



Scottish Information
Commissioner

**Decision 069/2006 Mr M and South Lanarkshire
Council**

Information about the removal of a caravan

**Applicant: Mr M
Authority: South Lanarkshire Council
Case No: 200502740
Decision Date: 2 May 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 069/2006 – Mr M and South Lanarkshire Council

Request for information about the removal of a caravan from Park Court, Hamilton – information not held (section 17) – information exempt under section 34(3)(a) and (b) – investigations by Scottish public authorities – information exempt under section 35(1)(g) and 35(2)(c) – law enforcement – compliance with statutory timescales (section 10(1)) – content of certain notices (sections 16 & 19)

Facts

Mr M's solicitors made two information requests to South Lanarkshire Council (the Council) on his behalf, trying to establish certain facts about the Council's involvement in the removal of a caravan from Park Court, Hamilton.

The Council's initial reply explained the limited involvement of officials from its Planning Service in the matter but refused to provide detailed answers to the questions raised because of an ongoing investigation into a possible breach of planning control. The Council also advised that the information requested was protected under the Freedom of Information (Scotland) Act 2002 (FOISA) and the Access to Information Act 1985.

Mr M's solicitors sent a request for a review of this response but after receiving no response, applied to me for a decision on the matter. Once the Council had been advised that an application for a decision had been received, it was established that no request for a review had been received by the Council. The Council then agreed to carry out a review although the statutory 40 day period for requesting a review had passed.

After review, the Council stated that some of the information requested was not held, some had already been provided, and some was exempt from disclosure under section 34(3) and section 35(1)(g) in conjunction with section 35(2)(c). Dissatisfied with the Council's review of its response, Mr M applied to the Scottish Information Commissioner for a decision on the matter.

During the course of the investigation it transpired that the Council did not hold the information to which the exemptions cited had been applied.



Outcome

The Commissioner found that the Council had failed to comply fully with Part 1 of FOISA. Although it had provided sufficient evidence to substantiate its claim that certain information was not held by the Council, its response to the applicant and the subsequent review of that response included significant factual inaccuracies.

The Commissioner found that even if the Council's initial response had been based on a true picture of the information held by the Council, it had failed to comply with section 16(1) and section 19 of FOISA which specify the required content of a refusal notice. Nor did the Council comply with section 17 of FOISA, which requires an authority to give an applicant notice in writing if information requested is not held by the authority. The Council had failed to reply to the initial information request within the period laid down in section 10(1).

The Commissioner accepts that the Council has recognised these failures in procedure and has taken steps to prevent a similar occurrence in future.

Appeal

Should either Mr M or South Lanarkshire 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 of receipt of this notice.

Background

1. Acting on his behalf, Mr M's solicitors made two requests for information from South Lanarkshire Council (the Council), on 8 February 2005 and 4 March 2005. The Council was asked to supply information on a number of points relating to the removal of a caravan from Park Court, Hamilton, some months previously.



2. The Council replied on 22 March 2005, stating that it held no information about the removal of the caravan from the site. The Council also stated that it could not provide the “detailed information” requested because of an ongoing investigation about another caravan, which had been sited in the same location as the first. The Council informed Mr M’s solicitors that “the information is protected under the Freedom of Information (Scotland) Act 2002 and the Access to Information Act 1985” but did not explain which exemptions in FOISA had been applied, or give details of the right to request a review of the Council’s response and to appeal to me for a decision.
3. Mr M’s solicitors wrote to the Council asking for a review of its response, but received no reply and appealed to me for a decision on 13 May 2005.
4. An investigating officer contacted the Council, who denied receiving a request for review from Mr M’s solicitors. The Council was able to show that no such letter had been logged in its record of incoming mail.
5. Although the 40 day period for requesting a review had now passed, the Council agreed to carry out a review using the discretionary powers provided in section 20(6) of FOISA. A letter giving the outcome of the review was sent to Mr M’s solicitors on 7 September 2005.
6. The Council identified 10 separate requests for information in the letters sent by Mr M’s solicitors on 8 February and 4 March 2005. It stated that with regard to requests numbered 2, 3, 5, 6, 7, and 9, it held no information. With regard to requests numbered 4 and 10, it considered that its letter dated 22 March 2005 had effectively answered these points. With regard to the requests numbered 1 and 8 it refused to disclose the information held by the Council, citing sections 34(3)(a) and 34(3)(b), and section 35(1)(g) in conjunction with section 35(2)(c).
7. On 29 September 2005 Mr M applied to me for a decision. An investigating officer was appointed to the case.

