1(5) states that requested information is not, by virtue of section 1(4), to be destroyed before it can be given, unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring.
16. Both Mr Brown and the Council stated that, at the commencement of proceedings on the afternoon of Friday 18 September 2009, the Chair of the Appeal Panel had made it clear to all present that the Panel's notes would be destroyed directly after the hearing.
17. Mr Brown advised the Commissioner that he handed his information request, in an envelope addressed to the Single Status Appeals Team, to the Appeal Panel before the conclusion of the Panel Hearing. The Council confirmed that the Panel received such an envelope before the conclusion of the hearing.
18. The Council advised the Commissioner that the Appeal Panel recollected a woman handing an envelope to the Panel. This raises the question of whether, in fact, more than one envelope had been handed over. However, both the Appeal Panel and Mr Brown recollect that only one envelope was handed over to the Panel. Having considered the circumstances of the case, the Commissioner has come to the conclusion that the envelope which was passed to the Panel contained Mr Brown's information request, albeit that Mr Brown may have passed the envelope to the Panel via a woman sitting closer to them.
19. Mr Brown advised the Commissioner that he had informed the Appeal Panel that the envelope contained a freedom of information request. Mr Brown recollected saying words along the lines of, "Well, I expect this is no surprise, but this is a freedom of information request".



20. The Council, on the other hand, stated that the contents of the envelope were not divulged to the Appeal Panel.
21. The Council explained that the Appeal Panel was made up of a Chairperson, a Union Representative and a Management Representative, who were all Council employees. The Council also explained that the Single Status Appeal Panel was not the same thing as the Single Status Appeals Team. The Council noted that Mr Brown had addressed his information request to the Single Status Appeals Team and advised that any correspondence to the Single Status Appeals Team would normally go through the Single Status Appeals Team Leader.
22. The Council stated that Mr Brown's envelope was placed in the in-tray for the Single Status Appeals Team Leader.
23. The circumstances of this case are highly unusual. If the information request regarding the notes had been made the day prior to the hearing taking place, clearly no information would have existed as no notes would have yet been taken. If the request had been made a day later, clearly the information would not be held as the information would have been destroyed immediately after the appeal hearing, following the stated procedure.
24. There was, then, an extremely narrow window of opportunity for a request to be made for information which was held, which was effectively towards the end of the appeal hearing when notes had been taken, but had not yet been destroyed. This is precisely what happened.
25. The Commissioner is satisfied that Mr Brown made an information request on the afternoon of Friday 18 September 2009 and accepts that it is likely that Mr Brown did inform someone that the envelope contained a freedom of information request, although this may not have been a member of the actual Panel.
26. The Council maintains that the envelope was actually addressed by name to the team leader. Mr Brown disputes this, on the grounds that he was not aware of the identity of the team leader at that time. The Commissioner is not in a position now to establish the facts of the matter. He notes, however, that the letter from Mr Brown is addressed simply to the 'Single Status Appeals Team, Aberdeenshire Council' and the appellation is 'Dear Single Status Team.' It would be surprising therefore if the envelope alone carried the name of a specific individual.
27. However, what does not appear to be in dispute is that the letter and envelope was intended for the Single Status Appeals Team. It appears to the Commissioner, from the submissions made by the Council, that the Appeal Panel treated Mr Brown's request as being intended for actioning by the Single Status Appeals Team to which the envelope was addressed and that they (the Appeal Panel) saw themselves as merely a conduit for passing on the request to the named team.



28. The Commissioner notes that, as the letter was contained in an envelope which was not opened by the Appeal Panel, the Appeal Panel did not know that Mr Brown was specifically asking for the Panel's handwritten notes to be included in the information he was requesting. It is perhaps unfortunate that Mr Brown did not make it clear to the Panel itself that his request included the notes prepared by the Panel during the hearing.
29. However, regardless of this, the Commissioner must conclude that a freedom of Information request was made to the Council by Mr Brown on the afternoon of 18 September 2009 and that once the envelope had been accepted by the Appeal Panel (which was, according to the Council, entirely made up of Council employees), it was at that point that the Council received the request.
30. The request was received before the end of the hearing, and before the point at which the notes from the hearing were destroyed. The Commissioner therefore finds that at the time of the receipt of Mr Brown's information request, the handwritten notes of the Appeal Panel were held by the Council.
31. As noted above, section 1(4) of FOISA states that the information to be given by the authority is that held by it at the time the request is received. However this section, read in conjunction with section 1(5), allows information to be amended or deleted if the amendment or deletion would have been made regardless of whether a request was made for the information, subject to the proviso that information is not to be destroyed unless it is not reasonably practicable to prevent the destruction.
32. If the Chairman or some other member of the panel had read the request, then it would have been clear that the information in their notes were relevant to the request and it was reasonably practicable for them to prevent destruction by suspending their usual procedure regarding disposal at the end of the hearing. Mr Brown may have believed that by handing in a request this is what would happen.
33. However, on the basis of the submissions made by both parties, the Commissioner is of the view that it was not reasonably practicable to prevent the destruction of the handwritten notes at the end of the appeal hearing, given that:
  - the information request was in a sealed envelope addressed to the Single Status Appeals Team and not to the Single Status Appeal Panel
  - the Appeal Panel members were not aware of the precise nature of the request and did not have sight of the actual wording of Mr Brown's request
  - Mr Brown did not directly ask the Appeal Panel to retain their handwritten notes, although he knew that the Panel intended to destroy them at the end of the hearing.





