



Scottish Information  
Commissioner

<b>Decision 008/2006 Mr James Todd and North Ayrshire Council</b>
<i>Request for information on responsibility for land maintenance</i>

**Applicant:** Mr James Todd  
**Authority:** North Ayrshire Council  
**Case No:** 200502344  
**Decision Date:** 30 January 2006

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Decision 008/2006 – Mr James Todd and North Ayrshire Council**

**Request for information on responsibility for land maintenance – information supplied – applicant dissatisfied with information and requested a review – request for review mislaid – failure to respond to request within 20 working days contrary to section 10(1) – failure to respond to request for review within 20 working days contrary to section 21(1)**

### **Facts**

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Mr Todd requested information relating to land maintenance in Kilwinning. North Ayrshire Council (the Council) responded to this request by providing certain information. Mr Todd was dissatisfied with the information supplied and sought a review of this decision. The Council acknowledged this letter but did not provide a substantive response within 20 working days. Further correspondence took place between Mr Todd and the Council in which the Council advised that it could not locate Mr Todd's letter of review. The Council asked Mr Todd to furnish it with a further copy. Mr Todd did not do so. Mr Todd applied to the Scottish Information Commissioner for a decision.

### **Outcome**

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The Commissioner found that North Ayrshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in the provision of information to Mr Todd.

The Commissioner found that North Ayrshire Council failed to comply with Part 1 of FOISA by failing to respond to Mr Todd's request for information within 20 working days in accordance with section 10(1) of FOISA.

The Commissioner found that North Ayrshire Council failed to comply with Part 1 of FOISA by failing to respond to Mr Todd's request for review within 20 working days in accordance with section 21(1) of FOISA.



The Commissioner decided that no remedial steps require to be taken by North Ayrshire Council.

## Appeal

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Should either North Ayrshire Council or Mr Todd wish to appeal against this 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.

## Background

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1. On 15 March 2005 Mr Todd wrote to North Ayrshire Council (the Council) and requested the following information under the Freedom of Information (Scotland) Act 2002 (FOISA):
  - All relevant details within the contracts/conditions of planning permission between Cunninghame Council/North Ayrshire Council together with all recent communications between all parties involved with regards to land maintenance along Meadow Park Road and the grasslands within Crannog Way
2. The Council acknowledged Mr Todd's request on 17 March 2005 and advised that his letter had been referred to the Council's Freedom of Information Officer to collate the information requested.
3. The Council responded substantively to Mr Todd's request on 18 April 2005. The Council addressed a number of points not directly related to the request for information and then supplied "copies of relevant planning permissions, and of recent communications between the various parties involved in this issue" to meet Mr Todd's information request.
4. Mr Todd responded to this letter on 20 April 2005. He advised that although it had been supplied outwith the time period the information was appreciated. He indicated, however, that there was no information relating to the maintenance of the land within Crannog Way or that of Meadow Park Road, or the consent/permissions awarded to either McLean Homes or Ambion Homes. He again requested that the information be made available under FOISA.



5. The Council responded to this letter on 3 May 2005 and advised that further information would be searched for.
6. Mr Todd received no further response to this request and on 27 June 2005 he wrote to the Council to advise that no response had been received and to remind the Council of the response time of 20 working days specified by FOISA.
7. The Council responded to this letter on 5 July 2005. It advised Mr Todd that he had been provided with all information held by the Council relevant to his request. The author advised that he was aware of the subsequent correspondence between Mr Todd and the Council dated 20 April 2005 and 3 May 2005 but that the letter of 20 April 2005 could not be located. The Council asked Mr Todd to forward a further copy of this letter in order that his outstanding matters relating to his request could be addressed.
8. Mr Todd did not supply a further copy of his letter of 20 April 2005 to the Council. On 8 August 2005 Mr Todd applied to me for a decision.

## Investigation

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### The validity of the application to me

9. The first step in this investigation was to clarify that the application made by Mr Todd to the Scottish Information Commissioner was indeed valid given that Mr Todd had not supplied a further copy of his letter of review when requested do so by the Council. The validity of the application was also subsequently queried by the Council in its letter to my office of 31 August 2005 (see below).
10. This was a slightly unusual case and the investigating officer looked at the documentation carefully before deciding that this was a valid application. Mr Todd sent a letter on 20 April 2005 the receipt of which was acknowledged by the Council in a letter of 3 May 2005. Mr Todd's letter expressed dissatisfaction with the information provided and therefore should have been treated as a request for review.
11. When Mr Todd received no response to his letter of 20 April 2005 he sent a reminder letter of 27 June 2005. The Council responded to this letter indicating that it was aware of Mr Todd's correspondence of 20 April 2005 and the Council's response of 3 May 2005 but that the letter of 20 April 2005 could not be located. Mr Todd was asked whether he would be willing to provide a further copy. Mr Todd did not do so and subsequently applied to me for a decision.



