



Scottish Information
Commissioner

**Decision 177/2006 Mr Donald MacKintosh and the
Scottish Executive**

*Request for a copy of a map submitted to a Public Local Inquiry
held in 1993*

**Applicant: Mr Donald MacKintosh
Authority: The Scottish Executive
Case No: 200600497
Decision Date: 3 October 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 177/2006 Mr Donald MacKintosh and the Scottish Executive

Request for a copy of a map submitted to a Public Local Inquiry held in 1993 – whether the information falls under the remit of the Environmental Information (Scotland) Regulations 2004 – whether the information is held for the purposes of the Freedom of Information (Scotland) Act 2002

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 17 (Notice that information is not held); 19 (Content of certain notices); 21(1) and 21(10) (Review by Scottish public authority)

The Environmental Information Regulations (Scotland) 2004 regulation 2(1) (interpretation)

Facts

Mr MacKintosh requested a copy of a map submitted to a Public Local Inquiry held in 1993 from the Scottish Executive (the Executive). The Executive responded stating that it no longer held the map and adhered to this position when Mr MacKintosh requested a review. Mr MacKintosh remained dissatisfied with the Executive's response and applied to the Scottish Information Commissioner for a decision. Following investigation the Commissioner found that the map was not held by the authority and therefore that it had dealt with Mr MacKintosh's request in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) subject to breaches of certain technical requirements.

Background

1. On 3 November 2005, Mr MacKintosh requested from the Executive a copy of a map submitted to a Public Local Inquiry held in 1993.



2. The Executive responded on 10 November 2005, stating that the file containing the map had been destroyed in line with its document retention policy.
3. Mr MacKintosh responded to the Executive on 21 November 2005, requesting that it review its response.
4. On 24 February 2006, the Executive wrote to Mr MacKintosh, informing him that the 2 parts of the file in which the map would have been kept appeared to have become separated. The first part of the file was destroyed in 2004 in line with the Executive's document retention policy. The second part of the file had been misplaced. The authority went on to assure the applicant that the map would in any event have been returned to the individual who had submitted it to the Public Local Inquiry.
5. Mr MacKintosh remained dissatisfied with the outcome of the review and on 27 February 2006 applied to me for a decision as to whether the Executive had dealt with his request for information in terms of FOISA. He was of the view that the Executive held a copy of the map, despite it having been returned to the individual who had originally submitted it. The case was allocated to an investigating officer and the application validated by establishing that Mr MacKintosh had made a request for information to a Scottish public authority and had applied to me only after asking the authority to review its response to his request.

The Investigation

6. The officer formally contacted the Executive on 24 March 2006 in terms of section 49(3) of FOISA, asking it to comment on the application as a whole, and in particular on possible procedural breaches of FOISA, whether the information requested fell under the remit of the Environmental Information Regulations (Scotland) 2004 (the EIRs), the Executive's document retention and destruction arrangements and how the search for the map was carried out.
7. The Executive responded on 6 April 2006, providing comments and copies of relevant documents. The Executive explained that Mr MacKintosh had requested a copy of a map submitted to a Public Local Inquiry into a planning decision by Argyll and Bute Council. The Public Local Inquiry was held in June 1993 and the map was submitted as part of evidence given by a witness. The Executive advised that, during such Inquiries, all off the documents connected with the case require to be made available for public inspection.



8. The Executive accepted that it had breached certain technical requirements of FOISA in responding to Mr MacKintosh's request and subsequent request for review. It apologised for this, but outlined that it had, during its correspondence with the applicant, attempted to provide him with as much information and advice as possible.
9. The Executive addressed the point of whether the map fell under the definition of environmental information for the purposes of the EIRs, but concluded that the information (being a map of the area, not information as to its state) fell under the remit of FOISA.
10. In its response, the Executive gave an outline of the search methods used to determine that the file which held the information requested by Mr MacKintosh which had been mislaid. It informed the officer that it had subsequently found the remainder of the file, which had been mislaid temporarily between the review being carried out and notice of the outcome of the review being written. The file had been found not to contain the map requested by Mr MacKintosh.
11. The Executive also provided evidence to show that the map requested by the applicant had been returned to the individual who had submitted it to the Public Local Inquiry, a copy of the Town and Country Planning Appeals (Determination by Appointed Person) (Inquiries Procedure)(Scotland) Rules 1980 (SI 1980/1677) and relative guidance, and a copy of the relevant section of its document retention policy held within its Records Management Manual.

The Commissioner's Analysis and Findings

12. In coming to a decision on this matter I have considered 3 main issues: firstly, whether the information requested comes under the ambit of the EIRs; secondly, whether the authority held the information requested by the applicant; and finally procedural or technical breaches of FOISA in the Executive's responses to Mr MacKintosh.

Whether the information falls under the remit of the EIRs

13. Mr Mackintosh requested a map of an area of land submitted to a Public Local Inquiry. On first sight, the investigating officer questioned whether such a map would fall within the definition of environmental information as set out in regulation 2(1) of the EIRs. She asked the Executive to comment on whether it had considered this in responding to the applicant.



