



Scottish Information
Commissioner

Decision 127/2006 Mr Aitken and North Ayrshire Council

<i>Request for copies of reports and records relating to road works</i>

Applicant: Mr Ian Aitken
Authority: North Ayrshire Council
Case No: 200501884
Decision Date: 27 June 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 127/2006 Mr Ian Aitken and North Ayrshire Council

Request for copies of reports and records relating to road works – section 17 information not held – section 19 content of certain notices – section 21 review by Scottish public authority

Facts

Mr Aitken requested North Ayrshire Council to provide information in regard to resurfacing work carried out on a specific road by the Council prior to an accident in which he suffered injury. This included a request for a copy of an original inspection record which measured resurfacing around a fixture within the road on which the accident occurred.

The Council responded by saying that it did not have a copy of the report containing this record and explained (upon Mr Aitken's request for a review of its decision) that the measurement had been completed for the purpose of completing a report to its insurers, which had been passed to them on completion without a copy being retained.

Mr Aitken then appealed to the Commissioner for a decision on the way in which the Council had handled his request.

Outcome

The Commissioner found that North Ayrshire Council did not hold a copy of the inspection report prepared for the insurers.

However, he found that the Council breached section 11(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) in failing to provide Mr Aitken with a copy of the document stating the work was complete and accepting the workmanship on the road concerned.

He found also found that the Council breached section 15 of FOISA in its misleading response to Mr Aitken's request for a record of measurement of a water toby, and misapplied the exemption in section 36(1) of FOISA to that information.



Finally, he found that the Council had breached sections 19 and 21(10) of the FOISA, in failing to inform Mr Aitken of his right to a review of the Council's decision on his request, his right to apply for a decision from the Commissioner on the way in which the Council handled his request, or his right to appeal to the Court of Session on a point of law following a decision of the Commissioner.

Appeal

Should either the Council or Mr Aitken wish to appeal against this decision, there is a right to 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. On 25 May 2005, Mr Aitken (referring to previous correspondence) requested North Ayrshire Council ('the Council') to provide him with
 - a) A copy of an inspection report, dated 10 March 2004, regarding resurfacing work on a road (on which he subsequently suffered an accident), which recorded that the work was complete.
 - b) A copy of the original record of the measurement for a water toby in the road, stating there was 10mm of difference in levels between the top of the toby and the top of the road surface.
 - c) A copy of the inspection report that accepted the resurfacing workmanship.
 - d) Details of the instructions and specifications relating to the resurfacing work.
2. The Council replied on 29 June, stating that the measurement had been taken to complete a report to its insurers and was not recorded in any other documentation. It also stated that the work was carried out by the Roads Operations Section and enclosed a copy of the internal bill of quantities for it. The specifications for resurfacing the road used the *Specification for Highway Works* published by Her Majesty's Stationery Office (HMSO). The letter did not outline Mr Aitken's rights to request a review of the Council's decision and appeal to me for a decision thereafter.



3. On 19 July 2005 Mr Aitken requested a review of the Council's decision. He noted the Council's statement that the measurement was not recorded in any other documentation, but also that the Council's insurers, Zurich Municipal, had stated in a previous letter to him that there had been a further inspection of the road after notification of his accident which noted the same 10mm difference in levels. He presumed that the Council had carried out this further inspection and noted surprise that it did not have records of this. He also stated that he required further advice from the Council on how to obtain the HMSO publication, or preferably a copy from the Council, since he could not find it on the internet.
4. The Council responded on 25 July 2005, stating that the measurement was taken only for the purpose of completing the insurance report, which was forwarded to its insurers on completion. It considered it to be exempt under FOISA on the grounds that it was prepared for the purposes of litigation, but if Mr Aitken required a copy he should contact Zurich Municipal. It also recommended contacting HMSO for a copy of the *Specification for Highway Works*. The letter did not state Mr Aitken's right to appeal for a decision from me, or his right to appeal to the Court of Session on a point of law following my decision.
5. Mr Aitken then appealed to me (on 23 August 2005) for a decision regarding the way in which his request had been handled. In particular, he was of the opinion that the Council had a duty to obtain the information from Zurich, as it originally obtained it and then passed it to Zurich.
6. The case was then passed to an investigating officer.

