

Decision Notice



Decision 198/2011 Mr D and Fife Council

Information on repair work undertaken at a named address

Reference No: 201001723

Decision Date: 30 September 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr D requested from Fife Council (the Council) copies of all correspondence (including workmen's reports) regarding repair issues at his address. The Council failed to respond to this request. Following a review, in which the Council disclosed some information to Mr D and sought confirmation as to whether he wished to access other information falling within the scope of his request, Mr D remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially dealt with Mr D's request for information in accordance with Part 1 of FOISA, by disclosing some information to him. However, the Council had failed to identify and supply other information falling within the scope of his request, and in so doing it breached section 1(1) of FOISA. The Commissioner also found that the Council failed to comply with the timescales set out in section 10(1) of FOISA by not responding to Mr D's initial request within 20 working days.

The Council disclosed further information to Mr D's satisfaction during the investigation, and so the Commissioner did not require the Council to take any action in response to this decision. However, he expressed serious concerns about the Council's handling of Mr D's information request and its conduct during the investigation.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement) and 10(1) (Time for compliance)

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

1. On 25 June 2010, Mr D wrote to the Council requesting copies of all correspondence, including notes regarding all the repair issues, and copies of workmen's reports for his address, from January 2002 to date.
2. The Council acknowledged receipt of Mr D's information request, but failed to provide a response.



3. On 30 July 2010, Mr D wrote to the Council requesting a review of its handling of his request, drawing the Council's attention to its failure to supply him with the information he had requested.
4. The Council notified Mr D of the outcome of its review on 26 August 2010. In its response, the Council supplied Mr D with a report in respect of a site visit, and a list of all jobs carried out at his address by its Building Services. It advised Mr D that it also held information about these visits, including who attended the job, for how long, and the materials booked for the job. Additionally, it explained that it held printed documents such as the job ticket and time sheet. The Council indicated that it had not supplied this data as it was unsure if Mr D wanted such information to be included within the scope of his request. The Council asked Mr D to confirm whether he did require this information.
5. Mr D responded to this letter in an email on the same day. He expressed continued dissatisfaction that the Council had not supplied all information falling within the terms of his request. He indicated that he did wish to access the types of information listed by the Council, as well as any further records relating to works at the relevant address.
6. Mr D received no further contact from the Council and, on 30 August 2010, he wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr D 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.

Investigation

8. On 15 September 2010, the Council was notified in writing that an application had been received from Mr D and was asked to provide the Commissioner with any information withheld from him. This was understood to be the information which the Council had identified as falling within the scope of Mr D's request following its review (and which he had confirmed he wished to access), but which had not been supplied to him by that time.
9. It is normal for a public authority to respond to such a request within two weeks. However, the Council did not respond to this request within the expected timescale, and a prolonged exchange of correspondence took place before the Council provided information to allow the Commissioner's investigation to begin.
10. The validation officer sent a first reminder to the Council on 8 October 2010, and the Council responded on 11 October 2010, suggesting that the requested information would be sent the same day. When the information was not received, a second reminder was sent on 18 October 2010.



11. On 19 October 2010, the Council wrote apologising for the delay and indicating that it was having difficulty identifying the information that was being withheld. The Council noted that it had asked Mr D whether he wished to receive further information (but made no reference to his response to this question) and indicated that none of what had been supplied had been held back.
12. The validation officer subsequently sent the Council a copy of Mr D's email of 26 August 2010, in which he made clear that he wished to access all information falling within the terms of his request, including the information identified by the Council but which it had not supplied. The validation officer confirmed that the Commissioner required copies of the information falling within the scope of Mr D's request which had not been supplied to him.
13. On 1 November 2010, the Council indicated that it had collated most of the information requested by Mr D and would be in touch to confirm this shortly. After the validation officer asked for a further update, the Council explained on 11 November 2010 that it had still not collated all of the information. On the same date, the validation officer asked the Council to provide the Commissioner with the information it had collated so far in order to allow the investigation to begin.
14. As a result, on 15 November 2010, two months after receiving the request to provide the information that it had identified but failed to supply to Mr D when responding to his request, the Council provided the Commissioner with *some* of that information. The case was then allocated to an investigating officer.
15. On 24 November 2010, the investigating officer contacted the Council, giving it an opportunity to provide comments on Mr D's application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the investigating officer highlighted that the information supplied on 15 November 2010 did not appear to include all of the types described in the Council's letter to Mr D of 26 August 2010. The Council was asked to confirm the extent of information held by the Council which fell within the terms of Mr D's information request.
16. The Council was also asked to
 - provide details of the searches undertaken to identify relevant recorded information;
 - confirm whether it considered any of the information provided to the Commissioner to be exempt from disclosure under FOISA;
 - confirm whether it had received Mr D's email of 26 August 2010 (in response to its letter confirming the outcome of its review) and
 - confirm whether any further information had been disclosed in response to this communication.