34. In the circumstances, therefore, the Commissioner accepts that it was always the intent of the Appeal Panel to destroy its handwritten notes at the end of the hearing, and that the Panel did not destroy the notes specifically in response to Mr Brown's information request. If that had been the case, then there is the possibility that a criminal offence would have been committed under section 65(1) of FOISA.
35. If the Appeal Panel had known the content of Mr Brown's information request at the time of his handing it over (in particular his reference to the Panel's handwritten notes), then it may have been reasonably practicable to prevent the destruction from happening.
36. Under section 17(1) of FOISA, a public authority which receives a request for information which it does not hold, must advise the applicant that it does not hold the information. This is what the Council did in this case. Although the Commissioner is satisfied that the Council did hold the information at the time of receipt of the request, the Commissioner considers that this was the correct approach, given that the information had been deleted shortly after the request was received, and given the terms of section 1(4) and (5) of FOISA.

#### *Section 15 (Duty to provide advice and assistance)*

37. In terms of section 15(1) of FOISA, 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.
38. In responding to Mr Brown's request (and subsequent request for review), the Council advised Mr Brown that the documents in question had been destroyed on the day of the appeal. On review, the Council also advised Mr Brown that it was not within the remit of the review panel to decide whether the information should have been destroyed.
39. The Commissioner does not agree entirely with this last point. While he agrees that it may not have been within the remit of the review panel to decide whether the information *should have been destroyed*, he considers, in line with section 1(4) of FOISA, that it was within the remit of the review panel to consider whether it had been *reasonably practicable* to prevent such destruction from occurring.
40. In any event he considers that, by failing to explain to Mr Brown why it had not been reasonably practicable to have prevented such destruction from occurring, the Council failed to comply with section 15(1) of FOISA.

#### *Records management issues*

41. It is clear that the policy of the Panel is to destroy all notes taken by members in the course of a hearing immediately after a hearing has taken place. The Commissioner notes that the Council's guidance on single status appeals states:

"Documentation relating to an Appeal whilst in our possession should be retained securely till the conclusion of the Appeals process. After a decision has been reached, Panel Members must return all documents relating to the Appeal to the Chair for disposal."



He also notes that the Appeals Panel Script states:

“We will be taking notes to help us with the decision making process but they will be destroyed after the hearing.”

42. This means that it is difficult to make a request for such information under the provisions of FOISA. On this point, the Council has submitted that, to its knowledge, no freedom of information request had ever been received previously by an Appeal Panel.
43. Indeed, the Council has suggested that an Appeal Panel would not necessarily know how to process an information request. If that is so, then it should be remedied.
44. As this case shows, the fact of the policy and practice of destroying information does not absolve the Panel from FOISA obligations. The outcome of this case could have been quite different if it had been found that the Panel was fully aware that a request for the information which it held had been made before they destroyed the notes, e.g. if the letter had been addressed to and received by the Chairman of the Panel before the end of the hearing, or it was clear that any of the panel members was fully aware of the content of the letter addressed to the Single Status Appeal Team.
45. In circumstances where information is being destroyed, it is essential that the Panel is aware of the rights and obligations arising under FOISA and that there is clear guidance provided to it should there be reason to believe that a request for that information has been made. In particular, procedures should be in place to avoid information being destroyed which may be relevant to a request.
46. The Commissioner recommends that the Council considers its records management procedures and the guidance it provides to the Panel in the light of the above.

## DECISION

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

He finds that the Council was entitled to advise Mr Brown that it did not hold the information in question. However, he finds that, in failing to explain why it had not been reasonably practicable to prevent the destruction of information after Mr Brown had made a request for it, the Council failed to comply with Part 1, and in particular with section 15(1), of FOISA.





## Appeal

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Should either Aberdeenshire Council or Mr Brown 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**25 August 2010**



## 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.
- ...
- (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.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- (6) This section is subject to sections 2, 9, 12, and 14.

##### 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.

...



**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); or
  - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(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.

...

**65 Offence of altering etc. records with intent to prevent disclosure**

(1) Where –

- (a) a request for information is made to a Scottish public authority; and
- (b) the applicant is, under section 1, entitled to be given the information or any part of it,

a person to whom this subsection applies who, with the intention of preventing the disclosure by the authority of the information, or part, to which the entitlement relates, alters, defaces, blocks, erases destroys or conceals a record held by the authority, is guilty of an offence.

- (2) Subsection (1) applies to the authority and to any person who is employed by, is an officer of, or is subject to the direction of, the authority.
- (3) A person guilty of an offence under subsection (1) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.