The Investigation

8. Mr M’s application was validated by establishing that he had made his request to a Scottish public authority, and had appealed me only after requesting the authority to review its response to his request.



9. The Council was advised that an investigation had begun, and invited to comment on matters raised by the applicant and on the application as a whole. The Council was also asked to provide the following information:
 - a) a description of the search process followed by staff in the Enterprise Resources department in order to establish what relevant information was held.
 - b) background information about the case, along with any other comments to be considered during the investigation.
10. The Council replied on 28 October 2005. It described the files held within the Council which contained relevant information and explained how a wider search had been carried out, which had included email files for key officials, Word documents, and the Council's database recording all incoming correspondence.
11. The Council explained that its Planning and Building Control Service had been advised verbally by a third party in October 2004 that a caravan had been sited on the access road at Park Court. Concern was expressed by the complainant that this compromised free movement in and out of the site and interfered with the visibility of drivers. The Enforcement Officer had made informal inquiries about the caravan with the factor of Park Court around the same time. A letter from the Planning and Building Control Service had been sent to Mr M on 27 October 2004, seeking clarification of whether or not he owned the caravan, but no reply had been received. The Council was investigating whether a breach of planning regulations had occurred, but had played no role in the removal of the caravan sometime between October 2004 and January 2005, when it was advised of the caravan's removal by Mr M's solicitors.
12. The Council also explained that its reply of 22 March 2005 (see paragraph 2 above) had been based on the assumption that it would hold a record of the initial complaint about the caravan and subsequent action taken. At the review stage it became apparent that the Planning Officer had not created these records, and that the Council therefore did not hold information relating to some of the questions raised by the applicant's solicitors.



The Commissioner's Analysis and Findings

Information not held

13. The Council stated that it held no information in respect of six of the questions raised by Mr M through his solicitors. The Council has provided evidence about the extent of the search carried out to allow me to assess whether it was sufficient to retrieve any relevant information relating to those questions.
14. The Council has explained that staff in two departments, Enterprise Resources and Housing & Technical Resources, were consulted to establish that all relevant material had been considered. The Council described the contents of two lever arch files relating to Mr M and Cadzow Nursery, the second of which contained correspondence relating to the siting of a caravan along with other matters. The lever arch files also contained the relevant planning enforcement files, which held information about the Council's actions following the complaint about the caravan.
15. The Council confirmed that it had also carried out searches for documents held electronically in Word format, for emails held in the mailboxes of three key officials, and for the records of any incoming correspondence which might relate to this matter: this would include emails, letters, faxes, notes of phone calls and other types of correspondence with the Council.
16. I consider that the searches carried out by the Council were sufficient to establish what information it held about the matters raised by Mr M's solicitors, and I accept that the Council does not hold recorded information relating to questions 2, 3, 5, 6, 7, and 9, as numbered in its letter to Mr M of 7 September 2005.

Information already provided to the applicant

17. The Council informed Mr M that it believed that two of his questions had effectively been answered in its letter of 22 March 2005. Mr M had asked why the Council's enforcement officer had made contact with the factor of Park Court (question 4), and why a planning officer had been involved in what was not a planning matter (question 10).



18. I have examined the letter sent on 22 March 2005, and find that it explains that the Planning Service was drawn into the matter following a complaint from an adjoining proprietor, and that Council officials were considering whether a breach of planning control had occurred in terms of the Planning Acts. In my view, this upholds the Council's view that it had already provided an answer to question 10.
19. It is clear from Mr M's application to me that he did not accept the Council's account of its involvement in this matter. The Council has further explained to me that the caravan was the subject of an enforcement investigation, and no other planning matter. While the caravan was not illegally sited, it was unauthorised in terms of planning legislation, as it required planning consent and none had been sought or obtained. This has confirmed my decision to uphold the Council's argument that a reply to question 10 had been provided in its letter of 22 March 2005.
20. With regard to question 4, I do not accept that the Council's letter of 22 March 2005 directly explains why an enforcement officer made contact with the factor of Park Court. The Council has confirmed that the searches carried out have established that there is no written record explaining why contact was made with the factor. The Council has commented that it has now been agreed that, in future, details of complaints should be recorded and an enforcement file opened. This did not happen in the current case.
21. I therefore find that the Council was mistaken in informing Mr M that it had provided a response to question 4 in its letter of 22 March 2005. However, I accept that it has now demonstrated that it does not hold any recorded information which explicitly records the reason why an enforcement officer made contact with the factor, and that it had been made clear to Mr M that the involvement of Council officials was to consider whether a breach of planning control had occurred.