14. The Executive responded in its letter of 6 April 2006 that it did not consider the information requested to fall within the ambit of the EIRs. This was because the request related to a map of an area, the planning permission for which was under dispute. The area was then subject to a Public Local Inquiry. The Executive did not consider this to be strictly within the parameters of the EIRs, as the map itself did not constitute information which related to the state of the environment, or related to measures and activities which would affect the environment.
15. It is arguable that a map submitted to a Public Local Inquiry might contain environmental information within the meaning of regulation 2(1). Whether the information contained within any particular document does fall within that definition will depend on the nature of the information. In this case, I have been unable to answer the question conclusively as the map in question is not available to me to consider. In any event, however, the main question for me to determine in this decision has been whether the information in question was held by the Executive. In the circumstances of this case, the status of the information as environmental or otherwise could have no bearing on that determination. Therefore, I do not consider the issue of which statutory regime the information falls within to be material to the outcome of this case and I will continue to consider it as the Executive did, under FOISA.

Whether the Executive holds the information requested by the applicant

16. Mr MacKintosh has requested a copy of a map submitted by an individual as evidence to a Public Local Appeal held in 1993. Initially the Executive stated that the file containing the map had been destroyed in line with its document retention policy. In response to the applicant's request for review, the Executive clarified that only part of the file had been destroyed, the remaining section of the file having gone astray. The Executive also advised Mr MacKintosh that, in any case, the map would have been returned to the individual who had submitted it as evidence following the outcome of the Public Local Inquiry, and so it would not have been retained within the file.
17. In its submissions to me, the Executive outlined the methodology it used to search for the information which had been requested by Mr MacKintosh. The Executive also stated that after the applicant had applied to me for decision on the matter it had found the remaining section of the file (which had been available for consideration at the time of the review and had only disappeared thereafter) and had searched it thoroughly to ensure that it did not hold a copy of the map.
18. The Executive also provided a copy of its records management manual which stipulated that files of this nature should be destroyed 10 years after closure.



19. In reference to the map itself, the Executive clarified to me that normally documents of this type would be returned to the individual who had submitted them to the Public Local Inquiry after the outcome of the Inquiry, in this case in 1993. However, the Executive had inadvertently retained this particular map until 1999, at which point it returned the map to the individual. The Executive provided a copy of the letter it sent to that individual enclosing a copy of the map as evidence that it had done so.
20. Finally, the Executive provided copies of correspondence preceding Mr MacKintosh's request made under FOISA, which explained to him that he should contact the individual who had submitted the map to the Public Local Inquiry directly should he wish to access a copy of it.
21. The Executive has provided me with sufficient evidence to show that it gave the map back to the individual who had retained it. I am also satisfied that the first part of the file which would have contained the map has been destroyed in line with its document retention policy. Finally, I am satisfied that the remaining part of the file, temporarily lost by the Executive, has been adequately searched and did not contain a copy of the map. In all the circumstances, I see no reason why a copy of the map should have been retained by the Executive at the time of Mr MacKintosh's request. In conclusion, I find that the Executive has carried out all reasonable steps to locate the information requested by the applicant and has shown that it does not (and did not at the time of the request) hold a copy of that information. I would add, however, that a more comprehensive and accurate explanation of the temporary disappearance of the file might have been helpful when the Executive responded to Mr MacKintosh's request for review.

Technical requirements of FOISA

22. Although the Executive responded to Mr MacKintosh's request for information, it made certain procedural errors in carrying out that response.
23. The authority did not provide Mr Mackintosh with details of the applicant's rights to seek a review from the authority and appeal to me in responding to his initial request, or his rights to appeal to me and the Court of Session in responding to his request for review. Therefore the authority breached sections 19 and 21(10) of FOISA in responding to the applicant's request for information and his request for review.
24. The Executive failed to respond to Mr MacKintosh's request for review within 20 working days of receiving that request and so breached section 21(1) of FOISA.



25. I am aware that the Executive has provided the applicant with advice and assistance throughout the process of his request. I am also aware that the Executive has accepted responsibility for these breaches in its submissions to me and that these have not prejudiced the applicant in the exercise of his rights under FOISA. Accordingly, I do not require the Executive to take any action to remedy the procedural breaches of FOISA.

Decision

I am satisfied that the Executive does not (and did not at the time of the request) hold a copy of the information which was requested by Mr MacKintosh and therefore find that the Executive was not under a duty to provide Mr MacKintosh with the information and applied section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA) correctly in this connection.

However, I also find that the Scottish Executive failed to comply with certain requirements of Part 1 of FOISA in responding to Mr MacKintosh's request. In particular I find that the Executive breached sections 19, 21(1) and 21(10) of FOISA, as set out above. I do not require the Executive to take any action as a consequence of these breaches.

Appeal

Should either Mr MacKintosh or the Scottish Executive wish to appeal against the decision, there is a right to 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
3 October 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

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.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

(a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and

(b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.



(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 a statement of 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.

The Environmental Information Regulations (Scotland) 2004:

Interpretation

2. - (1) In these Regulations-

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;



(d) reports on the implementation of environmental legislation;

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).