

Decision Notice



Decision 295/2013 Mr Niall Campbell and East Dunbartonshire Council

Primary schools in the Council area

Reference No: 201300891

Decision Date: 19 December 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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



Summary

On 10 January 2013, Mr Campbell asked East Dunbartonshire Council (the Council) for information about primary schools in the Council area. The Council responded, withholding certain information as commercially sensitive.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Campbell's request for information in accordance with Part 1 of FOISA, by failing to carry out a review in respect of Mr Campbell's request 1.

As the relevant information was disclosed during the investigation, the Commissioner did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1), (4) and (5) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy)

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 10 January 2013, Mr Campbell wrote to the Council requesting information about primary schools in the Council area. There were 41 numbered requests. Request 1 sought:
The most up to date resale value for all Primary School sites in East Dunbartonshire primary estate on a per school basis, presented to the elected Councillors as part of the current Primary School Estate Review.



2. On 23 January 2013, the Council informed Mr Campbell that it was having difficulty dealing with his requests, explaining that the Primary School Estate Review had generated an abnormally high volume of requests in a very short period of time, which had fallen to one small team within the Council. The Council thought it unlikely that it would be able to respond to all of the requests within the required statutory timescales. While acknowledging that he was not required to do so, it asked if he would consider splitting his requests into smaller batches.
3. Mr Campbell replied to the effect that he did not believe he could split the requests into smaller batches while still meeting his own timescales. The Council confirmed that it was progressing his requests.
4. The Council responded to a number of the requests on 7 February 2013. For request 1, it withheld information under section 33(1)(b) of FOISA.
5. On 9 February 2013, Mr Campbell wrote to the Council requesting a review of its decision. Among other points, he challenged the decision to withhold information under section 33(1)(b).
6. The Council notified Mr Campbell of the outcome of its review on 6 March 2013. Understanding that Mr Campbell now had access to the relevant figures, it made no decision in respect of request 1. This understanding appears to have been based on an assumption that Mr Campbell had access to certain information released by the Council to another person in response to another information request. The Council does not appear to have clarified this point fully in subsequent correspondence it had with Mr Campbell, although it appears clear from that correspondence that he did not have direct access to the information: at no point did it carry out the review he had requested in respect of request 1.
7. On 1 April 2013, Mr Campbell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review (in respect of a number of his requests, including request 1) and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Campbell made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.
9. The case was allocated to an investigating officer.

Investigation

10. The investigating officer subsequently contacted the Council, giving it notice of the application and an opportunity to provide comments on it (as required by section 49(3)(a) of FOISA). The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



11. During the investigation, the Council provided Mr Campbell with the information previously withheld from him in relation to request 1. It acknowledged that the information was no longer sensitive (or accurate enough) to justify it being withheld. Mr Campbell confirmed receipt, but indicated that he still required a decision from the Commissioner in respect of request 1. He confirmed that he did not require a decision in respect of the other requests identified in his application.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all relevant submissions, and parts of submissions, made to her by both Mr Campbell and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 21 of FOISA – Review by Scottish public authority

13. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review. This is subject to certain qualifications, none of which the Council has argued is relevant in this case.
14. Section 21(4) specifies the possible outcomes of a review by a Scottish public authority. Where the applicant has received a response to his or her request for information and is expressing dissatisfaction with that response, there are two options: the authority may either confirm its original decision on the request (with or without modification), or substitute a different decision.
15. Section 21(5) requires the authority to give the applicant notice of the outcome of its review, with its reasons for that outcome.
16. In its response to Mr Campbell's requirement for review, the Council did none of these things. It declined to carry out a review, on the assumption (not, it would appear, founded in any communication from Mr Campbell) that he already had access to the information. At no point has it rectified this omission, so the Commissioner must find that the Council failed to carry out a review in respect of Mr Campbell's request 1, as required by section 21 of FOISA.
17. Given that the information covered by request 1 was disclosed by the Council during the investigation, the Commissioner does not require the Council to take any action in respect of this failure in response to Mr Campbell's application.



18. The Council's handling of this case, both in dealing with Mr Campbell and with the Commissioner, has been confused. In the circumstances, submissions were sought from the Council during the investigation on its application of section 33(1)(b) of FOISA. Given her conclusion that no review was carried out in this case, the Commissioner cannot make a formal finding in respect of the Council's application of that exemption in relation to request 1. However, from the submissions she has received on this point she would observe that, in the circumstances, it is unlikely that the Council would be able to justify the application of the exemption.

DECISION

The Commissioner finds that East Dunbartonshire Council (the Council) failed to comply with Part 1 of FOISA in responding to Mr Campbell's request 1, by failing to carry out a review in respect of that request, as required by section 21 of FOISA. The information covered by request 1 has since been disclosed to Mr Campbell, so the Commissioner does not require the Council to take any action in respect of this failure.

Appeal

Should either Mr Campbell or East Dunbartonshire Council wish to appeal against this decision, they have the right to 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
19 December 2013



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.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...