Investigation

7. Mr Aitken's appeal was validated by establishing that he had made a request for information to a Scottish public authority, and had appealed to me only after asking the authority to review its original decision.
8. I invited comments from the Council as I am required to do under section 49(3)(a) of FOISA.
9. I also requested the Council to provide confirmation of what requested information it held and copies of all of this.



10. In its response, the Council provided a copy of the Standard Contract Document: Part 2, relating to the resurfacing works carried out in the road (which includes the Bill of quantities referred to in point 2), the record of inspections on the road at issue (which includes a note for 10 March 2004 recording 'resurfacing completed'), relevant extracts from the *Specification for Highway Works* and copies of the previous correspondence it had with Mr Aitken in February 2005.
11. The Council also stated to me that it had not received a report from its insurers in relation to the claim, but only copy correspondence from Zurich Municipal to Mr Aitken repudiating his claim for damages on the basis that they could not find any fault on the part of the Council. A copy of this was also provided to me. In any event, the Council considered this report to be exempt from disclosure on the basis that it regarded it as confidential and potentially the subject of litigation. It cited section 36(1) of FOISA in this regard.

Commissioner's Analysis and Findings

Did the Council hold a record of the measurement requested (and if so, was it exempt from disclosure under FOISA)?

12. The Council has stated that it does not (and did not at the time of Mr Aitken's request) hold the insurance report on the condition of the road on which Mr Aitken suffered his accident (which would contain the information requested by Mr Aitken under point 1(b) above), and has only received a copy of a letter from Zurich Municipal to Mr Aitken, repudiating his claim and finding no fault on the part of the Council.
13. Nevertheless, I note from the Council's letter of 25 July 2005, the statement that the measurement was taken to complete the insurance report, which was then forwarded to the insurers. This would indicate that the Council was involved in compiling information requested by the insurers, which was then analysed by Zurich Municipal to produce the conclusion which was outlined in its letter repudiating Mr Aitken's claim.
14. The Council has informed me that the public liability claims procedure it has established with Zurich involves filling out a claim form including information relevant to the claim to Zurich to make an initial determination on liability. Such a form would have been filled out as part of Mr Aitken's claim, including the measurement of the water toby requested by him, and would be retained by Zurich as part of its records of the claim.



15. The Council also stated that the procedure does not require the final claim reports which have been produced by Zurich for the purpose of determining the outcome of claims to be provided to it.
16. I am therefore satisfied that the Council does not hold a copy of the final report produced by Zurich. However it has confirmed to me (following further investigations) that it took a copy of the claim form that it filled out for its insurers, and that it still holds a copy of this, including a record of the measurement of the water toby. This is despite its statement of 29 June 2005, that it did not hold a copy of the measurement. I am satisfied that this measurement, rather than necessarily the insurers' report which may have contained it, was the information requested by Mr Aitken at point 1(b).
17. The Council has also stated that it considers the insurers' report to be exempt, being confidential and the subject of litigation. It has referred to section 36(1) of FOISA in this connection.
18. Nevertheless, the Council has not stated that it considers the claim form that it filled out to be exempt, and since both it and its insurers have stated to Mr Aitken that the measurement taken was 10mm, this information is clearly not exempt. I therefore see no reason for the Council to refuse to provide Mr Aitken with a copy of the original record of this measurement.
19. Accordingly, I do not find that the Council has made a case for the application of section 36(1) of FOISA to the measurement, and find that the exemption does not apply. Accordingly I do not have to consider the public interest test.

Did the Council provide a copy of the reports stating the work was complete and accepting the workmanship?

