

Decision Notice

Decision 066/2015: Mr X and East Lothian Council

Cemetery maps showing sections and lairs

Reference No: 201402586

Decision Date: 26 May 2015



Scottish Information
Commissioner

Summary

On 25 August 2014, Mr X asked East Lothian Council (the Council) for information about cemeteries and crematoria, including a photocopy of all cemetery maps (including churchyards) showing sections and lairs. The Council responded that it could not provide a photocopy of the cemetery maps because of the format in which they were held. The Council provided details of how a search for a particular lair could be facilitated. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that, in general, the Council had properly responded to Mr X's request for information in accordance with Part 1 of FOISA. Although the Council was incorrect to state that it held no recorded information covered by the request, the Commissioner accepted that, for the most part, the Council did not hold the information in the format required by Mr X, and had explained why the information could not be provided in this format (as required by section 11(3) of FOISA). The Commissioner found that the Council had failed to locate and provide one cemetery map which could be photocopied, and required the Council to provide this information to Mr X.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) General entitlement); 11(1), (2) and (3) (Means of providing information); 17(1) (Notice that information is 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 25 August 2014, Mr X asked the Council to provide (among other information which is not the subject of this decision) photocopies of all cemetery maps showing sections and lairs for each cemetery, including churchyards.
2. The Council responded on 24 September 2014. It stated that it could not provide a photocopy of the cemetery maps as most were old linen or paper maps pinned to boards. The Council explained that a search for a particular lair could be facilitated via the Council's Registrars and in line with published charges, details of which the Council provided together with contact details of its registration office.
3. On 25 September 2014, Mr X wrote to the Council requesting a review of its decision. He accepted that the original maps may be on old linen or pinned to boards, but suggested that smaller paper versions would also be held, for use by gravediggers.
4. The Council notified Mr X of the outcome of its review on 3 November 2014, and stated that it was upholding its initial decision. It explained that the maps had not yet been digitized, and no decision to digitize the maps had been taken. It confirmed that there were no paper copies of the old maps. The Council gave notice, in line with section 17 of FOISA, that it did not hold the information Mr X had asked for.
5. On 3 November 2014, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X was dissatisfied with the outcome of the Council's review because it stated that the Council did not have maps (which Mr X said was untrue). Mr X referred to an information request made by another person which he said had resulted in the Council

supplying photocopied maps, following an application to the Commissioner. Mr X also referred to maps used by gravediggers to locate plots and believed these may be held by the Council.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr X 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. 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 and answer specific questions including justifying its reliance on any provisions of FOISA or the Environmental Information (Scotland) Regulations 2004 it considered applicable to the information requested.
8. Mr X explained, by letter of 14 January 2015, that information received from the Council suggested that some cemeteries had interment grounds which were only 20 or 30 years old, which he believed would have paper format maps showing the details he required. He also described visiting a cemetery in East Lothian to locate a lair, after arranging with the Council to meet a gravedigger. Mr X indicated that this Council employee had in his possession a photocopy of the cemetery map.
9. On 14 April 2015, a member of the Commissioner's staff visited the Council to inspect the maps, to obtain a better understanding of their format and condition. The physical condition of the information is relevant to the issues raised by Mr X (see *Commissioner's analysis and findings* below).

Commissioner's analysis and findings

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

Scope of the investigation / information covered by the request

11. As noted above, in his request for review, Mr X appears to have accepted that the old cemetery maps held by the Council are in a format which cannot be copied. However, he questioned whether paper copies were not also held by the Council. He found it hard to believe that the Council did not hold paper editions of the maps in A4 or A3 size, for use by gravediggers. The Council gave notice that it did not hold paper copies of the old maps.
12. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
13. The Council made clear to the investigating officer that it had not relied upon section 17 in relation to all information covered by Mr X's request: as noted above, it has confirmed that it holds old maps of the cemeteries, too fragile to photocopy without destroying the map or causing irreversible damage. The Council's position (as set out in its review response) was

that it did not hold information in the format of photocopies of cemetery maps, as requested by Mr X and, under section 17(1) of FOISA, it gave Mr X notice of this in its review response.

