

# Decision Notice



Decision 107/2009 Mr R and Orkney Islands Council

Equal Opportunities Charter

Reference No: 200900332

Decision Date: 10 September 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr R requested from Orkney Islands Council (the Council) information relating to Equal Opportunities. He also asked for other information relating to him which does not form part of this Decision. The Council initially failed to respond but later responded to a request for review. It also supplied Mr R with its equal opportunity policy together with statistical information which fell within the scope of his request and an explanation of information held. Following the review, Mr R remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that it was correct to inform Mr R that it did not hold an Equal Opportunities Charter, in keeping with section 17 of FOISA.

However, the Commissioner also found that the Council failed to comply with Part 1 of FOISA, in particular by failing to provide reasonable advice and assistance to Mr R regarding clarification of the request and in line with its duty under section 15 of FOISA. It also failed to comply with Part 1 of FOISA by not responding within the statutory timescales in terms of section 10(1) of FOISA and by failing to carry out a review in line with sections 21(4) and (5) of FOISA within the timescales laid down by section 21(1) of FOISA. He does not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held), and 21(1), (4) and (5) (Review by Scottish public authority)

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

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1. On 7 August 2008, Mr R wrote to the Council requesting the following information (in addition to other items not covered by his subsequent application to the Commissioner):
  - a. Any and all information relating to the application, implementation and monitoring carried out by the Council of the Equal Opportunities Charter; and



- b. Any and all information relating to the monitoring of disabled applicants since November 2006 until the present.
2. The Council responded on 27 August 2008 to acknowledge receipt of the request but failed to provide any further response within 20 working days of receipt of Mr R's request.
3. Mr R wrote to the Council again on 10 October 2008, expressing his disappointment at the lack of a response and requesting a review of the Council's handling of his request.
4. The Council wrote to Mr R on 20 October 2008 to acknowledge receipt of his letter of 10 October 2008 and apologised for the delay in responding. It indicated that advice was still being sought from Council officers and confirmed that a response would be provided "in early course".
5. Mr R submitted an application to the Commissioner on 28 November 2008 as he had not received a response to his request for review.
6. After the intervention of the Commissioner, on 17 December 2008 the Council notified Mr R of the outcome of its review. In its review, the Council advised Mr R that it was not clear what he meant by "Equal Opportunities Charter": it assumed that he was referring to its equal opportunities policy, a copy of which it provided. It also provided copies of its employment application and monitoring forms with a brief explanation of the processes followed in relation to each of them. It also responded to part (ii) of Mr R's request by supplying statistical information relating to the number of disabled people shortlisted for interview in 2006, 2007 and for 2008 (up to 15 November).
7. On 3 February 2009 Mr R 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.
8. The application was validated by establishing that Mr R 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.

## Investigation

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9. On 4 March 2009 the Council was notified in writing that an application had been received from Mr R.
10. The investigating officer subsequently contacted the Council giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions, in particular in relation to the steps taken to identify and locate any information falling within the scope of Mr R's requests. The Council responded to these questions by providing an explanation of the searches conducted and the information held.



## Commissioner's analysis and findings

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

### Whether the information requested by Mr R was held by the Council

12. In his application, Mr R was dissatisfied with the Council's response to his request, believing it to be withholding information.
13. In order to determine whether the Council was correct to respond to Mr R's request by, in effect, stating that it did not hold some of the information he had requested, the Commissioner must satisfy himself as to whether the Council held the information requested at the time it received the request.
14. During the investigation, a detailed explanation was sought on the searches undertaken for any relevant information. Details were provided of the locations searched, the search terms used (where relevant) and the reasons for using these parameters. Explanations were provided of the information held (as provided to Mr R) and the processes relating to it.
15. Regarding part (i) of Mr R's request, the Council indicated it was required by law to have an equal opportunities policy (applying to disability amongst other areas), a copy of which it had supplied to Mr R. Although Mr R had referred to an "Equal Opportunities Charter", Council officers had no knowledge of and were unable to identify any document of that name. The only relevant document held was the equal opportunity policy. The Council acknowledged that it had made no attempt to clarify with Mr R precisely which document he was concerned about.
16. In relation to part (ii) of the request, the Council explained briefly how monitoring forms and information gathered from them were dealt with.
17. The Commissioner has considered the Council's submissions. He has also checked the Council's website for anything which might be described as an "Equal Opportunities Charter": given the nature of the term "charter", it would be reasonable to expect any document of that name to be intended for general public consumption and therefore generally available to the public. He has identified nothing of that description and is satisfied in the circumstances that the equal opportunities policy (as provided to Mr R) is the only relevant document held by the Council. Given the Council's submissions and all other relevant circumstances (including his general understanding of requirements applicable to public authorities in this area and of how such matters are dealt with in practice), he is satisfied that the Council was entitled to inform Mr R in terms of section 17 of FOISA that it did not hold any relevant information in addition to that provided to him.



