

# Decision Notice



Decision 211/2010 Mr David Eunson and Aberdeen City Council

Heating systems at Mastrick Land

Reference No: 201000567

Decision Date: 14 December 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Eunson requested from Aberdeen City Council (the Council) information relating to the heating system at Mastrick Land and its modification. The Council responded with some information. Following a review and the provision of further information, Mr Eunson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Eunson's requests for information in accordance with Part 1 of FOISA, by failing to identify, locate and provide all the information covered by the terms of Mr Eunson's request and in failing to respond within the requisite timescales. By the end of the investigation, however, the Commissioner was satisfied that the Council had taken adequate steps to identify and locate all relevant information (which had since been provided to Mr Eunson).

Given the outcome of the Commissioner's assessment of the Council's FOI practice (which followed its handling of Mr Eunson's request), the Commissioner did not require the Council to take any action in respect of the identified breaches.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1)(a) (Time for compliance) and 15(1) (Duty to provide advice and assistance)

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. Having read an article in a local newspaper on 7 January 2009 on this subject, Mr Eunson had contacted the Council seeking information on the replacement of gas boilers for certain Council housing stock (Mastrick Land). On 11 March 2009, Mr Eunson wrote to the Council, referred to the newspaper article, and requested the following information:
  - a. When were the 6kW boilers installed [request 1];
  - b. On whose design was the 6kW size based [request 2];



- c. All reports submitted to the Council on this subject including technical reports from external sources and, in particular the report which included the phrase “response time” [request 3]; and
  - d. The rationale and calculations supporting the statement that “The additional cost pays back in 7.5 years” [request 4].
2. The Council acknowledged the requests on 12 March 2009 and asked if Mr Eunson wished it to handle his requests under FOISA. Mr Eunson confirmed on 12 March 2009 that he wished the Council to deal with his information requests under FOISA.
3. The Council responded on 22 April 2009 and answered requests 1, 2 and 4. For request 3, the Council stated that it held no technical reports, and was checking if it held any non-technical reports. It provided a link to its website where it stated reports relating to Matrick Land could be found.
4. On 2 July 2009, Mr Eunson wrote to the Council and requested more information. In this new request he rephrased part of his original request [request 3] to include the information he wished to obtain. He requested:

*Copies of all recorded information the Council holds relating to the heating system at Mastrick Land and its proposed modification, starting from the first recorded complaint about the system with the 6kW boilers, until 24 June 2009. This should include, but not be limited to, all correspondence both external and internal (including letters and emails), reports, minutes, memos, and record of telephone calls. The recorded information should include the source of the phrase “response time” which was quoted by Mr Stirrat in his email dated 4 March [request 5].*
5. The Council acknowledged this new request on 2 July 2009 and on 14 July 2009 invited Mr Eunson to meet to discuss the information he was seeking.
6. On 18 August 2009, the Council responded to Mr Eunson’s request of 2 July 2009. It provided copies of the information relating to the heating system at Mastrick Land, but redacted certain personal data of third parties in terms of section 38(1)(b) of FOISA.
7. On 6 November 2009, Mr Eunson wrote to the Council requesting a review of its decisions for his requests of 11 March 2009 and 2 July 2009. Mr Eunson drew the Council’s attention to the types of documentation he would expect it to hold that would fall within his requests. Mr Eunson also expressed dissatisfaction at the time taken by the Council to deal with his requests, and its failure to provide adequate guidance on the operation of FOISA.
8. The Council notified Mr Eunson of the outcome of its review on 1 December 2009. The Council stated that it should have responded more fully to requests 3 and 4, subject to the use of appropriate exemptions under FOISA in respect of commercially confidential information.



9. Following this review, on 9 December 2009, the Council provided Mr Eunson with the technical drawings for the heating and hot water systems, a copy of the Bill of Quantities for the mechanical works element of the project and copies of all Clerk of Works weekly report sheets for the Project. Finally, the Council provided detail on the calculation for request 4.
10. On 30 April 2010 Mr Eunson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Eunson wrote again on 18 May 2010 with information supporting his application.
11. The application was validated by establishing that Mr Eunson had made requests 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 those requests. The case was then allocated to an investigating officer.