17. The Council responded to this letter on 21 December 2010. It provided further information that it had identified as falling within the scope of Mr D's request and indicated that it would provide Mr D with a copy of this information, with the personal data redacted on the basis that it was exempt from disclosure under section 38(1)(b) of FOISA. It explained that the searches for relevant information had involved three services, and that these searches had focused on Mr D's address.
18. Mr D contacted the investigating officer on 6 January 2011, and confirmed that he had received additional information from the Council. However, he noted that the disclosed information did not contain all of the information that fell within the scope of his request, and so he considered that the Council was still withholding information from him. The investigating officer agreed to raise questions with the Council to address his continued dissatisfaction with its handling of his request.
19. On 14 January 2011, the investigating officer contacted the Council to seek clarification on certain points and further submissions on this case. She highlighted in particular Mr D's concerns that the information supplied to him did not include or explain the omission of any correspondence between Mr D or his solicitor and the Council, or reports made by workmen who had visited his home on numerous occasions. The Council was asked to provide an explanation of the process followed by workmen, and information generated in relation to call outs. The Council was also asked to confirm whether the Council was still withholding any further information from Mr D. The investigating officer also asked the Council to confirm that the information provided to the Commissioner on 15 November 2010 had been disclosed to Mr D, as this was not clear.
20. The Council provided answers to some of the investigating officer's questions on 21 January 2011, but advised that further internal discussion was required before answers could be supplied regarding reports generated by workmen in relation to call outs.
21. The Council explained that it had not considered correspondence between Mr D (and his solicitor) and the Council to fall within the scope of Mr D's information request, since doing so would have required the request to be processed also as a subject access request under the Data Protection Act 1998 (DPA). The Council also indicated that it was of the view that it was not withholding any information from Mr D and that it believed that all of the information provided to the Commissioner on 15 November 2010 and 21 December 2010 had been disclosed to Mr D.
22. The Council provided a response to the outstanding questions concerning records of call outs on 11 February 2011. It provided an overview of the processes involved when it despatches workmen to attend a call at one of its properties, noting that for each call a job sheet is created. The Council indicated that it generates 140,000 job sheets a year as a result of these call outs and it argued that it would have to review all of these documents to identify information relevant to Mr D's request.



23. Given this, the Council submitted that the cost of complying with Mr D's request would exceed the prescribed limit of £600 set out in The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the fees regulations). It indicated that it now wished to refuse Mr D's request on the basis that section 12(1) of FOISA was applicable. (Section 12(1) of FOISA provides that an authority is not obliged to respond to a request where the cost of so doing would exceed the £600 limit.) However, the Council did not provide any evidence of its calculation of the estimated cost of complying with Mr D's request to support its application of section 12(1) of FOISA.
24. On 17 February 2011, the investigating officer contacted the Council and asked for a meeting to discuss the case in the light of this submission, and to enable her to better understand the process and costs that would be involved in complying with Mr D's request. The investigating officer indicated that she would need to see where and how the job sheets were stored by the Council and to gain first hand understanding of how searches for the job sheets would need to be undertaken.
25. The investigating officer visited the Council on 16 March 2011. During this meeting, the Council explained how the job sheets were stored and provided the investigating officer with a list of the job sheets that were relevant to Mr D's address. The Council noted that it did not hold some of the job sheets identified on the list (as they had been deleted in accordance with the Council's retention policy) and that not all of the job sheets related to plumbing jobs (which was the focus of Mr D's interest).
26. The Council indicated that it would be helpful if Mr D could look through the list of job sheets to identify any that he was particularly interested in. The Council advised that if the number of job sheets it had to retrieve was reduced it was more likely to come under the £600 cost limit set out in the Fees Regulations. The investigating officer agreed to ask Mr D to review the list of job sheets and identify ones that he considered to be most relevant to his request.
27. During this meeting, the investigating officer noted that the Council had failed to provide any calculations of estimated costs to support its application of section 12(1). The Council was asked to undertake sample searches for any five of the relevant job sheets and use these as the basis for its estimate of the time it would take to locate all of the relevant sheets, and the associated cost.
28. On 18 March 2011, the investigating officer sent a draft minute of the meeting with the Council, including details of actions agreed, to the Council. As agreed with the Council, she subsequently contacted Mr D and asked him to review the list of job sheets provided by the Council and indicate which he was interested in obtaining. On 22 March 2011, the investigating officer provided the Council with details of the job sheets selected by Mr D. In this email, the investigating officer also reminded the Council that it had agreed to undertake five sample searches of the job sheets, and that it was still to approve the record of the minutes she had provided.