12. For there to be a valid application under section 47(1) of FOISA the applicant must simply have made a valid request for review. The Council has accepted that it received Mr Todd's letter of 20 April 2005. Therefore a valid request for review had been received by the Council. The fact that it could not be subsequently located by the Council or that Mr Todd was asked to supply a further copy did not alter this fact. Therefore, when I received Mr Todd's application following the expiry of the 20 working day period from 20 April 2005 I was obliged to accept it as a valid application.
13. Given the unusual circumstances of the case the Council was subsequently offered the opportunity to carry out an informal review. The Council advised in a letter of 30 September 2005 that it did not wish to review its decision taken in connection with Mr Todd's request for information. The Council indicated that it was of the view that the information supplied to my office as part of the investigation was the information sought by Mr Todd.

#### Information sought from the Council

14. The investigating officer contacted the Council on 23 August 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by Mr Todd's case and to provide supporting documentation for the purposes of the investigation.
15. In particular, the Council was asked to supply a copy of the information provided to Mr Todd in its letter of 18 April 2005, to specify the steps it had taken to determine what information it held relevant to Mr Todd's request and to indicate whether the Council held any other information relevant to Mr Todd's request. Given the nature of the information requested the Council was also asked whether it had considered Mr Todd's request under FOISA or under the Environmental Information (Scotland) Regulations (EIRs) and the reasons for this decision.
16. Finally, the Council was asked to provide any internal correspondence relating to the consideration of the request and copies of any guidance relied on by the Council in deciding how to respond to Mr Todd's request.
17. The Council responded to this letter on 31 August 2005. It challenged the validity of Mr Todd's application to the Commissioner given that the Council had not located Mr Todd's request for review and that Mr Todd had not supplied a further copy. This matter is addressed in paragraphs 9-13 above.
18. The Council also responded to questions contained in the letter of 23 August 2005. Its responses are set below:

#### Submissions from the Council



19. The Council advised that it had submitted a number of documents to Mr Todd on 18 April 2005. These were copies of the planning consents granted by the former District Council to Tay Homes Limited, a Copy of the Landscape Masterplan and copies of title deeds which the Council had been able to identify pertaining to this particular area of ground.
20. In considering Mr Todd's request the Council advised that it had looked at the old planning files from the former District Council relative to the planning consents granted in 1990, 1991 and 1992 together with any records the Council might have regarding land ownership in this area.
21. The Council advised that subsequent to Mr Todd's request it had carried out further investigations (including enquiries of the relevant developers) regarding responsibility for maintenance of the area specified in Mr Todd's request and had obtained further documentation and correspondence relevant to his request that, I understand, clarified the position. This information, which was obtained after Mr Todd's request had been received, was also attached.
22. Finally, the Council provided copies of relevant correspondence both internal and external which had passed between the Council and the various parties in relation to this transaction.
23. The Council provided a bundle of documents to accompany its submissions.
24. The Council did not provide a schedule with these documents and the investigating officer was unable to discern what information had been supplied to Mr Todd, whether there was further information relevant to Mr Todd's request and whether the Council would be willing to supply this information to Mr Todd. The Council was asked to address these points. This resulted in further submissions from Council in a letter dated 9 November 2005. These are set out below.
25. The Council advised that the Council's letter of 18 April 2005 to Mr Todd had not included a schedule of attached documents and therefore it was unable to list all the papers sent to Mr Todd. The Council advised that he would have been sent every relevant document including extracts of planning consents issued by the former District Council, along with correspondence between the Service, the local Councillor and with Planning Officers.
26. The Council set out the steps taken in identifying the information requested by Mr Todd. The Council advised that ever since Mr Todd first approached the Council on this subject it had made every effort to identify all and any relevant documents held by the Council which might clarify which individual or organisation was responsible for maintenance of the areas referred to by Mr Todd.



27. The Council advised that following Mr Todd's request it had contacted both present and previous developers of the relevant area and their solicitors seeking copies of title deeds relevant to this enquiry. The Council advised that with considerable co-operation of the developer's solicitors it had been able to identify titles pertaining to all of the open space areas in question.
28. The Council indicated that it considered that the request for information should be considered under FOISA (rather than the EIRs) on the basis that the information sought was information on the legal status of the areas of open space and who owned them. It submitted that this was exclusively a legal ownership issue.
29. The Council advised that it was attaching copies of correspondence and documentation which clarified the ownership and maintenance issues of the areas of ground in question. This information had been obtained by the Council following Mr Todd's original request for information. Nonetheless, the Council advised that copies of this information was being sent to Mr Todd. A copy of the letter to Mr Todd was enclosed.

