

# Decision Notice



Decision 188/2010 Mr Roger Hayes and City of Edinburgh Council

Failure to respond to an information request

Reference No: 201001638

Decision Date: 12 November 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

This decision considers whether City of Edinburgh Council complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Roger Hayes.

## Background

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1. On 4 May 2010, Mr Hayes wrote to the Council requesting the following information:
  - a. A copy of all invoices received from Common Purpose [a not for profit organisation that runs leadership development courses] from January 2009.
  - b. Copies of all email traffic and attachments between a named person and Common Purpose from September 2009, and
  - c. The Council's spend with Common Purpose for the last 3 financial years, including the current financial year.
2. The Council acknowledged this request, but did not provide any response within 20 working days. On 22 June 2010, Mr Hayes wrote to the Council requesting a review of its failure to respond.
3. On 20 July 2010 the Council notified Mr Hayes of the outcome of its review. It provided a figure in respect of part (c) of Mr Hayes' information request (although not for the full period specified) but did not provide any substantive response to parts (a) or (b) of Mr Hayes' request.
4. The Council referred to the Court of Session ruling in the case of Glasgow City Council v Scottish Information Commissioner (issued on 30 September 2009) (the Opinion)<sup>1</sup> and highlighted that this confirmed that FOISA provides the right to access information, rather than documents. The Council referred to section 8(1)(c) of FOISA, which provides that a request for information must describe the information required, and stated that the parts of the request seeking invoices and emails did not do this. The Council invited Mr Hayes to resubmit his request clarifying exactly what information he was seeking.

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<sup>1</sup> <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



5. The Council's response recognised that it had breached section 10(1) and section 1(1) of FOISA by not responding to Mr Hayes' request within 20 working days. It also stated that it had breached section 15(1) of FOISA by not seeking clarification or offering advice on how he might specify the actual information he required that might be held within the documents mentioned in parts (a) and (b) of his request.
6. On 18 August 2010 Mr Hayes wrote to the Commissioner's Office, stating that he was dissatisfied with the Council's handling of his request and request for review and applying for a decision in terms of section 47(1) of FOISA. The case was allocated to an investigating officer, for consideration as to whether the requests made by Mr Hayes were valid for the purposes of FOISA, and so whether a valid application had been made.

## Investigation

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7. On 13 September 2010, the Council was notified in writing that an application had been received from Mr Hayes and was invited to comment on the question of whether parts (a) and (b) of Mr Hayes' request (and consequently his application for decision with respect to these parts) were valid.
8. The investigating officer drew the Council's attention to the Commissioner's guidance on the validity of information requests in the light of the Opinion, which was published on 27 January 2010<sup>2</sup>, and previous decisions issued in cases where the public authority had considered that a request was not valid in terms of section 8(1) of FOISA. The Council was asked to confirm whether it still considered any parts of Mr Hayes' request to be invalid and to provide any submissions it may wish to make in support of its position.
9. The Council's response to this letter referred only to part (b) of Mr Hayes' request. It maintained that by requesting copies of all email traffic and attachments, Mr Hayes had failed to specify the information he was seeking. The Council maintained that this part of the request was so lacking in specification that it was not possible for it to establish its obligations under FOISA, and so it could not be reasonably viewed as a request properly made.
10. A letter was sent to the Council on 5 October 2010 advising it that the Commissioner had determined that parts (a) and (b) of Mr Hayes' request were valid having met the requirements in section 8(1) of FOISA, and so a full investigation would take place in response to Mr Hayes' application for a decision. The Council was invited (as required by section 49(3) of FOISA) to make comments on matters raised by the application, and asked to provide any evidence in support of its position.
11. In its response dated 11 October 2010, the Council admitted that it had failed to respond to Mr Hayes' initial request within the statutory timescale. However, it noted that it had responded to Mr Hayes' request for review within the required period.