29. On 4 April 2011, the investigation officer contacted the Council and informed it that she was becoming very concerned with the lack of progress in this case. She noted that the Council had yet to confirm whether the draft minutes provided on 18 March 2011 represented an accurate record of the meeting, or whether it had undertaken any of the action points agreed at the meeting.
30. The Council contacted the investigating officer on the same date and confirmed the minutes of the meeting as accurate (with some minor corrections). In a telephone conversation, the investigating officer was advised that initial estimates of costs had been supplied by the department holding the information, but that these would need to be reconsidered to ensure that only costs allowed within the Fees Regulations were included.
31. On 6 April 2011, the Council provided detailed cost estimates resulting from the sample searches of the job sheets. The Council had conducted four of the five requested searches, and it provided estimates of the costs of these searches, which indicated that it had taken three council employees 4.5 hours each to find these four documents. The Council indicated that, as it had calculated the total cost of these four searches as £160, compliance with Mr D's request (which sought more than 40 job sheets) would exceed the £600 set out in the Fees Regulations, and so section 12(1) of FOISA was applicable.
32. On receipt of this email, the investigating officer held meetings with the Commissioner's Deputy Head of Enforcement (DHoE) and Head of Enforcement in order to determine how to take this case forward.
33. On 14 April 2011, the DHoE contacted the Council's Chief Legal Officer raising concerns about the progress on this case. She highlighted difficulties experienced by the Commissioner's staff throughout the investigation to that point, including repeated delays in the provision of information and submissions, and responses to questions which were partial and in some cases contradictory. The DHoE also noted that, after indicating that section 12(1) applied to Mr D's request, the Council had provided cost estimates which provided no explanation to suggest that they were a reasonable estimate of the allowable costs that would be incurred in locating, retrieving and providing the information requested by Mr D.
34. This letter set out the DHoE's concerns that almost eight months after receiving Mr D's application for decision, the investigation had not yet allowed the Commissioner to understand fully what information was held by the Council which fell within the scope of his information request, how it is recorded and could be retrieved, and what, if any, exemptions the Council considered to be applicable to this information. It went on to note that routine communications between the Council and investigating officer had proved unproductive, and so asked for the Chief Legal Officer to intervene to assist colleagues in bringing this matter to a conclusion without any further waste of time and resources.



35. The Council responded on 22 April 2011, apologising for the poor manner in which it had progressed matters to date. The Council indicated that the worksheets are held by the Council's Building Services department, which has a large amount of material which has not been stored or archived correctly, and that this was the reason for the delays in this case. The Council provided clarity on the outstanding matters and indicated that it no longer wished to rely upon section 12(1) of FOISA in relation to Mr D's information request. It indicated that a full-time resource had been allocated to Mr D's request and that all relevant information held by the Council would be disclosed to Mr D.
36. On 6 May 2011, the Council provided Mr D with copies of the job sheets he had requested along with a spreadsheet to help him understand the disclosed information.
37. On 5 July 2011, Mr D confirmed (after additional correspondence between him and the investigating officer) that as he was in possession of most of the information he requested from the Council, he was content for the investigation to end at this point.

Commissioner's analysis and findings

38. Although the investigation has been both long and complex, the matters to be considered by the Commissioner are relatively simple.

Section 10(1) of FOISA – Time for Compliance

39. In his application to the Commissioner, Mr D expressed dissatisfaction at the Council's failure to respond to his request for information within the timescale prescribed in FOISA.
40. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
41. In this case, the Council did not provide a substantive response to Mr D's request of 25 June 2010 within the 20 working days allowed by section 10(1) of FOISA.
42. The Commissioner therefore finds that the Council failed to respond to Mr D's information request within the 20 working days allowed by section 10(1) of FOISA, and in so doing, it breached Part 1 of FOISA in its handling of this request.

Section 1(1) of FOISA – General entitlement

43. Mr D has also expressed dissatisfaction with the Council's failure to provide him with the information he had requested.
44. Section 1(1) of FOISA creates a general entitlement to access information held by a Scottish public authority (subject to the application of any exemptions in Part 2 of FOISA, and any other relevant provision in Part 1).



