

Decision Notice



Decision 228/2011 Mrs S and Aberdeen City Council

Harmony Kayaks

Reference No: 201101214

Decision Date: 11 November 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mrs S asked Aberdeen City Council (the Council) for various pieces of information relating to Harmony Kayaks, a company which operates in Duthie Park, Aberdeen. The Council did not provide a response to Mrs S's request. However, in response to Mrs S's request for a review, the Council provided information which addressed some parts of her request, subject to redaction of certain information it considered exempt from disclosure under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council also gave Mrs S a notice, in line with section 17 of FOISA, that it did not hold any information which would address other parts of her request. Following this review, Mrs S remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mrs S's request for information in accordance with Part 1 of FOISA, in particular section 1(1) by failing to provide Mrs S with all of the recorded information that it held falling within scope of part (b) of her request.

The Commissioner also noted that the Council failed to comply with Part 1, in particular section 10(1) of FOISA in not responding to Mrs S's request for information within 20 working days.

However, the Commissioner found that, by providing Mrs S with a notice in terms of section 17 of FOISA for certain of the information she requested, and all of the recorded information it held falling within scope of part (c) of her request, the Council complied with Part 1.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Timescale for compliance) 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 30 March 2011, Mrs S wrote to the Council to request the following information relating to Harmony Kayaks, a company operating in Duthie Park, Aberdeen:
 - (a) the length, width and depth of the large pond in Duthie Park;
 - (b) contact details of Harmony Kayaks;
 - (c) a copy of any contract that the Council has with Harmony Kayaks (Mrs S indicated she would accept a redacted copy);
 - (d) a copy of any inspections the Council has carried out on Harmony Kayaks;
 - (e) a copy of any audits the Council has carried out on Harmony Kayaks;
 - (f) whether the Council holds Disclosure Scotland certificates for the personnel who operate the service;
 - (g) the number of personnel operating the service for whom the Council hold Disclosure Scotland certificates;
 - (h) any other information on Harmony Kayaks held by the Council that it could release under FOISA.
2. No response was received from the Council and, on 13 May 2011, Mrs S wrote to the Council to request a review.
3. The Council notified Mrs S of the outcome of its review on 7 June 2011. In its response, the Council provided Mrs S with the dimensions of the pond in Duthie Park, and an address for Harmony Kayaks, care of that pond, in response to parts (a) and (b) of her request. The Council also provided a letter, which it indicated was its contract with Harmony Kayaks in response to part (c) of her request, subject to the redaction of information it considered exempt under section 38(1)(b) of FOISA (on the basis that it was personal information, disclosure of which would breach the data protection principles).
4. The Council also notified Mrs S, in line with section 17 of FOISA that it did not hold any information which would address parts (d), (e), (f), (g) and (h) of her request. In particular, the Council explained that it does not hold records of inspections carried out of Harmony Kayaks (part (d)) and, as Harmony Kayaks is a private company, the Council does not carry out audits of it (part (e)). The Council explained that, as part of its contract, the Council insists that all staff are checked by Disclosure Scotland, but it advised that as Harmony Kayaks is privately owned, the Council does not hold the Disclosure Scotland certificates (parts (f) and (g)). With respect to part (h), the Council indicated that it did not hold any further information relevant to this request.



5. On 28 June 2011, Mrs S wrote to the Commissioner, stating that she 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. Mrs S indicated in her application that she was satisfied with the response received to part (a) of her request.
6. However she did indicate that she was not satisfied that the address provided to her in response to part (b) of her request ("c/o boating pond, Duthie Park") was Harmony Kayaks' registered address. Mrs S also commented that the information provided in response to part (c) was not a contract but an undated letter. Mrs S also expressed dissatisfaction with the Council's position that it did not hold any information to answer parts (d), (e), (f), (g) and (h) of her request.
7. The application was validated by establishing that Mrs S 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. On 20 July 2011, the investigating officer contacted the Council, 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. The Council was asked to explain the nature of the searches that it had carried out to determine whether information was held which would address Mrs S's request. The Council was also asked to explain why it considered that the searches it carried out would have been likely to retrieve any information covered by parts (d), (e), (f), (g) and (h) of Mrs S's request.
9. The Council was also invited to comment on various matters raised by Mrs S in her application as to why she considered that the Council should hold information relevant to parts (d), (e), (f), (g) and (h) of her request.
10. The investigating officer also asked the Council to carry out searches to determine whether it held a copy of a contract between itself and Harmony Kayaks, and any other contact details for Harmony Kayaks that it could provide to Mrs S.
11. A submission was also sought from the Council as to why it did not respond to Mrs S's request within the statutory timescale set out in section 10(1) of FOISA.
12. A response was received from the Council on 17 August 2011. The submissions received from both the council and Mrs S are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

13. 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 Mrs S and the Council and is satisfied that no matter of relevance has been overlooked.