## Investigation

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12. The investigating officer contacted the Council on 29 June 2010, notifying it that an application had been received from Mr Eunson and giving it an opportunity to provide comments on that application (as required by section 49(3)(a) of FOISA). The Council was asked to respond to specific questions, with particular reference to the steps it had taken to establish what relevant information it held. Specific reference was made to expectations as to the information it should hold.
13. Mr Eunson had, in his email to the Council of 2 July 2009, stated that request 1 had been answered to his satisfaction. Similarly, Mr Eunson confirmed to the Commissioner on 29 June 2010 that he was not interested in obtaining the personal data redacted by the Council from released documents in terms of section 38(1)(b) of FOISA. The Commissioner will therefore not consider the Council's response to request 1, nor whether the Council was correct in terms of section 38(1)(b) of FOISA to withhold personal data.
14. Mr Eunson explained (in his request for review of 6 November 2009, and during the investigation) that the responses he had received from the Council lacked the documentation he would expect. That is, he expected the Council to hold some form of document describing the terms of the contract for the provision of the heating system, along with such documents as letters, emails, memos and records of telephone conversations within the Council and with the contractor. The relevant submissions received from both Mr Eunson and the Council will be considered fully in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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15. In coming to a decision on this matter, the Commissioner has considered all the submissions made to him by Mr Eunson and the Council and is satisfied that no matter of relevance has been overlooked.
16. In order to determine whether the Council dealt with Mr Eunson's requests correctly, the Commissioner must be satisfied as to whether, at the time it received his request, the Council held any information which would fall within the scope of the requests.
17. Mr Eunson has not expressed dissatisfaction specifically about how the Council dealt with request 2 (on whose design was the 6kW size based), and from the correspondence it appears to the Commissioner that request 2 was answered in full by the Council in its initial response of 22 April 2009. In the circumstances, the Commissioner does not find it necessary to consider request 2 further.
18. Request 4 was answered by the Council on 22 April 2009, but the Council's review stated that a fuller response should be given. The Council then responded on 9 December 2009, repeating the text supplied in its initial response, but also referring to an attached calculation. Mr Eunson explained that this calculation was not included, only the principles used. The Council indicated in the course of the investigation that it believed Mr Eunson had already been provided with the back-calculation, but because the officer involved was no longer employed by the Council this could not be verified. The provision of this calculation could not be verified from any of the information the Council identified to the Commissioner as having been provided to Mr Eunson in response to his request. During the investigation, the Council agreed to supply a copy of the back-calculation to Mr Eunson, as had been required by its review panel, and the Commissioner accepts that this has now been done (and therefore that a full response has now been provided to Mr Eunson by the Council in respect of request 4).
19. The request of 2 July 2009 (referred to as request 5) is set out in full in paragraph 4 above. Given its terms, the Commissioner considers this request to have superseded request 3 (which he will therefore not consider further).
20. The Council provided Mr Eunson with information falling within the scope of request 5 in response to his initial request (on 18 August 2009), in further correspondence of 17 September 2009, and following its review (on 9 December 2009). Minutes of design and site meetings held in connection with the project were made available to him following a meeting in September 2009. However, additional relevant information was identified by the Council and supplied to Mr Eunson in the course of the investigation.



21. During the investigation, the Council was asked to detail the steps it had taken to establish what relevant information it held. The Council responded that details of the searches undertaken could not be provided, as the Council officers involved in managing the original requests were either no longer employed by the Council or could not be contacted at that time. It described the processes it believed had been followed and agreed to conduct further searches to ascertain if any additional information was held that fell within Mr Eunson's request, particularly in view of the concerns Mr Eunson had raised in his application about information he expected to be held.
22. The Council believed that in responding to Mr Eunson's requests it would have carried out searches of documentation held in all Mastrick Land project files (hard copy and electronic): it identified the parts of the Council in which these would be held and the relevant types of information these services would hold. There would also have been a search of certain internal electronic files to retrieve copies of committee reports submitted in connection with the Mastrick Land project. It explained the likely extent of the searches, assuming that searches of hard copy files would have involved officers reading through the documentation and extracting anything that fell within Mr Eunson's enquiries, while searches of electronic files and email records would have involved either the use of key word searches (for example "Mastrick Land") or officers again reading through the documentation to establish what information was held that was relevant to the requests. Searches of email records would have focused on persons most likely to have been involved in or had an interest in the project (for example local councillors, known project staff, and so on).
23. The Council identified the staff consulted in connection with the investigation and described their involvement in the project. It advised that the Council officers involved in delivering the project, or liaising with residents, had been requested to search e-mail accounts for correspondence connected to the Mastrick Land project. The project files and Councillor enquiry records had also been re-examined and certain further information located. The Council explained that there would be no record of telephone calls from tenants or any other party, as no relevant logs had been kept, although correspondence from tenants and Councillors relating to the heating system had been located as a consequence of the additional searches carried out during the investigation.
24. In respect of the expression "response times", which Mr Eunson had enquired about in request 5, the Council's Energy Adviser had advised that the phrase was not taken from a report, but had been used in an e-mail to Mr Eunson himself from the Council and referred to the time taken for heat, when called for, to reach a radiator.
25. With regard to contractual documentation and correspondence with the contractor, the Council located limited additional information in the course of the investigation. While it could not locate a contract, it had provided Mr Eunson with a copy of the letter of instruction to the contractor on 17 September 2009.