20. Mr Aitken's initial request of 25 May referred the Council back to a previous request of 4 February, and reiterated that he required copies of the requested information outlined in points 1a and 1c above. This was because the Council's response of 18 February (to the 4 February request) had provided him with a statement in answer to both requests, that "The Council inspected the location on 10 March 2004. The report records 'resurfacing completed'."
21. The Council's choice of words in this respect is somewhat confusing, as this statement comes from the record of inspections referred to in paragraph 10. I accept that this record satisfies the requirements of both 1a and 1c, as in relation to the latter point the statement of completion also implies acceptance that the work has been carried out to a satisfactory standard. However, the use of the word "report" suggests something more substantial than the record actually is, and does not help the applicant to understand the implications of what is being expressed to him.



22. While Mr Aitken was effectively provided with a digest or summary of the relevant information as requested, I find that this does not comply with the requirements of section 11(1) of FOISA, as Mr Aitken required the Council to provide an 'actual copy of the report and details' (i.e. the record of inspections). It would not have been impractical for the Council to have done this.

Procedural aspects

23. Paragraph 66 of the Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (Section 60 Code) states that any review of an authority's original decision in regard to a request for information should generally be handled by staff who were not involved in the original decision. I regard this to be good practice which ensures that the review process is carried out impartially by an independent person within the authority.
24. The Council's responses to Mr Aitken's initial request and request for review were clearly signed by the same individual as proxy for the Head of Roads. In this regard, I find it difficult to see how the Council could have carried out an independent and impartial review of its decision on Mr Aitken's request.
25. I also note that the Council's review response of 25 July 2005 stated that it considered the insurance report requested to be exempt, but did not state which exemption was being applied. Given that the Council did not hold a copy of the report, there was no requirement for it to identify the report as exempt information. As will be clear from paragraph 16 above, I also think it was unwarranted for the Council, on a reasonable interpretation of Mr Aitken's request, to assume from his seeking a record of the toby measurement that he required to see a copy of the insurers' report (as opposed to another record it might be more reasonable to expect the Council to possess – such as the claim form that was traced towards the end of this investigation). In all the circumstances, I would regard the Council's response to this part of Mr Aitken's request as misleading and unhelpful.
26. The provision of accurate information in the course of handling information requests is a vital part of a public authority's duty to provide advice and assistance under section 15 of FOISA, and I therefore find that the Council has breached this part of the Act in dealing with that part of Mr Aitken's request relating to the toby measurement.



Content of notices

27. Under section 19 of FOISA, a public authority must state an applicant's right to request a review of its decision when a request for information is refused, along with the applicant's right to appeal to me if he or she remains dissatisfied following the review. Section 21(10) of the Act also states that any letter detailing an authority's decision in response to a review undertaken by it, must contain details about the applicants rights to make an appeal to me regarding the authority's handling of the request and thereafter to appeal to the Court of Session on a point of law.
28. In this regard the Council breached these sections of the Act in failing to inform Mr Aitken of any of these rights in its responses of 29 June and 25 July 2005.

Decision

I find that North Ayrshire Council (the Council) does not (and did not at the time of Mr Aitken's request) hold a copy of the inspection report prepared for the insurers.

I find that the Council breached section 11(1) of FOISA in failing to provide Mr Aitken with a copy of the document stating the work was complete and accepting the workmanship on the road concerned.

I also find that the Council breached section 15 of FOISA in its misleading response to Mr Aitken's request for a record of measurement of a water toby, and misapplied the exemption in section 36(1) of FOISA to that information.

I find that the Council breached sections 19 and 21(10) of FOISA, in failing to inform Mr Aitken of his right to a review of the Council's decision on his request, his right to apply for a decision from the Commissioner on the way in which the Council handled his request, or his right to appeal to the Court of Session on a point of law following a decision of the Commissioner.

I require the Council to provide Mr Aitken with a copy of the document stating the work was complete and accepting the workmanship on the road concerned.

Since Mr Aitken only asked for a copy of the record of measurement for the water toby, I require the Council to provide a redacted copy of the page of the claim form containing the measurement, where any extraneous information not relating to the measurement has been blacked out.



I cannot require the Council to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require the Council to contact Mr Aitken within 42 Days of the date of this decision notice.

Kevin Dunion
Scottish Information Commissioner
27 June 2006