### **Commissioner's analysis and findings**

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30. In his letter of 15 March 2005 Mr Todd requested the following information:
  - All relevant details within the contracts/conditions of planning permission between Cunninghame Council/North Ayrshire Council together with all recent communications between all parties involved with regards to land maintenance along Meadow Park Road and the grasslands within Crannog Way

#### FOISA or EIRs

31. Given that the request for information included a request for planning permissions in respect of land I considered it necessary to consider whether the information request should have been dealt with under the EIRs rather than under FOISA.
32. The first category of information that Regulation 2 of the EIRs defines as Environmental Information is: "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”.

33. It is recognised that the information requested by Mr Todd might provide information about the state of the land. However, I understand this to be incidental to Mr Todd's request as the purpose of his request was to determine responsibility for the maintenance of the land. Therefore the focus of the information provided is on establishing this issue of legal responsibility rather than on providing information on the state of the land.
34. As a result I am satisfied that this information request was properly considered under FOISA rather than under the EIRs.

#### Information supplied to Mr Todd by letter dated 18 April 2005

35. The Council has advised me that Mr Todd was supplied with every relevant document including extracts of planning consents issued by the former District Council, along with correspondence between the Service, the local Councillor and with Planning Officers.
36. The Council also set out the steps taken in identifying the information requested by Mr Todd. The Council advised that ever since Mr Todd first approached the Council on this subject it had made every effort to identify all and any relevant documents held by the Council which might clarify the individual or organisation responsible for maintenance of the areas referred to by Mr Todd, including enquiries of the relevant developers and their solicitors.
37. It is worth noting that FOISA only covers information actually held by an authority at the time of a request. An authority is not obliged to create information when it receives a request nor is it obliged to seek information from external bodies so that it can respond to the request. Therefore the Council was only obliged to supply Mr Todd with the information it actually held on the date his request of 15 March 2005 was received.
38. In his letter of 20 April 2005 Mr Todd expressed dissatisfaction with the information supplied because it did not provide information on responsibility for the maintenance of the land identified. However, the Council was only obliged to supply the information it actually held at that time. If the Council did not hold information on this matter it could not supply it under FOISA.
39. I have considered both internal and external correspondence in this case, the submissions of the Council and its willingness to contact third parties in order to respond to Mr Todd's queries. In all the circumstances of the case I am satisfied that the Council took all reasonable steps to identify the information it held relevant to Mr Todd's request of 15 March 2005. I am satisfied that all of this information was supplied to him on 18 April 2005.

#### Information supplied to Mr Todd which post-dated his request





40. In its letter to my office of 9 November 2005 the Council advised that it had carried out further investigation into Mr Todd's request and had been in contact with present and previous developers and with their solicitors. As a result of this research, further information had been obtained and then supplied to Mr Todd. This information was obtained following Mr Todd's request and therefore is outwith the scope of the investigation. However, I understand that this material clarifies the position in respect of legal responsibility for land maintenance.
41. In further correspondence with my office Mr Todd confirmed receipt of this information but wanted me to comment on the way in which his request had been handled by the Council.

#### Technical breaches of FOISA

42. Mr Todd was also dissatisfied with the delays by the Council in responding to his request for information of 15 March 2005 and his request for review dated 20 April 2005 respectively.
43. It is unclear from the correspondence whether Mr Todd's original request for information was received on 16 March 2005 or 17 March 2005. In either case, the response dated 18 April 2005 would have been outwith the 20 working day time limit specified by Section 10(1) of FOISA.
44. Mr Todd sent his request for review on 20 April 2005. This letter was acknowledged by the Council on 3 May 2005. Mr Todd received no further response, however, until the Council was prompted to respond to his letter of reminder of 27 June 2005. The Council indicated that it could not locate Mr Todd's letter of 20 April 2005. However, this does not alter the fact that the Council did not respond to Mr Todd's request for review within 20 working days (which was quite clearly received).

#### **Decision**

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I find that North Ayrshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in providing all information it held relevant to Mr Todd's request at the time of his request.

I find that North Ayrshire Council failed to comply with Part 1 of FOISA by failing to respond to Mr Todd's request for information within 20 working days in breach of section 10(1) of FOISA and by failing to respond to Mr Todd's request for review within 20 working days in breach of section 21(1) of FOISA.



I do not require the Council to take any remedial steps.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**30 January 2006**