

Decision Notice

Decision 204/2016: Laura Twaddell and South Ayrshire Council

The 2009 Prestwick Common Good review

Reference No: 201601061

Decision Date: 28 September 2016



Scottish Information
Commissioner

Summary

Ms Twaddell asked South Ayrshire Council (the Council) for the information held for every Prestwick property/asset relevant to a Common Good review undertaken in 2009. The Council informed Ms Twaddell that it did not hold the information she was seeking. Following an investigation, the Commissioner accepted this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information not held)

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

Background

1. On 16 November 2015, Ms Twaddell made a request for information to the Council. Her information request stated:

In 2009 South Ayrshire Council carried out a review of all the Council's properties in the five Burghs to determine if 1) they were Common Good assets 2) if so, if the asset was inalienable or not. I request to view: the information held for every Prestwick property/asset relating to this common good review undertaken in 2009.

A previous FOI request to you has provided one such document for one asset: <http://bit.ly/1OaG0TV> I now request to see all other documents relevant to this review for Prestwick properties/assets.
2. The Council responded on 18 December 2015. It explained that the information relating to the common good review was held on the Council's mapping system and provided Ms Twaddell with a copy of a plan which set out the assets in Prestwick held on the Common Good account.
3. On 22 December 2015, Ms Twaddell wrote to the Council requesting a review of its decision. She stated that the plan provided could not contain the information from the 2009 Common Good review because a putting green marked on the plan did not exist in 2009. She did not accept that a single map could be the only information held from a full review of the Common Good Assets in 2009. Twaddell, and queried why the Council had not provided her with all the other documents from the 2009 review akin to the document she had previously received (the asset review form for the Municipal Chambers).
4. The Council notified Ms Twaddell of the outcome of its review on 26 January 2016. It provided notice under section 17(1) of FOISA that it did not hold the information requested by her.
5. On 3 June 2016, Ms Twaddell applied to the Commissioner for a decision in terms of section 47(1) of FOISA. She stated that it was reasonable to expect that the documents in question would be held by the Council because she had been provided with one of them just weeks prior to submitting her information request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms Twaddell made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 4 July 2016, the Council was notified in writing that Ms Twaddell had made a valid application. The case was then allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application including justifying its reliance on section 17(1) of FOISA and providing an explanation of how it had reached the conclusion that it did not hold any information covered by Ms Twaddell's request.
9. During the course of the investigation, the Council provided a spreadsheet of information which it felt might be of assistance to Ms Twaddell.
10. Ms Twaddell was also asked for, and provided, further submissions as to why she expected the Council to hold the information.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Ms Twaddell and the Council. She is satisfied that no matter of relevance has been overlooked.

Submissions from the Council

12. The Council provided submissions to support its position that it did not hold any information covered by Ms Twaddell's request. It explained that its Legal Services department had provided legal advice to the Assets Register in relation to the Common Good title in 2008/2009. The provision of this advice involved solicitors, acting in their capacity as legal advisors, attending the Council's Assets Register to peruse title packets and thereafter advise if the title met the criteria at that time to be deemed as Common Good. This legal decision taken was noted on an "Audit Form" and placed in the title packet that had been perused. This audit was undertaken for various title packets, not just the title packet relating to the Municipal Chambers in Prestwick (the form that Ms Twaddell had previously received). Upon completion of this exercise, the Assets Register used the forms completed by Legal Services to input the information regarding the Prestwick Common Good Assets into a spreadsheet.
13. The Council stated that it had been established, through the knowledge of employees working within the Assets Register at the time, that once the exercise was completed the audit forms were not retained on the basis that the information had been transferred to an electronic records spreadsheet. Thereafter, the information contained within this spreadsheet was digitised into a GiS Webmap, which provides a digital image of all areas of land, deemed to be Common Good in Prestwick, following the 2009 audit exercise.
14. In relation to the single form which was previously provided to Ms Twaddell, the Council explained that at the time the forms were disposed of, the title packet in relation to the Municipal Chambers in Prestwick was on loan to the Council's legal services department, and the audit form for this particular title area was not disposed of in 2009. The Council

stated that there was no specific record to confirm the exact date when the other audit forms were disposed of, but (based on Asset Register staff knowledge) it was estimated to have been around 2009/2010, on the basis that the information had been transferred to electronic records.

15. The Council submitted that it no longer held the original electronic spreadsheet but, as previously explained, the information from the spreadsheet had been transferred to the Council's GIS Webmap. The Council provided the Commissioner with a similar spreadsheet prepared by its Assets Register Team which contained information relating to title of the Prestwick Common Good Assets. The spreadsheet clarified further information relating to the title areas deemed in the 2009 audit to be Common Good in Prestwick. The Council stated that it was happy for Ms Twaddell to have this spreadsheet to assist her, and this was provided to her.
16. The Council also provided the Commissioner with details of the searches that it had carried out in order to ascertain that it did not hold any further information falling within the scope of Ms Twaddell's request.

Submissions from Ms Twaddell

17. After looking through the spreadsheet provided by the Council, Ms Twaddell submitted that it did not show whether Common Good was alienable or inalienable, in relation to the assets listed. She stated that it was in the public interest to know what community assets had the additional statutory protection for inalienable assets. She was of the view that the Council should hold information determining whether or not an asset was inalienable.
18. In response to the points put forward by Ms Twaddell, the Council explained that the Common Good review in 2009 did not undertake to establish which areas of Common Good land were and were not alienable or inalienable. This was not advice provided by the Legal Services department to the Assets Register and is not information held by the Council.
19. The Council stated that to establish whether or not a Common Good asset is or is not an alienable asset would require the application of a set of legal principles through case law and a review of the titles of each individual area of land held to be Common Good in South Ayrshire. This was not undertaken at the time of the Common Good review in 2009, as it was not part of the review process. The Council stated that in the event this information was required, it would be provided as legal advice based on a legal assessment of titles and case law.
20. The Council stated there is no obligation upon the Council or its predecessors to retain a history on the use of common good assets and in particular whether the subjects have been used by members of the public. It reiterated that it did not hold information showing which areas of Common Good land were and were not alienable or inalienable.

The Commissioner's findings

21. While the Commissioner understands Ms Twaddell's concerns, she cannot decide whether a public authority *should or should not* hold particular information. She can only consider whether or not an authority *actually holds* the information, and did so at the time the information request was made.
22. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Council took adequate, proportionate steps in the circumstances to establish what information it held. Given the explanations as to why the Council would not expect to

hold the information, she is satisfied that the Council does not and did not, on receipt of the information request, hold the information requested by Ms Twaddell.

23. The Commissioner therefore finds that the Council was correct to give Ms Twaddell notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope her request.

Decision

The Commissioner finds that South Ayrshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Twaddell.

Appeal

Should either Ms Twaddell or the Council wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement

28 September 2016

Appendix 1: 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.

...

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info