45. In order to comply with section 1(1), an authority must therefore take steps to identify all information falling within the scope of a request, and provide it to the applicant, unless it is exempt from disclosure under Part 2 of FOISA, or otherwise subject to one or more of the provisions set out in Part 1 of FOISA.
46. It is clear from the Council's response to Mr D's request for review that it held information that would fall within the terms of his request, which was not supplied to him, as it asked Mr D to confirm whether he wished to access this information.
47. Mr D confirmed by return that he did wish to access all information falling within the terms of his information request, which was, in the Commissioner's view, clearly expressed. The Council has stated that it did not receive this confirmation from Mr D (which was correctly addressed and sent by email), and so no further action was taken.
48. It is not necessary for the Commissioner to dwell upon the question of whether the Council did or did not receive this response, since the onus was upon the Council to supply the information falling within the terms of the request. There is no provision in FOISA which allows an authority to respond to a request for review by indicating that relevant information is held, but asking for the applicant's confirmation as to whether it is required before issuing it.
49. Since it is clear that the Council failed to identify and supply the requested information to Mr D's satisfaction until a considerable time after he had applied to the Commissioner, the Commissioner must find that the Council failed to comply with section 1(1) of FOISA in responding to Mr D.
50. However, the Commissioner recognises that the Council did, eventually, identify and release the relevant information to Mr D's satisfaction, and so the Commissioner does not require the Council to take any further action in response to this failure.

Commentary

51. Having reached his formal conclusions above, the Commissioner wishes to highlight his serious concerns about the Council's handling of Mr D's information request, and its conduct during the investigation of this case.
52. While Mr D had obtained the information he wished to access by the end of the investigation, the Commissioner recognises that he quite rightly feels aggrieved that this resolution was not achieved until 11 months after he first made his request. The Commissioner can see no valid reason why the handling of Mr D's request and his investigation should have been subject to such significant delays.
53. It appears that after the Council initially failed to respond to the information request at all, upon review, it failed to properly consider the full extent of information falling within its scope. It assumed that Mr D was not seeking his own correspondence with the Council (and so it neither refused to provide this information, nor processed his request also as a subject access request made under the DPA), and indicated that it was unsure as to whether other information clearly falling within the scope of the request was required by Mr D.



54. The Council's failure to consider fully the information falling within the terms of Mr D's request continued well into the investigation, during which the Council appeared over a long period to be either unable or unwilling to identify the relevant information or provide complete and coherent answers to the questions put forward by the investigating officer.
55. Once it did identify the key information of interest to Mr D, the Council delayed the resolution of this case further by providing inadequate submissions. These failed to properly address the relevant matters, or provide any reasonable justification of the Council's assertion (made almost five months after the Commissioner first asked to be provided with the outstanding information sought by Mr D) that the cost of complying with the request would exceed the £600 prescribed limit.
56. As a result, Mr D has received extremely poor service from the Council, and has been significantly inconvenienced by the delay in obtaining the information he clearly wished to access from the outset. Furthermore, the Commissioner considers a disproportionate amount of his staff's time has been expended in order to resolve this matter.
57. The Commissioner notes that his investigations proceed on a basis of trust between his staff and those of the Scottish public authority concerned. In this case, the information and submissions received from the Council were of such poor quality, that it became difficult for these to be accepted as a reliable basis for the Commissioner to reach an informed decision about the matters raised.
58. Once his DHoE took the unusual step of emailing the Council's Chief Legal Officer and highlight her concerns about the investigation, the Council moved quickly to allow resolution of the case to Mr D's satisfaction. However, the Commissioner is disappointed that this escalation was necessary, and that routine communications within his normal investigative procedures were unable to gather the required information in a timely manner in this case.
59. As noted above, the Commissioner does not require any action to be taken in relation to the breaches identified above in response to this decision. However, he is extremely concerned to note the practice of the Council in relation to Mr D's information request, and during the investigation of this case.
60. The Council's request handling practice was subject to an assessment by the Commissioner's staff in 2010, and the Commissioner continues to monitor the Council's practice. He recently highlighted to the Council his ongoing concerns about its compliance with the timescales required by FOISA, and the adequacy of the searches it undertakes to locate information sought by requestors.
61. The findings in this case will be taken into consideration when determining whether any further action should be taken in respect of the Council under the Commissioner's enforcement strategy.



DECISION

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

The Commissioner finds that by disclosing some information to Mr D, the Council complied with Part 1.

However, by failing to identify other information falling within the scope of Mr D's request, the Council failed to comply with Part 1 and section 1(1) of FOISA. The Commissioner also found that the Council failed to comply with the timescales set out in section 10(1) of FOISA by not responding to Mr D's initial request within 20 working days.

Given that the Council has now disclosed further relevant information to Mr D's satisfaction, the Commissioner does not require the Council to take any action in response to these failures in response to this decision.

Appeal

Should either Mr D or Fife 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
30 September 2011



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.
- ...
- (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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request 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) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...