Information initially described as withheld

22. The Council informed Mr M that it had withheld information relating to two questions:

Q1 Regarding the reference in a letter from Enterprise Resource to an "adjoining neighbour" – Confirm if the adjoining neighbour is [name].

Q8 Who made you [Director of Enterprise Resource] aware that the caravan had been removed?

The Council stated that it was justified in withholding information relating to those questions under the following exemptions in FOISA: sections 34(3)(a) and 34(3)(b), and section 35(1)(g) in conjunction with section 35(2)(c).



23. However, the Council was asked whether it did hold the information to which these exemptions had been applied, as this seemed to contradict the Council's statement that the initial complaint about the caravan had not been recorded. After further enquiry, the Council confirmed that it did not, in fact, hold the information.
24. The Council explained that, when carrying out the review of its response to Mr M, the Review Panel were aware that some of the information requested was not held and so substituted the ground for refusal in relation to most of the requested information. However, for reasons which are now unclear, it did not now appear that they had been fully aware that no information at all was held. The Council admitted that this was extremely regrettable: if this fact had been reflected in their letter of refusal it might have avoided the need for Mr M to apply to me for a decision on the matter.
25. The Council has apologised for the confusion caused and has assured me that its procedures for reviewing its responses to requests have now changed. All information subject to the request must now be provided to the Review Panel, unless it is unreasonable or impracticable to do so. Where information has been redacted, copies of documents both in their unredacted and redacted formats must be supplied. The Council believes that this change to its procedure should prevent the mistakes made in this case re-occurring in the future.
26. As the Council has accepted responsibility for its mistakes and has taken steps to improve its procedures, I do not require any further remedial steps to be taken at present. However, I am aware that this is not a unique instance of a public authority responding to an applicant on the basis of information that is assumed to be held, instead of carrying out a search to establish a factual basis for the response. I would ask all Scottish public authorities to learn from these cases and to make sure that their procedures will prevent similar occurrences in future.
27. In this case, I accept that the Council does not hold the information asked for in questions 1 and 8 of Mr M's request, for the reasons discussed in paragraph 12 above.



Content of notices sent to the applicant / compliance with timescales

28. As noted in paragraph 2 above, the Council's initial reply failed to include all the information required by FOISA. Where an authority receives a request for information which is not held, it is required to give the applicant notice in writing that it does not hold it (section 17). Where an authority holds relevant information but claims that the information is exempt from disclosure, it must provide a refusal notice which discloses that the information is held, states that the information is exempt, specifies the exemption in question, and states why the exemption applies (section 16(1)). Section 19(b) requires an authority to inform an applicant about their right to seek a review of the authority's response and their right to apply to me for a decision.
29. Section 10 of FOISA requires an authority to respond to an information request promptly and not later than the twentieth working day after receipt of the request. In this case the Council complied with section 10 in respect of the information request dated 4 March 2005, but failed to respond within the required period for the information request dated 8 February 2005.
30. I accept that the Council has now taken steps to improve its compliance with these aspects of FOISA.

Other matters raised by the applicant

31. In his application to me, Mr M raised a number of concerns about the Council's explanation of its response to his information requests. Most of these questioned the Council's approach to enforcing planning legislation, and the role of its planning officials. Such matters fall outside my remit, and cannot be considered within the scope of my decision.
32. Mr M expressed his confusion that, as he understood it, the Council had at one time stated that it knew nothing about the circumstances surrounding the removal of the caravan, and then later cited the Freedom of Information legislation to prevent the release of information that it did not have. I believe that this confusion may have been avoided if the Council's initial reply had contained the information required by FOISA (as discussed in paragraph 28 above) and if that reply had been based on a true representation of the information held or not held by the Council.



Decision

I find that South Lanarkshire Council failed to comply with Part 1 of FOISA in failing to issue a notice in accordance with section 17(1) of FOISA advising Mr M that it did not hold some of the information requested and advising him of his rights in accordance with section 19 of FOISA. The notice issued by the Council also failed to comply with the requirements laid down in section 16(1) of FOISA. The Council failed to comply with section 10(1) of FOISA in respect of the information request dated 8 February 2005.

These failings are significant in this case, but I have accepted assurances from the Council that it has already taken remedial steps to improve its procedures and at present I do not require further action.

I find that where the Council stated that information was not held, it was able to demonstrate to me that such was the case.

Kevin Dunion
Scottish Information Commissioner
2 May 2006