

# Decision Notice



Decision 201/2010 Mr Kiran Oza and Dundee City Council

Failure to respond to requirement for review

Reference No: 201002051

Decision Date: 3 December 2010

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

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

## Background

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1. On 7 July 2010, Mr Oza wrote to a Dundee City Councillor, requesting the following information:

*I write to you in your capacity as leader of the administration to ask about the West End Schools Project. Please can you ask the relevant council officers to advise me:*

1. *What is the current market value of the St Joseph's RC Primary School building and grounds, including "land at Bellfield" as identified in report 69-2009?*
2. *What is the current market value of the Logie site of the former Harris Academy Annexe on Blackness Road?*
3. *Will there be any funds transfer if the above lands are exchanged by way of excambion, as agreed at City Development Committee meeting of 22 February 2010?*
4. *Alternatively, would any funds transfer only happen when the existing St Joseph's RC Primary School is sold to the Al-Maktoum Foundation?*
5. *Will St Joseph's RC Primary School continue to have unrestricted access to the playing field (car park), football pitch and surrounding green space until such time as the new school is built and the children and teachers have transferred to the new facility?*
6. *Does the city council have any evidence that, after nearly 10 years of promised investment by the Al-Maktoum Foundation, that a cultural centre or other development will actually be built on the St Joseph's land, if this is exchanged for the Logie site as planned in the West End schools proposal?*

*As the formal planning application is currently underway, I would appreciate your early response so that parents and residents can be assured regarding these plans.*



2. On 2 September 2010, Mr Oza wrote to the Council providing a copy of the request for information as outlined above and requesting a review in that he had not received a response from the Councillor.
3. The Chief Executive of the Council responded on 9 September 2010, indicating that the Councillor had forwarded his request of 7 July 2010 to the Council and apologising that a response had not been provided. The Council informed Mr Oza that it had carried out a review and informed him it did not hold any information relating to his requests numbered 5 and 6. It further stated that information relating to his requests numbered 1 to 4 was being withheld in terms of section 33(1)(b) of FOISA as release of the information would or would be likely to prejudice substantially the commercial interests of the Council and the Al-Maktoum Foundation.
4. On 10 September 2010, Mr Oza wrote to the Commissioner stating 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.
5. On 13 September 2010, Mr Oza was informed that his application to the Commissioner was not valid in that his initial request of 7 July 2010 had been sent to the named Councillor, who is not a Scottish public authority for the purposes of FOISA. He was further advised that his email to the Council of 2 September 2010, in which he forwarded his request, was considered to be his initial request to the Council. Consequently, for the purpose of FOISA, the Council's response of 9 September 2010 was considered as a response to that request and not a response to a request for review.
6. On 13 September 2010, Mr Oza wrote to the Council requesting a review of its decision as advised by the Commissioner's office. Mr Oza also wrote to the Commissioner asking that the Commissioner explain to the Council that the Council's response of 9 September 2010 was not considered to be a response to review.
7. The Council was informed by the Commissioner's office that the request of 7 July 2010 was not a valid request for the purposes of FOISA and that the response of 9 September 2010 was being treated as the response to the initial request of 2 September 2010.
8. On 21 September 2010, the Council responded to Mr Oza's request for review of 13 September 2010 informing him that discussions were taking place with the Commissioner's office as to how to take the matter forward.
9. During further correspondence between the Commissioner and the Council, the Council indicated that it disagreed with the Commissioner's view, indicating that it accepted and accepts Mr Oza's request of 7 July 2010, addressed to the Councillor, as valid for the purposes of FOISA. As such, the Council believed that the Chief Executive's response of 9 September 2010 was a response to the request for review.
10. Mr Oza did not receive a response to his request for review of 13 September 2010 and on 27 October 2010 wrote to the Commissioner's Office, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.



11. The application was validated by establishing that Mr Oza 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

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12. On 12 November 2010, the Council was notified in writing that an application had been received from Mr Oza and was invited to comment on the application. It was explained to the Council that, in the light of the above, Mr Oza's request for a review dated 13 September 2010 is valid in terms of section 20 of FOISA, and therefore that a review should be carried out in accordance with section 21 of FOISA.
13. The Council responded on 2 December 2010 indicating that whilst it believed that Mr Oza's request of 7 July 2010 was valid, and therefore the response of 9 September 2010 by the Chief Executive was in fact a response to a review, it proposed that the Chief Executive would carry out a review of his previous reply and respond to Mr Oza within a period of 20 working days.
14. The Council further indicated that, given the circumstances, it did not believe that it had breached Part 1 of FOISA and that it would not progress the review pending confirmation that the review within 20 working days was an acceptable way forward.

