



Scottish Information
Commissioner

Decision 010/2005 – Mr M and Glasgow City Council

**Refusal to release information relating to Chirnsyde
Community Initiative**

Applicant: Mr M
Authority: Glasgow City Council
Case No: 200500740
Decision Date: 13 July 2005

Kevin Dunion
Scottish Information Commissioner

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Decision 010/2005 – Mr M and Glasgow City Council

Information about Chirnsyde Community Initiative – whether information can be reasonably obtained other than by requesting it under FOISA – section 25(1) – whether requests for information made in the course of ongoing correspondence should be handled in accordance with FOISA – whether an application to the Commissioner is frivolous or vexatious – section 49(1)(a)

Facts

Mr M made a request to Glasgow City Council (the Council) for information relating to Chirnsyde Community Initiative (the Initiative), a community-based organisation that is funded by the Council but independent of it. In response, the Council wrote that it understood that the Initiative had agreed to provide the information to him. Mr M then sought a review, stating his dissatisfaction that the Initiative had not provided the information he sought in full. The Council then refused to provide the information on the grounds that it was reasonably obtainable to him directly from the Initiative and so exempt from release under section 25(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Following an application to the Scottish Information Commissioner, the Council provided the applicant with copies of all relevant information that it holds. Mr M has asked for a decision on whether the Council acted correctly in response to his initial request and request for review.

Outcome

The Commissioner found that the Council has not dealt with Mr M's request for information in accordance with Part 1 of FOISA. The Council should put in place procedures to conform with the provisions of FOISA particularly with respect to Sections 16, 19 and 21 and with reference to paragraphs 63-71 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, relating to these sections.



Appeal

Should either the Council or Mr M wish to appeal against my 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 of receipt of this notice.

Background

1. Mr M wrote to the Chief Executive of Glasgow City Council (the Council) on 2 February 2005. He requested copies of a range of information about Chirnsyde Community Initiative (the Initiative):
 - Its Constitution
 - Minutes of its last AGM
 - Minutes of all other Management Committee meetings held in the last two years
 - A list of the management committee membership
2. Mr M had previously requested the information directly from the Initiative (in a letter dated 11 January 2005) but had not been provided with it. The Initiative is a community-based organisation that is funded by but independent of the Council. The Initiative is not a public authority as defined by FOISA and so there is no direct right to access the information it holds.
3. The Chief Executive of the Council acknowledged Mr M's letter on 9 February and then responded in a letter dated 17 February 2005. In this second letter, the Chief Executive expressed his understanding that the Initiative had agreed to furnish Mr M with the information he had requested.
4. A letter was sent to Mr M by the Secretary of the Initiative on 16 February 2005. This letter enclosed one year of management committee minutes, a copy of one AGM minute, and noted that names of management committee members were enclosed on the minutes.



5. Mr M wrote again to the Chief Executive of Glasgow City Council on 22 February 2005. This letter referred to the Council's response of 17 February and noted that the Initiative had not provided the requested information in full. The outstanding items were listed as a copy of the constitution, a full list of the management committee membership, or a full set of minutes for the previous 2 years.
6. On 23 February, Mr M wrote to my asking me to take up his case with the Council. An Investigating Officer was allocated to the case.
7. On 24 February, the Council issued a refusal notice in response to Mr M's request of 22 February. This notice confirmed that the Council holds the information requested but stated that all the information was exempt from release under section 25(1) of FOISA. Section 25(1) states that information is exempt from release if it can reasonably be obtained other than by making a request under FOISA. The refusal notice stated that the information requested could be obtained from the Management Committee of Chirnsyde Community Initiative, and again expressed an understanding that this Committee was currently responding to the request in full.
8. The refusal notice provided information on how to request an internal review of the Council's handling of the information request. On 2 March 2005, Mr M wrote to the Chief Executive of the Council once again to request a review of the decision set out in the notice of 24 February 2005.
9. Mr M's request for a review expressed dissatisfaction with the assertion that the information is available to him from the Management Committee of the Initiative. He again stated that the Initiative had not responded to his request in full. He also indicated that he believed that his personal safety would be in jeopardy if he were to visit the Initiative in person to collect information.

The Investigation

Validating the case

10. The first stage in this investigation sought to establish whether a valid application had been made to my Office. Under section 47 of FOISA, an application to the Commissioner can only be made only once a valid request for information has been made to a public authority and the response received (or the 20 working days for providing such a response has passed), and then an internal review has also been requested and the response provided (or the time for doing so expired).