Section 1(1) – General entitlement

14. Section 1(1) creates a general right of access to recorded information held by a public authority.

Part (b) – Contact details

15. In part (b) of her request for information, Mrs S asked the Council for contact details for Harmony Kayaks. In its response to her request for review, the Council provided Mrs S with contact details for Harmony Kayaks, care of the boating pond in Duthie Park.
16. In her application to the Commissioner, Mrs S provided photographic evidence to demonstrate that the only facility that Harmony Kayaks has in Duthie Park next to the boating pond is a shed, which has no facility to receive correspondence. Mrs S also expressed dissatisfaction that she did not consider this to be a registered address for the business.
17. During the course of the investigation, following a request by the investigating officer for further searches to be carried out, the Council advised that it had identified alternative contact details for Harmony Kayaks, which it was willing to provide to Mrs S. These contact details were subsequently provided to Mrs S.
18. As the Council did hold further recorded information falling within the scope of part (b) of Mrs S's request, and was not relying on any exemption(s) in FOISA for withholding this from her, the Commissioner finds that the Council did not comply with section 1(1) of FOISA in responding to part (b) of Mrs S's request. However, as the Council has now provided the relevant information to Mrs S, the Commissioner does not require the Council to take any action in relation to this breach.

Part (c) – Copy of contract

19. In part (c) of her request for information, Mrs S asked for a copy of the contract that the Council entered into with Harmony Kayaks. In response to her request for review, the Council provided Mrs S with a letter between itself and Harmony Kayaks setting out the conditions under which Harmony Kayaks would be entitled to use the boating pond in Duthie Park. Certain information considered to be exempt from disclosure under section 38(1)(b) of FOISA was redacted from that letter.
20. In her application to the Commissioner, Mrs S commented that she did not receive a copy of the contract between the Council and Harmony Kayaks



21. During the course of the investigation, the Council was asked to carry out further searches to determine whether it holds a contract between itself and Harmony Kayaks.
22. In its response, the Council explained that it considers that the letter of permission which was provided to Mrs S constitutes a binding contract between itself and Harmony Kayaks, as it sets out the conditions under which Harmony Kayaks can use the boating pond in Duthie Park. The Council advised that it does not hold any other contractual documentation with Harmony Kayaks. The Council therefore submitted that it has provided Mrs S with all the contractual documentation between itself and Harmony Kayaks that it holds.
23. In its submissions, the Council also outlined the searches that it carried out to ascertain whether any other contractual information was held, this included the areas within the Council that were searched, together with the types of records searched and the keywords and phrases used.
24. Having considered the submissions from the Council, the Commissioner accepts that the searches carried out by the Council to determine whether any relevant information was held regarding contractual information between the Council and Harmony Kayaks were adequate.
25. As a consequence, the Commissioner accepts that the Council does not (and did not at the time of Mrs S's request and requirement for review) hold any information, other than the letter provided to Mrs S, that constitutes a contract between itself and Harmony Kayaks.
26. The Commissioner notes that Mrs S's original request indicated that she was willing to receive a redacted copy of the contract, and she has raised no objection to the redactions within the letter provided to her. The Commissioner has therefore not considered the Council's application of the exemption in section 38(1)(b) of FOISA to the redacted information within this decision.
27. As the Commissioner is satisfied that the Council provided Mrs S with all relevant recorded information that it held in relation to part (c) of her request (subject to the redaction of personal data) at the time that it responded to her request for review, he is satisfied that the Council complied with section 1(1) of FOISA in dealing with part (c).

Section 17 – Information not held

28. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, that held at the time the request is received.
29. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.



