

# Decision Notice



Decision 086/2010 Mr Thomas Brown and the City of Edinburgh Council

Terminology used in employment contract

Reference No: 200902033  
Decision Date: 8 June 2010

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Brown requested from the City of Edinburgh Council (the Council) information as to particular terminology used in an employment contract. The Council responded by advising Mr Brown that the information was otherwise accessible to him. Following a review, in consequence of which the Council advised Mr Brown that it did not hold the information, Mr Brown remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Brown's request for information in accordance with Part 1 of FOISA, by giving him notice that it did not hold the information requested.

## Relevant statutory provisions and other sources

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (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 28 September 2009, Mr Brown wrote to the Council requesting the following information, in respect of certain posts where the contract of employment stated that the pay rate included an allowance for essential preparation, calculated at the rate of 20 minutes per contracted hour:
  - a. The definition of essential preparation
  - b. What happens to the 20 minutes if a member of staff had no preparation?
  - c. Does this provision only apply to part-time staff members, and if so why?
2. The Council responded on 26 October 2009, explaining that it was relying on the exemption in section 25(1) of FOISA as the information could be obtained from it by other means. In this connection, it noted that Mr Brown had raised a formal grievance and that the necessary information would be provided through this process. In this connection, he was asked to contact a specified HR adviser within the Council.



3. On 27 October 2009, Mr Brown wrote to the Council requesting a review of its decision. He noted that he had so far been unable to obtain the clarification he sought through the formal grievance process.
4. The Council notified Mr Brown of the outcome of its review on 24 November 2009. It upheld its decision to rely on section 25(1) of FOISA for the requested information, on the understanding that Mr Brown had spoken to the named HR adviser and had been provided with a full explanation of the essential preparation issues raised in his information request. The Council also explained that as Mr Brown's request was for an explanation rather than recorded information, it was giving him notice in terms of section 17(1) of FOISA to the effect that it held no relevant recorded information.
5. On 25 November 2009 Mr Brown 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.
6. The application was validated by establishing that Mr Brown 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

---

7. On 25 January 2010, the Council was notified in writing that an application had been received from Mr Brown. The investigating officer provided the Council with an opportunity to give comments on Mr Brown's application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. It was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to sections 17(1) and 25(1).
8. A response was provided by the Council and further clarification was obtained in the course of the investigation. The submissions from the Council will be considered fully, insofar as relevant, in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

---

9. 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 Brown and the Council and is satisfied that no matter of relevance has been overlooked.



## Section 17 – information not held

10. 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. In this connection, it should be noted that the general entitlement to information in section 1(1) of FOISA extends (subject to qualification – see full text of section 1(4) below) to any information held by the authority at the time it receives the applicant's request.
11. In its response to Mr Brown's request for review, the Council notified Mr Brown, in terms of section 17(1), that it did not hold the information he had requested. Somewhat confusingly, given that notice in terms of section 17(1) and the citation of an exemption should be mutually exclusive, it also referred to its earlier citation of section 25(1) of FOISA. Noting the terms of the Council's submissions in the course of his investigation, the Commissioner will first of all consider whether the Council was correct to give Mr Brown notice in terms of section 17(1).
12. In its submissions, the Council advised that the information requested by Mr Brown did not exist in recorded form.
13. The Council explained that an allowance for preparation time was included in pay rates following a report to the Executive of the Council on 15 June 2004, with further action following another report to the Executive on 8 November 2005. The Council submitted that neither of these reports used the term "essential preparation". It is not clear to the Council when this term was first used to describe the preparation time consolidated into the pay rates. While considering it easy to understand why the word "essential" would come to be used, the Council noted that this was not the term used in the report establishing the payment, suggesting that a definition of what constituted "essential preparation" became problematic if a "non-common sense" stance was adopted.
14. The Council indicated that it regarded Mr Brown's request to be for an explanation of the interpretation and application of "essential preparation time". Such information was not, the Council's submitted, held in recorded form as it was not the term used to consolidate the payment.
15. In its submissions, the Council provided the Commissioner with copies of the reports to the Executive of the Council dated 15 June 2004 and 8 November 2005. These reports provide some information as to the reasons for introducing the new arrangements in respect of preparation time, but do not address any of the points raised by Mr Brown in his request. The Council's guidance notes for the relevant managers appear to go some way towards identifying what is intended to fall within the scope of "essential preparation", but this document has clearly been studied by Mr Brown at length in the course of preparing his grievance and does not address any of these points to his satisfaction.



16. Having considered the submissions from the Council, together with the terms of Mr Brown's request, the Commissioner accepts the Council's arguments that it did not, at the time it received the request, hold any recorded information falling within the scope of Mr Brown's request at the time the request was received. The Commissioner is therefore satisfied that the Council was correct to give Mr Brown notice under section 17(1) of FOISA in respect of this information.
17. Having decided that the Council was correct to determine that it did not hold the information Mr Brown was seeking, the Commissioner is not required to go on to consider the application of section 25(1) of FOISA in this particular case.

## DECISION

The Commissioner finds that the City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Brown.

## Appeal

---

Should either Mr Brown or the City of Edinburgh 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**  
**8 June 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.

...

- (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.

...

##### 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.

...

Decision 086/2010  
Mr Thomas Brown  
and the City of Edinburgh Council