## Commissioner's analysis and findings

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15. Section 1 of FOISA states that a person who requests information from a Scottish public authority is entitled to be given it by the authority.
16. Section 3 of FOISA defines a Scottish public authority for the purposes of FOISA. A Councillor is not a Scottish public authority for the purposes of FOISA (see Appendix below).
17. Mr Oza made a request for information to a named Councillor in his capacity as leader of the administration. The Councillor is not a Scottish public authority for the purposes of FOISA and he holds the position of leader of the administration in his capacity as a Councillor. The request Mr Oza submitted to the Councillor on 7 July 2010 is therefore not a valid request in terms of FOISA in that the request was not made to a Scottish public authority. Whilst the Commissioner notes and appreciates the Council's willingness to accept the request of 7 July 2010 as valid, this is not a defect the Commissioner would regard as capable of being cured by a unilateral decision of the Council that it accepted and accepts the request to be valid.



18. The Commissioner has produced guidance on this matter which can be found on the Commissioner's website<sup>1</sup>. In summary, this guidance states that when a Councillor receives a request for information, they should advise the applicant to resubmit the request to the Council. If the request was passed to the Council (as happened in this case), the Council, under its duty to provide advice and assistance, '*.....could have fulfilled this duty by either making the information available, or inviting the requester to make a fresh request directly to the authority.*'
19. In the circumstances, whilst noting the Council's disagreement, the Commissioner is satisfied that by providing the request to the Council on 2 September 2010, this is deemed to be the initial request (in that it is the first correspondence Mr Oza had with the Council, as opposed to with the named Councillor) and therefore a valid request in terms of section 1(1) of FOISA. The subsequent response of 9 September 2010 is a response to the request of 2 September 2010 and the Commissioner is satisfied that the request for review of 13 September 2010 is valid in terms of section 20(1) of FOISA (see Appendix below).
20. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant in this case. The remainder of section 21 governs the review process and the giving of notice of the outcome to the applicant (see Appendix below).
21. The Commissioner notes the Council's submission that it did not believe it had breached FOISA, and its proposal that it would carry out a review and respond to Mr Oza within 20 working days. It further indicated that it would take no further action until this proposal was confirmed as an acceptable way forward.
22. Whilst noting the Council's proposal to respond within 20 working days, given the fact that no review has been carried out in relation to Mr Oza's request (made on 13 September 2010), the Commissioner considers it appropriate to require the Council to carry out a review in terms of his powers under section 49(6) of FOISA.
23. The Commissioner therefore finds that the Council failed to provide a response to Mr Oza's which satisfies the requirements of section 21 of FOISA (see Appendix below) and requires it to do so.

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<sup>1</sup> <http://www.itspublicknowledge.info/web/FILES/ElectedfactsheetB.pdf#search=%22councillors%22>



## DECISION

The Commissioner finds that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), by failing to comply with Mr Oza's requirement for review as required by section 21 of FOISA.

The Commissioner therefore requires the Council to respond to Mr Oza's requirement for review, in accordance with the requirements of section 21 of FOISA, by 18 January 2011.

## Appeal

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Should either Mr Oza 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.

**Margaret Keyse**  
**Head of Enforcement**  
**3 December 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.

##### 3 Scottish public authorities

- (1) In this Act, "Scottish public authority" means-
  - (a) any body which, any other person who, or the holder of any office which-
    - (i) is listed in schedule 1; or
    - (ii) is designated by order under section 5(1); or
  - (b) a publicly-owned company, as defined by section 6.

...

##### 20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

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##### 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.
- (2) If-
  - (a) the authority is the Keeper of the Records of Scotland; and



- (b) a different authority is, by virtue of section 22(4), to review a decision to which the requirement relates,
- subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.
- (3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on 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.
- (6) The Scottish Ministers may by regulations provide that subsections (1) and (5) and section 47(4)(b) are to have effect as if the reference in subsection (1) to the twentieth (or as the case may be the thirtieth) working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.
- (7) Regulations under subsection (6) may-
- (a) prescribe different days in relation to different cases; and
- (b) confer a discretion on the Scottish Information Commissioner.
- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
- (a) the requirement is vexatious; or
- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.





- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.
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