

Decision Notice



Decision 194/2010 Mr Iain Maciver and Comhairle nan Eilean Siar

Legal advice on applications for extension to opening hours

Reference No: 201002013

Decision Date: 24 November 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Iain Maciver requested from Comhairle nan Eilean Siar (the Council) all legal advice made available to Western Isles Licensing Board (the Board) concerning applications by Stornoway Golf Club for a Sunday extension to its opening hours. The Council responded that it did not hold any recorded information falling within this request, in terms of section 17 of FOISA. Following a review, Mr Maciver remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Maciver's request for information in accordance with Part 1 of FOISA by relying on section 17(1) of FOISA. He did not require the Council to take any action.

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 19 August 2010, Mr Maciver wrote to the Council requesting copies of all documents "comprising, and referring to, all legal advice made available this year to Western Isles Licensing Board concerning applications by Stornoway Golf Club for a Sunday extension to its opening hours".
2. The Council responded on 23 September 2010 and stated that it did not hold any recorded information relating to legal advice provided or made to the Board regarding applications by Stornoway Golf Club for a Sunday extension to its opening hours. The Council informed Mr Maciver that legal advice had been provided to the Board, but that this was done verbally and therefore there was no written record of the advice.



3. On 22 September 2010, Mr Maciver wrote to the Council requesting a review of its decision. He considered it inconceivable that a professional legal adviser would fail to record advice researched and provided to the Board in the knowledge that public bodies must comply with legally competent inquiries into how decisions were arrived at. He also questioned whether a legal adviser would be able to impart detailed and perhaps complex legal advice to members of the Board without the benefit of notes.
4. The Council notified Mr Maciver of the outcome of its review on 18 October 2010. It advised that it had checked with all officers involved in providing advice to the Board in respect of the application in question, and had also checked the relevant files. The Council confirmed that it did not hold any recorded information in relation to provision of legal advice to the Board in respect of the application, and consequently upheld its initial decision that the information was not held.
5. The Council explained that officers who provided legal advice to the Board generally did so at briefing meetings for Board members and, as these officers were generally familiar with the terms of the legislation (and in particular the principles against which applications were judged), a verbal discussion would generally take place. This discussion would take account of the salient points of individual applications and how the Board members should exercise their discretion in accordance with the statutory requirements and licensing principles. Officers would then take questions from Board members on any aspect of an application. In this case, as was usual, the relevant discussion and advice was completed verbally, and as the meeting in question was a briefing for Board members there was no written record. In contrast, advice given to the Board in open session was recorded and made available within the note or minute of the meeting.
6. On 23 October 2010, Mr Maciver 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.
7. The application was validated by establishing that Mr Maciver 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

8. The investigating officer wrote to the Council on 3 November 2010, 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, the Council was asked to provide details of the steps it had taken to establish that no relevant information was held.



9. The Council responded on 11 November 2010, confirming its position that it did not hold any information falling within Mr Maciver's request and providing an explanation as to why it considered this to be the case. It provided details of the steps taken to verify this.
10. In support of his view that information should be held, Mr Maciver reiterated the points he had made in his request for review. The relevant submissions made by both Mr Maciver and the Council will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 17 – Notice that information is not held

12. Section 17(1) of FOISA states that where a Scottish public authority receives a request for information which it does not hold, it must, in accordance with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information. In terms of section 1(4), the information an authority is required to provide in response to a request is generally that held by it at the time the request is received (see the Appendix for the full text of the subsection).
13. The Council explained that the request was based upon two applications made by Stornoway Golf Club and considered by the Board earlier in 2010, seeking a variation to its premises licence amending the hours of operation to include sale of alcohol on Sundays. The Council detailed the officers who had acted in the capacity of legal adviser on each occasion the matter had been considered: on one occasion this had been the Legal Services Manager and on the other the Head of the Executive Office.
14. The Council explained that when Mr Maciver made his request, the Legal Services Manager had met with the Head of the Executive Office to discuss its terms and whether either had recorded information that fell within the request. The Council confirmed that neither had made any written notes before advising the Board, or made any notes of advice provided to the Board during consideration of the applications.
15. The Council reiterated what it had stated in its review response, i.e. that advice to the Board was usually provided verbally and that no written record of this advice was kept. The Legal Services Manager commented that he had been assisting in the provision of advice to the Board for ten years and had never had an occasion to issue written advice to the Board or record the advice provided. The Legal Services Manager added that neither he nor the Head of the Executive Office, both experienced solicitors in the field of licensing law and familiar with the issues in question, had prepared any research on any issue relating to the Golf Club applications.



16. The Council was asked where any legal advice would be recorded: it replied that had any written record of the advice been made, it would have been stored in the licensing files for the Golf Club. The Council pointed out these files were examined in the course of the review, the conclusion being that the information sought was not held. It added that all officers involved in consideration of the Golf Club applications (the Licensing Standards Officer in addition to the two officers referred to above) had been asked in the course of the review whether they held any information falling within the scope of the request. All enquiries at that stage had been conducted by the Council's Chief Executive.
17. Having considered the submissions and explanations he has received, the Commissioner is satisfied that adequate steps were taken by the Council to determine whether it held the information requested by Mr Maciver. In the circumstances, he is satisfied that the Council did not hold any information falling within the scope of Mr Maciver's request at the time it received the request, and consequently he is satisfied that it was correct to give Mr Maciver notice in terms of section 17(1) of FOISA in response to the request.

DECISION

The Commissioner finds that Comhairle nan Eilean Siar (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Maciver.

Appeal

Should either Mr Maciver or Comhairle nan Eilean Siar 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
24 November 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.

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