14. The Council explained that, in order for it to provide copies of the cemetery maps, digital copies would have to be made. It estimated the cost of digitizing the maps to be £12,000 to £15,000; the maps would have to be carefully packaged and sent to a specialised firm for digitisation. Even reproducing a single map would by far exceed £600 (the cost limit set by the relevant Fees Regulations for dealing with requests under FOISA) and it was not possible to digitise part of a map. Therefore, the Council explained, it could not even offer Mr X the option of limiting or narrowing his request. The Council advised Mr X to contact the Registrar's Office where he could obtain information on individual lairs.
15. The Commissioner accepts the Council's submissions in relation to the difficulties presented in copying old, large-format maps held on fragile paper or linen. Such maps represent information which is held by the Council but, because of its unique nature, is available for inspection only. The Commissioner acknowledges that Mr X is unable, at present, to visit Council premises to inspect the maps in person.
16. The investigating officer asked if it was possible to photograph the maps. The Council commented that taking such photographs (for example, using a smartphone) was not feasible; the photographs would lack definition as the maps were large. After viewing the maps, the Commissioner accepts this.
17. As noted above, Mr X queried whether all cemetery maps held by the Council were in a format unsuitable for copying, particularly in relation to cemeteries opened within the last 20 or 30 years. He also made reference to a photocopy of a map of Tranent cemetery, which had been obtained by an acquaintance. He said that he had seen this map and believed it would provide him with information of the type he sought.
18. The Council commented:

"It is entirely possible that Mr X has viewed a map of Tranent cemetery...maps can be viewed in situ without any problem. They cannot, however, be photocopied."
19. The Tranent cemetery map was examined during the Commissioner's visit to the Council. It is mounted on a large board. The Council acknowledged that a photocopy of part of the map had been provided in response to another information request (see paragraph 5), but explained that it was impracticable to produce a full copy of the map because of its size and condition. The Council explained the difficulties it had encountered in producing the photocopied section for the previous information request. The Commissioner accepts that it is reasonable for the Council to decide against making further copies from this map, because of its condition. She also accepts that it would be impracticable to produce a single photocopy of the whole map, because of its size.
20. The Commissioner investigated whether the Council holds alternative maps of cemeteries, perhaps maps used by gravediggers. The Council explained that gravediggers are provided with the information on individual lairs. When a burial is to take place, the location of the lair is identified on the old maps. The gravedigger is told the location and directed to the Registration Office to obtain more details about the lair. The Council stated that individual cemeteries do not hold any information, and that all information is held centrally.
21. For completeness, the Council was asked if it held, in terms of section 11(2)(b), any digest or summary of the information: for example, family history societies sometimes document graveyards, and donate copies of their indexes to libraries and Council archives. The

Council stated that there are a number of books and pamphlets produced by societies about, for example, special gravestones or monuments in East Lothian, but, after searching through this material, it confirmed there are no comprehensive cemetery maps in those books.

22. After investigation, the Commissioner is satisfied that (with one exception, discussed below) all cemetery maps held by the Council are on large linen or papers sheets, or pinned or mounted on boards, even those relating to newer cemeteries. The Commissioner accepts that the format and condition of these maps (some of which are extremely faded and fragile) makes it impracticable for the Council to produce photocopies.
23. During the Commissioner's visit, the Council located a small photocopied map of North Berwick cemetery. This map had been extracted from a cd of information provided to the Council by the Scottish Genealogical Society. As the map fell within the terms of Mr X's request, the Council agreed to approach the Scottish Genealogical Society to find out if that society had any comment to make about disclosure of the map under FOISA. The Council was not able to obtain a reply from the Scottish Genealogical Society.
24. The Council held several photocopies of the North Berwick map, which might reasonably be taken to indicate that it was prepared to hand copies out to enquirers. It has not been established whether the Scottish Genealogical Society holds copyright for the map, but disclosure of copyrighted material in response to an information request does not breach copyright protection law¹. In the circumstances, the Commissioner has decided that the map of North Berwick cemetery is information which the Council holds and which should have been provided to Mr X in response to his request.