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<sup>2</sup> <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>



12. The Council highlighted that its response to part (c) of Mr Hayes' request had provided total spend with Common Purpose over the previous three years. However, it acknowledged that it had omitted to advise Mr Hayes of the sum which applied during the period from January 2009 to the date of his request. The Council indicated that this was an error on its part, and that it would endeavour to establish what invoices were received and forward the information to Mr Hayes. However the Council reiterated that it did not intend to provide Mr Hayes with the emails and attachments referred to in part (b) of his request, on the basis that it did not consider this to be a valid request for information.
13. On being asked for further clarification on its intentions regarding the specific parts of Mr Hayes' request, the Council submitted that its finance department had been asked to confirm the outstanding figure in respect of Common Purpose from January 2009 to the date of the request. The Council indicated that its finance department would provide either copies of the invoices themselves or a spreadsheet detailing the information contained in the invoices to Mr Hayes. However, at the time of the finalising this decision, no further information had been disclosed to Mr Hayes.

## Commissioner's analysis and findings

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### Validity of Parts (a) and (b) of the request

14. In this case, the Commissioner first considered whether parts (a) and (b) of Mr Hayes' request were valid information requests in terms of section 8(1) of FOISA.
15. Section 8(1) of FOISA specifies that a request for information for the purposes of FOISA is one which:
  - (a) is made in writing or another permanent form capable of subsequent reference,
  - (b) states the name of the applicant and an address for correspondence and
  - (c) describes the information requested.
16. As noted above, when notifying Mr Hayes of the outcome of its review, the Council referred to the terms of the Opinion, and in particular comments therein that highlighted that FOISA provides a right to information rather than documents. It also indicated that the requests for invoices (part (a)) and emails (part (b)) failed to specify the actual information that was being sought within these documents, and so did not fulfil the requirement of section 8(1)(c) of FOISA. Having reached this conclusion, the Council provided no substantive response to these two parts of the request.
17. When asked by the investigating officer to comment on the question of validity of Mr Hayes' requests, the Council offered no submission in support of the position set out to Mr Hayes with respect to his request for invoices received from Common Purpose (part a), and it no longer maintained that this part of his request was not valid.



18. However, the Council provided submissions in support of its position that part (b) of Mr Hayes' request, which sought all email traffic and attachments between a named individual and Common Purpose, was invalid as it did not adequately identify the information requested as required by section 8(1)(c) of FOISA.
19. The Council highlighted that in the Opinion, their Lordships had accepted that the right to information should not be interpreted or applied in a manner which would render the exercise of that right impractical or unduly difficult. It submitted that it was not reasonably clear from Mr Hayes what information he was seeking with this part of his request. It expressed the view that Mr Hayes could clarify what information he was seeking because it was, in his opinion, to be found only in email traffic that has passed between a particular employee of the Council and Common Purpose. The Council suggested that it might be in Mr Hayes' interest to clarify the information he is seeking as this information may be recorded in another format.
20. The Council maintained that part (b) of Mr Hayes' request was so lacking in specification that, without clarification, it would not be possible for the Council to determine whether he might reasonably obtain the information elsewhere. The Council argued that if a request does not enable it to establish its obligations under the terms of FOISA, it cannot reasonably be viewed as a request properly made.
21. In further submissions, the Council asserted that Mr Hayes' request for sight of a single medium of communication was both too broad and too narrow a means to identify any specific information and that it elicited simply what the named Council employee chose to commit to email in her dealing with the Common Purpose.
22. The Commissioner notes that, in the Opinion, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant.
23. In the Commissioner's guidance (as noted at paragraph 8 above), he states (at paragraphs 3.1, 3.4 and 3.5):

*"FOISA provides a right to obtain information and not a right to obtain copies of specific documents. However, this does not mean that a request for a copy of a document is automatically invalid, as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants. If it is not reasonably clear, the public authority can contact the applicant to obtain clarification.*

[...]



*Therefore where an applicant has asked for a copy of a document and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA. A reference to a specific document is a commonplace way of describing the information sought and can be of assistance to an authority in identifying and locating the information. Such a reference can also benefit the authority by limiting the scope of the information request, e.g. to that contained in a minute of a certain date.*

*If it is not reasonably clear to a public authority what information the applicant wants, and the public authority reasonably needs further detail to identify and locate the information, the public authority must tell the applicant what other information it needs."*