11. As noted above, Mr M first wrote to me in the course of an ongoing exchange with the Council. With his letter of 23 February 2005, he included copies of his initial letter of 2 February, and the response of 17 February 2005. No reference was made to the letter to the Council dated 22 February 2005.
12. Following a request from my office, copies of the following were also provided
 - The letter from the Initiative dated 16 February
 - The Council's refusal notice of 24 February
 - The applicant's request for review dated 2 March.
13. Mr M was not able to provide a copy of his letter to the Council of 22 February. A copy of this document was provided by a fax from the Council following a conversation with a member of staff within the Chief Executive's Office.
14. Consideration of these documents (and a telephone conversation with the Council) made clear that Mr M's initial letter of 2 February had not been treated as a request under the terms of FOISA. However, this letter fulfilled all the requirements of a valid request set out in section 8 of FOISA:
 - The request was in writing
 - It set out the requestor's name and address for correspondence
 - It describes the information sought.
15. The response to this request of 17 February did not explain the applicant's right of review under FOISA. However, when Mr M wrote again to the Council on 22 February, he expressed his dissatisfaction with the Council's response, noting that the Initiative had not provided the information sought in full. The Council treated this letter as an initial request made under the terms of FOISA.
16. I consider this letter of 22 February to be a request for review made under the terms of section 20 of FOISA. A valid request for review must:
 - Be in writing or some other permanent form
 - State the name and address of the applicant
 - Specify the request to which the request for a review relates and
 - Specify the reasons for the applicant's dissatisfaction.



17. This letter did all of these things. Although it did not explicitly request that the Council review its handling of the request, section 64 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 provides clear guidance on situations such as this. This states:

“Where an applicant has not been made aware of his or her rights to a review but nevertheless questions, in writing, the decision of an authority, the authority should treat the query as a formal request for review.”

18. Since Mr M had already sought a review in this letter of 22 February 2005, it was not necessary for him to send (or await the response to) the subsequent request for review dated 2 March before applying to my Office.
19. However, his initial letter to my Office was dated 23 February, the day before the Council's response to his letter of the 22 February had been sent to him. Therefore, this letter did not constitute a valid application for decision under the terms of FOISA. Following the advice of the Investigating Officer, Mr M wrote again to my office on 11 March 2005. As a result, a valid application for decision in this case was received on 15 March 2005.

The full investigation

20. A letter was written to Glasgow City Council on 17 March 2005, informing it of the commencement of this investigation. That letter noted that an internal review had been requested by Mr M on 2 March 2005 which had not yet been completed. However, it explained, as detailed above, that this stage had not been necessary and a valid application had been made to the Commissioner following on from the request made to the Council on 2 February 2005, the request for review of 22 February 2005 and the Council's responses to these.
21. The Council was invited to comment on the case in terms of section 49(3) of FOISA and was asked to provide a range of information and documentation. The following was requested:
- Copies of any internal documents and correspondence relating to Mr M's request for information of 2 February 2005 and the request for review of 22 February 2005.
 - Copies of any documents relating to communications with the Initiative about Mr M's request and request for information to the Council.
 - Details of the process followed in response to Mr M's second letter of 22 February 2005, including whether the request was considered afresh and whether any steps were taken to review the Council's response of 17 February 2005.



- Details of the relationship between the Council and the Initiative, and the status of the latter organisation.
 - Details of any steps taken to establish that information would be made available to Mr M in response to his request to the Council.
 - Details of how the Council understood that the information would be made available to Mr M, and any evidence that supported this understanding.
22. The Council was asked to provide a response to this letter by 15 April 2005. No acknowledgement of or response to this letter was received by this date. A reminder was sent to the Council on 21 April, asking that a response be provided no later than Friday 29 April 2005.
23. An e-mail was received from the Council on 29 April 2005 providing interim comments on the case, but not a full response to the letter of 17 March and the requests detailed in paragraph 24 above. The Council's key points are summarised below:
- a) Mr M's request of 2 February had not been taken by the Council to amount to a formal request under FOISA. The Council had instead treated this as "business as usual". As a result, there had been no formal review by the time that this case reached my Office.
 - b) A review was subsequently conducted in response to Mr M's letter of 2 March. The outcome of this review was a conclusion that the Council's response of 24 February was correct.
 - c) The Council believes that Mr M already had in his possession the minutes and other information requested on 2 February. This understanding is based on the Initiative having informed the Council that it passed on the information as requested, and references to the content of the information within subsequent correspondence to the Council from Mr M. On the basis of this, the Commissioner might reasonably conclude that the appeal, at least insofar as it relates to the question of whether the information should be provided to the applicant, is vexatious. (Under section 49(1) of FOISA, the Commissioner does not have to reach a decision where he is of the opinion that an application is frivolous or vexatious.)
 - d) FOISA is not intended to force one organisation to act as a post-box for another organisation which is willing to provide the information in question.
 - e) The Council is aware of Mr M's reluctance to visit the Initiative's premises as are the police, but no allegations have been substantiated. It does not believe this issue is relevant to the case.