### Section 15 of FOISA – duty to provide advice and assistance

18. Mr R indicated in his application that he was concerned as to the quality of the information the Council supplied. Whilst the Commissioner can investigate what is actually held by a Scottish public authority, there is no provision in FOISA as to the quality of any information held: section 73 of FOISA simply defines *information* as "information recorded in any form". Therefore, the Commissioner cannot (having satisfied himself as to what the Council actually held) comment on Mr R's view that the detail is poor and does not appear to reflect what he expected to be held. However, while it is still not exactly clear what he was expecting, it is evident that the material supplied did not, in Mr R's view, match what he had actually asked for, particularly with regard to information on the Council's "Equal Opportunities Charter".
19. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 Code") in providing advice and assistance in any particular case, it is taken to have complied with this duty for the purposes of that case.
20. During the investigation, the Council was asked if it had contacted Mr R for clarification before assuming he was referring to its equal opportunities policy. The Council indicated that it had not. Although the Council pointed out in its submission that Mr R did not attempt to clarify matters either following receipt of a copy of its equal opportunities policy, the onus is on the public authority to provide advice and assistance in these situations. Moreover, it was only following an application to the Commissioner that Mr R became aware of the interpretation the Council had placed on the term "Equal Opportunities Charter". While in the circumstances it is difficult to see which document Mr R might be referring to other than the Council's equal opportunities policy, ultimately that is a question only Mr R can answer. Given his adherence to use of the term "charter" in all of his correspondence with the Council, it is difficult to understand why the Council did not clarify its understanding of this point by contacting Mr R directly.
21. For the reasons set out above, the Commissioner is of the opinion that the Council did not act in accordance with its duty to provide advice and assistance to Mr R under section 15 of FOISA, in particular by failing to seek clarification directly from Mr R as to what information he required.

### Technical issues

22. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
23. The Council acknowledges that having received Mr R's request for information dated 7 August 2008, it failed to respond to the information request thereafter.



24. The Commissioner therefore finds that the Council failed to respond to Mr R's request for information within the 20 working days allowed by section 10(1) of FOISA.
25. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case.
26. Mr R requested a review on 10 October 2008, to which the Council responded (20 October 2008) by apologising for the delay and advising that a response would be forwarded "in early course". Section 21(4) of FOISA provides an authority with three possible options for responding to a requirement for review. Of these, however, the only one available where the applicant's complaint is that no decision has been reached (as in this case) is that set out in section 21(4)(c), in other words to reach a decision on the applicant's request. Given the terms of the Council's response of 20 October 2008, which merely advised that a response would be provided in time, the Commissioner could not accept that this met the requirements of section 21 of FOISA.
27. In failing to comply with the timescale required by section 10(1) of FOISA and in failing to carry out a review in accordance with section 21 of FOISA as outlined above, the Council failed to comply with Part 1 of FOISA. The Commissioner notes, however, that a response to Mr R's information request and request for review has since been sent to him and in these respects the Commissioner does not require any further action to be taken.

## DECISION

The Commissioner finds that Orkney Islands Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr R by supplying the information held which falls within his request. In particular, he is satisfied that the Council does not hold some of the information requested in part 1 of Mr R's request and that it was therefore entitled to give notice in terms of section 17(1) of FOISA to the effect that it did not hold the remainder of the information requested.

However, the Commissioner also found that the Council failed to comply with Part 1 of FOISA, in particular by failing to provide reasonable advice and assistance to Mr R with a view to clarifying aspects of his request, in line with its duty under section 15 of FOISA. It also failed to comply with Part 1 of FOISA by not responding within the statutory timescales in terms of sections 10(1) and 21(1) of FOISA, and by failing to carry out a review meeting the requirements of sections 21(4) and (5) of FOISA. Given that a review was carried out and the Commissioner is satisfied that all relevant information held has been released to Mr R, the Commissioner does not require the Council to take any further action in respect of these failures in response to this particular application.



## Appeal

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Should either Mr R or Orkney Islands 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**10 September 2009**

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## Appendix

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### 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.

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##### 10 Time for compliance

- (1) ... a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) ... the receipt by the authority of the request;

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

##### 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.

....

## 21 Review by Scottish public authority

- (1) ...a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- (4) The authority may, as respects the request for information to which the requirement relates-
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...