24. The Commissioner has considered the comments from the Council along with the terms of Mr Hayes' information request and the content of both the Opinion and his own guidance.
25. He notes that the statutory requirement, under section 8(1)(c) of FOISA, is confined to a description of the information requested. He takes the view that the purpose of the description is to allow the public authority to identify and locate the information and that the purpose of the reference in FOISA to "information" is to relieve the applicant from specifying particular documents, since he or she cannot be expected to know in what form information is held. The principal objective of the whole FOISA regime is to make information accessible, provided it can be identified and located at a cost that is not excessive, and provided it does not fall within one of the statutory provisions (such as that in section 14) or statutory exemptions.
26. Where an applicant has made a request for a copy of a document, and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA.
27. Notwithstanding their expression in terms of requests for a copies of particular documents (emails and attachments and invoices), the Commissioner considers it to be clear that parts (a) and (b) of Mr Hayes' information request intended to seek all information that is contained in the documents requested.
28. The Commissioner has considered the particular points made by the Council with respect to part (b) of Mr Hayes' information request. Since Mr Hayes has specified his request in a way that clearly indicates where the information of interest to him could be located (i.e. within the relevant email communications), the Commissioner is unable to accept the Council's argument that without further clarification it would be unable to determine its obligations in relation to this request and the information contained in the specified documents.



29. Should the Council consider that there may be other information of interest to Mr Hayes within other documents it holds, there is nothing to prevent it from highlighting this to him in pursuit of its duty to provide advice and assistance. However, in the absence of any evidence to suggest otherwise (and noting that Mr Hayes is not required to explain the reason for his making any information request that fulfils the requirements of section 8(1) of FOISA), there is no reason to believe that Mr Hayes wished to see anything other than the information he has requested (i.e. all of that contained within the relevant email communications and associated attachments).
30. In this case, the Commissioner considers that the descriptions of the information Mr Hayes wishes to access via parts (a) and (b) of his request are sufficiently clear to enable the identification and location of that information, which must be the primary consideration in determining whether a request is valid. In both cases, the description, in the view of the Commissioner, clearly fulfils the requirements of section 8(1)(c) of FOISA.
31. In the circumstances, the Commissioner has therefore concluded that all three parts of Mr Hayes' request to the Council adequately described the information he was seeking, and that they were valid information requests, which fulfilled all of the requirements of section 8(1) of FOISA.
32. Accordingly, the Commissioner concludes that the Council was under an obligation to respond to parts (a) and (b) of Mr Hayes' information request. The Commissioner considers the failure to acknowledge and handle these two parts of the request as valid information requests made in terms of FOISA, to be a breach of Part 1 and section 1(1) of FOISA.
33. In what follows, the Commissioner considers the particular areas where the Council's handling of the three parts of Mr Hayes' request failed to comply with the requirements of FOISA.

#### **Initial handling of the request**

34. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exemptions which are not relevant in this case. Since the Commissioner is satisfied that each part of Mr Hayes' information request is valid, this obligation applies in relation to his request in its entirety.
35. The Council did not provide a response to any part of Mr Hayes' request of 4 May 2010 within the required timescale. The Commissioner therefore finds that the Council failed to comply with the requirements of section 10(1) of FOISA.
36. The Council acknowledged its failure to respond within the required timescale in its response to Mr Hayes' request for review, and the Commissioner notes that the Council has apologised to Mr Hayes for this failure.



### Mr Hayes' requirement for review

37. Section 21(1) of FOISA gives a Scottish public authority a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
38. Section 21(4) sets out what an authority might do when it conducts a review. The authority can:
  - i. confirm its original decision, with or without modification,
  - ii. substitute a different decision from that originally made, or
  - iii. reach a decision where the applicant's complaint is that none has been made.
39. The Commissioner's view is that where (as in this case) no response has been made to an information request, the first two options are unavailable to the authority, and so the only appropriate review outcome in a case such as this is for the authority to reach a decision where none has been reached before, in line with section 21(4)(c) of FOISA.
40. Section 21(5) then requires the authority to notify the applicant of what it has done under section 21(4), and issue a statement of its reasons for so doing, within the time allowed by section 21(1).
41. The Commissioner is satisfied that, within his email to the Council of 22 June 2010, Mr Hayes made a valid request for review to the Council. Since the Commissioner is also satisfied that each part of Mr Hayes' information request was valid, he considers that the obligations in sections 21(1), (4) and (5) apply in relation to his request in its entirety.
42. The Council responded to Mr Hayes' request for review on 20 July 2010, the 20<sup>th</sup> working day following its receipt. The email provided some information in response to part (c) of Mr Hayes' information request, which had sought the total sum spent with Common Purpose across a specified period. While the Commissioner has commented on the deficiencies with this response below, he accepts that, for this part of the request, the Council complied with sections 21(1), (4) and (5).
43. The Council's email of 20 July did not provide any substantive response to parts (a) and (b) of Mr Hayes' information request. Instead, it indicated that these requests were not valid in terms of section 8(1) of FOISA (and so it believed that it was under no obligation to provide any substantive response).
44. The Commissioner therefore finds that with respect to parts (a) and (b) of Mr Hayes' information request, the Council failed to carry out a review in line with section 21 of FOISA, and in particular sections 21(4) and (5) of FOISA, within the 20 working days allowed by section 21(1) of FOISA.





