

Decision Notice



Decision 157/2010 Mr W and North Lanarkshire Council

Tender information

Reference No: 201000282

Decision Date: 8 September 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr W requested from North Lanarkshire Council (the Council) information relating to the tenders for the lighting system for the Motherwell Concert Hall. The Council responded by explaining that it did not hold some of the information he requested, while directing him to its website in respect of the remainder. Following a review, Mr W remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially dealt with Mr W's request for information in accordance with Part 1 of FOISA. He also found, however, that it had failed to cite section 25(1) of FOISA in relation to information otherwise accessible and had failed to respond to part of Mr W's request. In the circumstances, he did not require any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and 2(a) (Effect of exemptions); 17(1) (Notice that information is not held) and 25(1) (Information otherwise accessible)

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 6 July 2009, Mr W wrote to the Council to request the following information relating to the contract for the replacement of the lighting dimmer system at Motherwell Concert Hall:
 - i) What drawings had been issued to allow estimates
 - ii) Whether it was correct that the contract had only been advertised on the Council's website and tender documents had only been requested by and issued to three contractors
 - iii) Details of the tenders received (including contact details for the tenderers)
 - iv) Details of the evaluation process and who had been qualified to do the evaluation
 - v) Where the tender was publicly available.



2. The Council responded on 24 July 2009, indicating that no drawings had been issued and directing Mr W to its website for information on the advertisement and evaluation of tenders (with a link to the pages on “Contract Standing Orders”).
3. On 3 August 2009, Mr W wrote to the Council requesting a review of its decision. In particular, Mr W was dissatisfied with being directed to the Council’s website and indicated that he would prefer the information in hard copy.
4. Following further correspondence, the Council notified Mr W of the outcome of its review on 17 November 2009. It upheld its previous decision on the grounds that full information had already been provided to him. This letter provided confirmation in response to both points in Mr W’s question ii.
5. On 3 February 2010, Mr W 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 W 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

7. On 9 March 2010, the Council was notified in writing that an application had been received from Mr W and was asked to provide the Commissioner with comments on that application, as required by section 49(3)(a) of FOISA. In particular, it was asked to comment on the steps it had taken to establish what relevant information it held, its handling of information otherwise accessible and certain aspects of Mr W’s request it appeared not to have answered.
8. The submissions received from the Council and Mr W, insofar as relevant, will be considered fully 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 W and the Council and is satisfied that no matter of relevance has been overlooked.



Section 17 – Notice that information is not held

10. The Council submitted that it did not hold the drawings requested by Mr W. Where a Scottish public authority receives a request for information it does not hold it must, in line with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information. In this connection, it should be noted that the general entitlement to information in section 1(1) of FOISA extends (subject to qualification – see the text of section 1(4) below) to any information held by the authority at the time it receives the applicant's request.
11. The Council reiterated in response to the investigating officer that it did not hold the drawings Mr W had requested, advising that potential tenderers had been provided with a written specification and invited to determine how they would deliver their proposals. They had been offered site visits to discuss the project, but no drawings had been prepared by the Council. The Council advised which officers had been asked about this.
12. Having considered the Council's submissions, the Commissioner is satisfied that drawings were not issued for the purposes of the contract in question. There would therefore be no reasonable expectation that the Council should hold such drawings, and in the circumstances the Commissioner accepts the Council's contention that it did not.
13. The Commissioner has therefore concluded that the Council acted in accordance with section 17(1) of FOISA in respect of the drawings requested by Mr W.

Section 25(1) – information otherwise accessible

14. The Council confirmed to the investigating officer that it was withholding the remainder of the information requested under section 25(1) of FOISA, which exempts information the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA. This exemption is absolute and therefore is not subject to the public interest test set down by section 2(1)(b) of FOISA.
15. It should be noted that section 25(1) is not restricted to information which is publicly accessible. It recognises that where information is already available to the applicant (even if it is not available to the general public), there is no need to provide an alternative right of access to it through FOISA.
16. The Council gave details of the Council's website, with a specific link to a page for "Contract Standing Orders", which details the processes for both the advertisement and evaluation of tenders. The Commissioner also notes that Mr W clearly had access at the time he made his request to a report submitted to the Council's Learning and Leisure Services Committee on 28 January 2008, which in any event is publicly available. This report contains details of how this particular tendering exercise was handled. It also appears from Mr W's correspondence that he was aware of the terms of the invitation to tender.



17. In all the circumstances, therefore, the Commissioner accepts that the Council was justified in this case in taking the view that certain of the information requested was reasonably accessible to Mr W other than by requesting it under FOISA. Consequently, the Commissioner accepts that the Council was entitled to withhold any information covered by points ii, iii and iv of Mr W's request under section 25(1) of FOISA.
18. In this connection, the Commissioner notes Mr W's wish, stated in his requirement for review, although not in his initial request, to receive the requested information in hard copy. He must also note, however, that Mr W (while advancing other reasons why he should have the information in this form) has not suggested that he is unable to access the information in the form in which it was identified by the Council. In the circumstances, he does not consider himself to be in a position to take account of Mr W's expressed preference in determining whether the information was in fact reasonably accessible to him.
19. In reaching his conclusions, the Commissioner has taken account of the terms of Mr W's request. He accepts that the Council responded to the request by directing him to information which dealt with the points raised in fairly general terms. Given the way in which the request was framed, however, the Commissioner does not consider that to have been an unreasonable response.
20. The Commissioner must also note, however, that at no point in responding to Mr W did the Council cite section 25(1) of FOISA. It only did so in response to the Commissioner's investigation. To that extent, therefore, the Commissioner must find that the Council failed to deal with the request in accordance with section 1(1) of FOISA. On the other hand, as indicated above, he is satisfied that the Council would have been entitled to rely on section 25(1) in respect of points ii, ii and iv of the request and therefore does not require it to take any further action in respect of those points.

Point v of the request

21. The last part of Mr W's request asked where the tender was publicly available. While this question might be open to more than one interpretation, the Commissioner cannot accept that it could be dealt with by reference to the information identified in the Council's responses to Mr W. In any event, he is not persuaded by the Council's submissions in the course of the investigation that such information was necessarily otherwise accessible at the time the Council dealt with the information request and request for review. In the circumstances, he finds that the Council failed to respond to point v in accordance with section 1(1) of FOISA. Equally, however, he must note a subsequent request by Mr W for copies of the tenders received, and in the circumstances does not require the Council to take any further action on this point.



DECISION

The Commissioner finds that North Lanarkshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr W. He also finds, however, that the Council failed to cite section 25(1) (as it was entitled to do) in respect of points ii, iii and iv of Mr W's request, and that it failed to respond to part v of the request. In these respects, it failed to comply with Part 1 (and in particular section 1(1)) of FOISA. In the circumstances, the Commissioner does not require the Council to take any action.

Appeal

Should either Mr W or North 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
8 September 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.
...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
...

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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...