30. In order to determine whether the Council has dealt with parts (d) to (h) of Mrs S's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mrs S's request, the Council held any information which would fall within the scope of these parts of her request.
31. The Council submitted that searches were carried out of a file held by City Events, (which is within the Enterprise, Planning and Infrastructure Department of the Council) which relates to Harmony Kayaks. Searches were also carried out of an electronic shared drive, together with emails belonging to the Events Officer responsible for issuing permissions. Searches of these areas would, the Council submitted, have allowed retrieval of the desired information, if held.
32. Regarding inspections and audits (the information sought by parts (d) and (e) of Mrs S's request), the Council explained that the manager of Duthie Park regularly checks on Harmony Kayaks and reports any problems, issues or breaches of terms and conditions to City Events. Visits are also made, the Council advised, by other City Events Officers as and when necessary. The Council stated that action will always be taken against any event organiser hiring Council parks or open spaces if terms and conditions are broken or a complaint is received from a member of the public. However, the Council advised that no written log is taken of visits, and no paper trail has been introduced for any visits where no remedial action is necessary.
33. With respect to the question of whether the Council holds any Disclosure Scotland certificates (parts (f) and (g) of Mrs S's request), it explained that, as Harmony Kayaks is the operator of the service on the boating pond, it was Harmony Kayak's responsibility as an employer to ensure that it is complying with the legal requirements in respect of the checks on employing staff working with children. The Council added, however, that it was aware that under the terms of the contract that it signed with Harmony Kayaks it had the ability to request the disclosure certificates from Harmony Kayaks. However, it maintained that it did not hold the certificates itself.
34. In her application to the Commissioner, Mrs S commented, in relation to part (h) of her request, that she found it strange that the Council does not hold a copy of the public liability insurance for Harmony Kayaks and a risk assessment that she knew had been prepared by Harmony Kayaks and provided to the Council.
35. In its submissions, the Council advised that it is in the process of obtaining a copy of the public liability insurance certificate from Harmony Kayaks, and it accepts that this should have been submitted before the activity commenced. The Council also explained that it did hold a copy of the risk assessment referred to by Mrs S, but this was received after she made her request for information.
36. As mentioned previously, in assessing whether the Council was correct to give Mrs S a notice under section 17 of FOISA, that no relevant recorded information is held, he must consider what was held by the Council at the date of Mrs S's request (30 March 2011). As the Council did not receive the risk assessment referred to until 26 April 2011, he accepts that this was not held at the time of Mrs S's request.



37. While it is clear from reading the Council's submissions that it acknowledges that certain information *should* have been held by it at the time of Mrs S's request, the Commissioner can only consider the information that was actually held by the Council at the time that Mrs S's request was received.
38. Having taken into account the submissions from the Council, the Commissioner is satisfied that the Council took adequate steps and carried out reasonable searches in this particular case to identify and locate any recorded information which fell within the scope of parts (d) to (h) of Mrs S's request. The Commissioner is satisfied, on balance, that the Council did not, at the time it received the request, hold any recorded information which would address parts (d) to (h) of the request.

Section 10(1)

39. Although Mrs S did not raise this point in her application, the Commissioner considers it appropriate to note that the Council failed to comply with the timescales required by FOISA when dealing with her request.
40. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not applicable in this case.
41. It will be evident from the timescales set out in the "Background" paragraphs above that this requirement was not met by the Council in this case. As a result the Council failed to comply with Part 1 of FOISA in this respect.
42. The Council acknowledged this in its submissions to the Commissioner, and explained that the delay in responding to Mrs S's request was due to the absence of a key member of staff to grant approval for the release of information. The Council apologised for this.



DECISION

The Commissioner finds that Aberdeen City Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs S.

The Commissioner finds that by failing to provide Mrs S with all of the recorded information that it held falling within scope of part (b) of her request, the Council failed to comply with Part 1 and, in particular, with section 1(1) of FOISA.

However, the Commissioner finds that by providing Mrs S with a notice in terms of section 17 of FOISA in relation to the information covered by parts (d), (e), (f), (g) and (h) of her request, and all recorded information held by it covered by part (c) of her request (subject to limited redactions which Mrs S did not dispute), the Council complied with Part 1 and section 1(1).

Given that Mrs S received the additional information held by the Council falling within scope of part (b) of her request during the course of the investigation, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mrs S 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.

Margaret Keyse
Head of Enforcement
11 November 2011



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.

...

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.

...

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.

...