45. The Commissioner now requires the Council to conduct a review of its handling of parts (a) and (b) of Mr Hayes' information request (which should be in terms of section 21(4)(c) of FOISA), and to notify Mr Hayes of the outcome of its review in terms of section 21(5) of FOISA.

#### **Response to part (c) of Mr Hayes' request**

46. As noted above, the Council did provide information in response to part (c) of Mr Hayes' request, in the form of a figure for the spend by the Council with Common Purpose. However, during the investigation, the Council acknowledged that the information provided did not actually cover the full period specified in Mr Hayes' information request. The Council acknowledged its error, and indicated that further information would be sent to Mr Hayes.
47. In these circumstances, the Commissioner must conclude that the Council's response to part (c) of Mr Hayes' information request did not comply with section 1(1) of FOISA, in that the information supplied was not what he had requested.
48. The Commissioner now requires the Council to provide a further response to part (c) of Mr Hayes' information request which either
- a. provides in full the information requested, or
  - b. provides appropriate notice if the Council considers the information to be exempt from disclosure, or that any provision in Part 1 of FOISA applies, meaning that Mr Hayes is not entitled to receive it.

#### **The duty to provide advice and assistance**

49. Under section 15(1) of FOISA, a 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.
50. When notifying Mr Hayes of the outcome of its review, and again in its submissions to the Commissioner, the Council indicated that it had not acted in accordance with this duty in this case. It highlighted that having reached the view that two parts of Mr Hayes' request were not valid because they did not describe the information he was seeking, it should have provided advice to assist him in clarifying his request.
51. In this case, having concluded that the requests to which these comments relate were indeed valid, the Commissioner does not agree with the Council's conclusions regarding the type of advice it should have offered.
52. The Commissioner would agree in general that advice and assistance should be offered in circumstances where an applicant attempts to make a request under FOISA, but the presentation of their request is perceived to have deficiencies that mean it is not valid in terms of section 8(1). However, since the Commissioner does not consider there was any deficiency in the presentation of these requests, he does not believe the Council was required to offer such advice.



53. Consequently, he has concluded that there was no breach of section 15(1) of FOISA in this case.

## DECISION

For the reasons set out above, the Commissioner finds that the Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Hayes. In particular:

- By failing to recognise parts (a) and (b) of Mr Hayes' request as valid information requests in terms of section 8(1) of FOISA and by failing to provide any substantive response to these parts, the Council failed to comply with section 1(1) of FOISA.
- By failing to provide a response to part (c) of Mr Hayes' information request that provided in full the information requested, the Council also failed to comply with section 1(1) of FOISA.
- By failing to respond to any part of Mr Hayes' information request within 20 working days following its receipt, the Council failed to comply with section 10(1) of FOISA.
- By failing to conduct any review in relation to parts (a) and (b) of Mr Hayes' information request within the required timescale, the Council failed to comply with the requirements of section 21 of FOISA, and in particular sections 21(1), (4) and (5).

The Commissioner now requires the Council to:

- (1) Conduct a review in relation to parts (a) and (b) of Mr Hayes' information request (which should be in terms of section 21(4)(c) of FOISA) and notify him of the outcome of the review in terms of section 21(5), and
- (2) Provide a further response to part (c) of Mr Hayes' information request in line with either of the options set out in paragraph 48 of this decision.

The Commissioner requires the above steps to be taken by 7 January 2011



## Appeal

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Should either Mr Hayes or the 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.

**Claire Sigsworth**  
**Deputy Head of Enforcement**  
**12 November 2010**



## 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) states the name of the applicant and an address for correspondence; and...
- (c) describes the information requested.

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), 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) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

##### 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.

...

## **21 Review by Scottish public authority**

- (1) Subject to subsection (2), 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.

...