Whether the Council's response otherwise complied with FOISA

25. Mr X asked for information from the maps to be provided in a specific format: a photocopy. The Commissioner takes the view that, by using the word "photocopy", Mr X expressed a preference for the information to be provided in permanent form.
26. Section 11(1) of FOISA provides that, where an applicant expresses a preference for receiving information by one of the means specified in section 11(2), the public authority must, so far as is reasonably practicable, provide the information in the preferred format. The means specified in section 11(2) are: a copy (section 11(2)(a)); a summary or digest (section 11(2)(b)); or a reasonable opportunity to inspect a record containing the information (section 11(2)(c)).
27. Section 11(3) states that, in determining whether it is reasonably practicable to provide information in the specified format, the authority may have regard to all the circumstances, including cost. Where it determines that it is not reasonably practicable to give effect to the preference, it must explain why.
28. The Court of Session stated in *Glasgow City Council v The Scottish Information Commissioner*² [2009] CSIH 73 (at paragraph 57):

"When section 11(2)(a) refers to the "form" in which a copy of the information may be provided, it appears to us to have in mind such possible forms as electronic files, paper

¹ Since 1 January 2005, public authorities in Scotland have been able to disclose information which is third party copyright in response to a FOI request without breaching the Copyright, Designs and Patents Act 1988 as a result of The Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004.

² <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

documents, audio or video tapes, or verbal communication. That is consistent with the sense in which the word "form" is used elsewhere in the Act (e.g. in sections 8(1)(a) and 47(2)(a))."

29. The Commissioner accepts that, although the Council holds information covered by Mr X's request, it is not "reasonably practicable" (in terms of section 11 of FOISA) for it to provide the vast majority of that information by the means preferred by Mr X, i.e. by providing a photocopy. The Commissioner accepts that the material is not suitable for photocopying, and that the cost of creating digital copies of the maps (which would enable copies to be produced) would be considerable, and well in excess of the £600 limit applying to FOI requests. She is satisfied that the Council gave Mr X some explanation of the difficulties involved. In this regard, the Council's response complied with the requirements in section 11(3) of FOISA.
30. The Commissioner finds that the Council was wrong to give Mr X notice, in terms of section 17(1) of FOISA, that it did not hold the information he asked for. The information was held by the Council, but not in the format he required. In this respect, the Council failed to comply with Part 1 of FOISA.
31. Additionally, having received no evidence that the map of North Berwick cemetery is not held by the Council in terms of FOISA, the Commissioner must decide that it is information which falls within Mr X's request, and which should have been provided when the Council responded to that request. In failing to do so, the Council failed to comply with section 1(1) of FOISA. The Commissioner requires the Council to disclose a copy of the map to Mr X.

Decision

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

The Council was wrong to give notice, in terms of section 17(1) of FOISA that it did not hold the information covered by Mr X's request. The Council correctly gave Mr X an explanation of why the majority of the information could not be provided in the format he required, as required by section 11(3) of FOISA.

In failing to provide information which it held and which was covered by Mr X's request, the Council failed to comply with section 1(1) of FOISA. The Commissioner requires the Council to provide Mr X with the information specified in the last paragraph of the decision, by 10 July 2015.

The Commissioner does not require the Council to take any other action in relation to Mr X's application for a decision.

Appeal

Should either Mr X 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

26 May 2015

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.

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.

- (2) The means are-

- (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
- (b) such provision to the applicant of a digest or summary of the information; and
- (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.

- (3) In determining, for the purposes of subsection (1), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.

...

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