

Decision Notice



Decision 070/2010 Mr John Mohan and Dundee City Council

Adequacy of proposed school site

Reference No: 201000187
Decision Date: 19 May 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Mohan requested from Dundee City Council (the Council) information as to work undertaken in relation to the site of a proposed new school. The Council did not provide a response to Mr Mohan's information request. Following a request for a review and an application to the Commissioner, the Council notified Mr Mohan that it did not hold any information falling within the scope of his request. Following this review, Mr Mohan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Mohan's request for information in accordance with Part 1 of FOISA. He did not accept that the Council held no relevant information. As Mr Mohan had received from elsewhere a copy of the letter the Commissioner found the Council to hold, the Commissioner did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) (General entitlement) and 17(1) (Notice that information is not held)

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

1. On 25 May 2009, Mr Mohan wrote to the Council requesting the following information:
Copies of any documents pertaining to the work undertaken to ensure that the Logie (former Harris annexe) site can
 - a. *accommodate, without dispensation being sought, the maximum design capacity of the proposed St Joseph/Park Place primary school(s).*
 - b. *accommodate, without dispensation being sought, the projected pupil role of the proposed St Joseph/Park Place primary school(s).*



c. accommodate, without dispensation being sought, the playing field area required by the proposed St Joseph/Park Place primary school(s).

2. The request was acknowledged by the Council in an automated email dated 26 May 2005.
3. Having received no response to his request, Mr Mohan wrote to the Council on 25 June 2009 requesting a review of its failure to respond.
4. Having received no response to his request for review, Mr Mohan applied to the Commissioner on 10 September 2009, seeking a decision on the Council's failure to respond to his information request and request for a review. During the course of the investigation (on 22 December 2009) the Council provided a response to Mr Mohan's request for a review. In responding, the Council advised Mr Mohan that it did not hold the information he had requested.
5. The Commissioner subsequently issued a decision (*Decision 014/2010 Mr J Mohan and Dundee City Council*) in respect of the Council's technical breaches of FOISA.
6. On 29 January 2010, Mr Mohan wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Mohan had made a request 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 that request. The case was then allocated to an investigating officer.

Investigation

8. On 10 February 2010, the Council was notified in writing that an application had been received from Mr Mohan. The investigating officer asked the Council to provide its comments on the application (as required by section 49(3)(a) of FOISA), and to respond to specific questions. In particular, the Council was asked to provide submissions in support of its contention that it did not hold the information requested, with particular reference to the steps taken to confirm this.
9. A response was provided by the Council, followed by further correspondence with both parties in the course of the investigation. Additional clarification was obtained from the Council at a meeting.
10. The submissions from both parties, insofar as relevant, will be considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Mohan and the Council and is satisfied that no matter of relevance has been overlooked.

Section 17 – Notice that information is not held

12. Section 17(1) of FOISA requires that where a Scottish public authority receives a request for recorded information that it does not hold, then it must give the applicant a notice in writing to that effect. The Council gave Mr Mohan notice to this effect in responding to his request for review and maintained this position in its submissions to the Commissioner.
13. In order to determine whether the Council has dealt with Mr Mohan's request correctly, therefore, the Commissioner must be satisfied whether, at the time it received Mr Mohan's request, the Council held any information which would fall within the scope of that request.
14. With this in mind, the investigating officer asked the Council what searches it had carried out to determine whether any relevant information was held. Further correspondence and a meeting sought to clarify the steps the Council had taken to establish what relevant information it held.
15. The Council's position was it did not hold any of the information requested when it received the request. It stated that it had not carried out any searches as the Director of Education knew the requested information did not exist. It explained that information of that description would normally be held within the Education Department.
16. The Council also contended that no information falling within the scope of Mr Mohan's request was held by or on behalf of the Council in any form. It added that it was not aware of any recorded information which had been generated or held at any time by, or on behalf of, the Council and which would fall within the scope of Mr Mohan's information request.
17. The Council did not believe it was required to search for information it knew not to exist. It did not believe it had a duty to provide advice and assistance (under section 15 of FOISA) in the particular circumstances of this case, because the information did not exist. The Council stated that consequently there was no advice or assistance it could give Mr Mohan beyond confirming that the information was not held.



18. During the course of the investigation, Mr Mohan provided the investigating officer with information he had received from the Scottish Government in response to a separate information request, which he considered should have been covered by his information request to the Council. He was of this view as the information provided to him by the Scottish Government originated from the Council. The information included a letter from the Council's Director of Education to an individual within the Scottish Government, dated 22 May 2009 and raising the question of whether dispensation was required from the Scottish Ministers for the proposed school development (the remaining information dates from June and July 2009 and therefore could not have been held by the Council when it received Mr Mohan's request). Mr Mohan has also referred to reports submitted to meetings of the Council's Education Committee and a media statement by the Convener of that Committee, the content of which led him to believe that other relevant information should have been held by the Council at the time of receiving his request.
19. Further comments were sought from the Council regarding this information. The Council explained that it did not consider the 22 May letter to fall within the scope of Mr Mohan's information request. This was because the letter "only described the Council's intention and sought the Scottish Government's informal opinions". It was clear from the letter, the Council submitted, that it did not believe that dispensation was necessary: previous work on the school proposal, including the Committee reports referred to by Mr Mohan, had proceeded on that basis. It had not, therefore, taken any action based on the assumption that dispensation would or might be required. As it considered Mr Mohan's request to be for information pertaining to "any potential dispensation", it did not hold any relevant information.
20. In the course of the investigation, the Council also confirmed that neither the Chief Executive nor the Depute Chief Executive held any relevant information.
21. Having considered the Council's submissions, together with the subject matter of the information request and the submissions received from Mr Mohan, the Commissioner cannot accept that the Council held no information falling within the scope of Mr Mohan's request at the time that request was received. Clearly, the information in the letter of 22 May 2009 was held by the Council at that time. The Commissioner does not accept the Council's view that this letter fell outwith the scope of Mr Mohan's request. Whether the Council's proposals (albeit that they are at this stage couched in fairly broad terms and only an informal view is being sought) might be accommodated on the site in question without the need for a dispensation is clearly the subject matter of the letter: that, in the Commissioner's view, is enough to bring the letter within the scope of Mr Mohan's request.
22. Having considered the Council's submissions, however, the Commissioner is prepared to accept that this letter represents the start of consideration of this question and therefore to conclude, on the balance of probabilities, that no further information was held by the Council which would have been caught by the request. In the circumstances, therefore, the Commissioner does not require the Council to take any further action in response to Mr Mohan's request.



DECISION

The Commissioner finds that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mohan. The Commissioner finds that the Council was wrong to provide Mr Mohan with a notice under section 17 of FOISA that it held no information falling within the scope of his request.

Given that Mr Mohan already has a copy of the relevant letter (provided in response to an information request he made to the Scottish Government) and the Commissioner is satisfied that the Council did not hold any further information at the time of receiving Mr Mohan's request, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr Mohan or Dundee 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
19 May 2010



Appendix

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.

...

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.

...