26. Mr Eunson remained unhappy with the quality of the information located and provided to him by the Council, whether in the course of dealing with his request or in the course of the investigation. The Commissioner's role, however, is to consider whether the Council dealt with Mr Eunson's request in accordance with the requirements of Part 1 of FOISA, and not to determine whether it held adequate records of the project in question.
27. In the circumstances, having considered the submissions provided by the Council, the Commissioner is satisfied that information covered by Mr Eunson's information requests was held by the Council at the time it received those requests. Clearly, not all of that information was identified, located and provided to Mr Eunson in response to either his information request or request for review. To the extent that it failed to do this, the Council failed to deal with the request in accordance with Part 1 (and in particular section 1(1)) of FOISA. It is particularly disappointing in this connection that the Council was unable to locate any records of the searches it carried out in dealing with the request and request for review.
28. Having considered all the submissions he has received, and taking account of the searches conducted by the Council in the course of the investigation, the Commissioner is satisfied that adequate steps have now been taken by the Council to determine what information it held falling within the scope of Mr Eunson's requests for information. He is also satisfied that all relevant information so located has been supplied to Mr Eunson.

### Technical Issues

29. Mr Eunson expressed his dissatisfaction at the Council's handling of his requests in terms of the timescales in Part 1 of FOISA, also considered that the Council had failed in its duty to advise him properly on how to obtain information using FOISA. The Commissioner will consider these technical issues raised by Mr Eunson.

#### *Section 10(1) of FOISA – time for compliance*

30. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
31. Mr Eunson's submitted an information request on 11 March 2009 and the Council acknowledged (on 12 March 2009) that it had been received on 11 March 2009. The Council responded to this request on 22 April 2009. He made a further request on 2 July 2009, which the Council acknowledged having received on the same day. The Council responded to this information request on 18 August 2009, and apologised for its late response.
32. The Commissioner finds that the Council failed to respond to either of Mr Eunson's requests for information within the 20 working days allowed by section 10(1) of FOISA.



*Section 15 of FOISA – duty to provide advice and assistance*

33. Mr Eunson also complained that the Council had failed in its duty to advise him properly on how to obtain information using FOISA. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
34. The Commissioner has scrutinised the correspondence supplied by both the Council and Mr Eunson. Having done so, he does not consider that it would be reasonable in the circumstances to identify any failure on the Council's part in providing Mr Eunson with appropriate advice to enable him to pursue his rights under FOISA. Consequently, he does not find that the Council failed to comply with section 15(1) of FOISA in dealing with Mr Eunson's request. He notes that this matter was not addressed by the Council when it was raised in Mr Eunson's requirement for review, although he would also observe (considering the way in which the issue was framed at that point) that it may have been reasonable for the Council to interpret Mr Eunson's concern as relating to the general quality of service provided by the Council (over which the Commissioner would have no jurisdiction) rather than being specific to the quality of advice or assistance provided in relation to making a request under FOISA.

**Action required by the Council**

35. This decision notice has identified breaches of Part 1 of FOISA by the Council in responding to Mr Eunson's requests for information. The Commissioner must now decide what action, if any, he should require of the Council in respect of these breaches.
36. In February 2010, the Commissioner carried out an assessment of the Council's practice in relation to its obligations under FOISA and the associated Codes of Practice, publishing his report (with recommendations intended to improve practice in certain areas) on 13 September 2010.<sup>1</sup> The assessment took account of the period within which Mr Eunson's requests were made and dealt with by the Council.
37. Certain of the Commissioner's recommendations to the Council in his assessment report are relevant to the breaches of Part 1 of FOISA he has identified in this case. In particular:
  - Recommendation 1 seeks a significant improvement in compliance with timescales for response
  - Recommendation 7 seeks (in part) to ensure that staff involved in the initial response to the applicant are asked to provide the review panel with details of the searches or enquiries carried out to establish what relevant information the authority holds (which should in turn ensure that such information is available should an application be made to the Commissioner).

An action plan has been agreed with the Council with a view to implementing the report's recommendations and further action may be taken by the Commissioner if the agreed actions are not taken.

<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=4129&SID=2756>





38. In the light of the preceding paragraph, the Commissioner does not consider it necessary to require the Council to take further action in response to the breaches of Part 1 of FOISA he has identified in this decision.

## DECISION

The Commissioner finds that Aberdeen City Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr Eunson.

In particular, the Commissioner finds that the Council failed to identify, locate and provide Mr Eunson with all of the information he had requested, as required by section 1(1) of FOISA. It also failed to respond to Mr Eunson's requests for information within the relevant timescales laid down by section 10(1) of FOISA. Taking account of the relevant recommendations in the report on his assessment of the Council's practice published in 13 September 2010, the Commissioner does not require any action to be taken in respect of these failures in response to Mr Eunson's application.

## Appeal

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Should either Mr Eunson or Aberdeen City 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**  
**14 December 2010**



## Appendix

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### 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.

...

#### 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

...

#### 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.

...