- f) Although Mr M's letter of 2 February technically satisfied the criteria of a request under FOISA, it is artificial to consider it outside the context in which it was written. This letter formed one part of a lengthy ongoing exchange of correspondence between the Council and Mr M. As soon as Mr M indicated that the character of his correspondence [with his reference to a complaint to the FOI in his letter of 22 February], the Council responded appropriately. The Council suggests that to uphold the complaint on this point would be counterproductive as it would require public authorities to spend considerably more time considering whether to treat something that could be dealt with as "business as usual" as an FOI request instead.

The proposed settlement

24. In its e-mail of 29 April, the Council also asked for a settlement proposal to be passed on to Mr M. Recognising that there is legitimate public interest in the Initiative's affairs, it offered to lodge copies of the documentation in the local public library for Mr M and any other interested parties to view and copy.
25. Alongside my powers to formally investigate and issue decisions in relation to applications made under FOISA, I also have the power to effect a settlement between the two parties to a case. If both parties agree to a settlement terms in relation to all or part of a case, the applicant will be asked to withdraw the formal application, in full or in part. There is no obligation for either party to the case to accept or discuss a settlement in the course of an investigation.
26. A letter was sent to Mr M on 4 May 2005, explaining that the Council had made settlement proposals and explaining that he could choose to accept this, reject it, or propose his own settlement terms. This letter explained that even if he chose to accept the Council's proposal, I would still reach a decision in relation to any outstanding areas in which Mr M remained dissatisfied with the Council's handling of his request if he so wished.
27. Mr M responded to this letter on May 10. He declined to accept the settlement offered by the Council, asking why the documents were not simply sent to him as requested. He stated that he believed the Council was being obstructive and so asked the Commissioner to reach a full formal decision in this case.
28. Mr M's decision was conveyed to the Council in a telephone call on 11 May 2005. During this conversation, there was some discussion of the implications for this investigation should the Council proceed with its plan to make the information available through its library. The Investigating Officer indicated that I would still need to consider whether this information was reasonably obtainable and so exempt from release under section 25 (1) of FOISA since access would only be available to those willing and able to inspect on site.



A frivolous or vexatious application?

29. The 4 May letter to Mr M also sought clarification on which parts of the information he had requested he had in his possession. This request was made in response to the Council's comments set out in paragraph 23c above. Mr M was asked to confirm whether the list of documents that he currently held remained the same as that set out in his initial letter to my Office.
30. Mr M confirmed in his letter of 10 May that he had not received any further information since he first wrote to my Office, and that he still did not have copies of all minutes for the last two years, a copy of the Constitution of the Initiative, or a full list of the members of the Initiative's Management Committee.

The Council's full response

31. On 18 May 2005, a further reminder e-mail was sent to the Council noting that although interim comments had been received on 29 April 2005, no full response had yet been received to the letter sent on 15 March. This e-mail observed that two months had now passed and the investigation could not proceed until the information requested by my Office was received.
32. The Council's full response, dated 23 May, was received on 24 May 2005. This indicated that, although the Council still maintained that it was entitled to withhold the information under section 25(1) of FOISA, it had decided to release the information to Mr M as a gesture of good will.
33. Copies of correspondence and other documents relevant to the case were also provided.

The Council's comments on the case

34. The Council restated its view (previously expressed in its interim comments) that, although the information request made on 2 February satisfied the technical requirements of FOISA, the Council should not be found to have acted in breach of the Act by failing to treat it as a formal request under FOISA, and the subsequent letter of 22 February as a valid request for review. The Council expressed its opinion that to require an authority to do so in the course of the ongoing correspondence with an individual would place an impossible bureaucratic burden on Scottish public authorities.
35. The Council suggests that Mr M's letter of 2 February could be read as a complaint against the Initiative's failure to respond to correspondence. The Council's response to this was to liaise with the Initiative, secure assurances that the information would be provided, and then write back to the applicant to advise him of this.



36. Mr M's letter of 22 February was then treated as an initial request under FOISA and a response letter drafted using the Council's FOI template letter. The Council observes that this letter was sent to the applicant within 20 working days of the initial request of 2 February.
37. The Council asserts that in providing this response, the Council had complied with its obligations under FOISA, providing a refusal notice in compliance with section 19 within 20 working days of the request, as required by section 10(1).
38. The Council accepts that there was a technical breach of the Act when it failed to progress the internal review requested in Mr M's letter of 2 March. This failure was in part a response to the commencement of the investigation by my Office and the consequent irrelevance, as it saw it, of the internal review.
39. Finally, although the provision of the information directly to the applicant in this case makes a decision from me on this unnecessary, the Council sought my comments on its proposals to make the information requested by Mr M available through its local library. It expressed concern at the prospect that this approach would not have been considered to be making the information readily available.

Confirming that the request for information had been answered in full

40. The Council's letter to my Office dated 23 May enclosed copies of a letter dated 20 May 2005 and documents sent to Mr M in response to his request for information. This collection included:
 - A copy of the Constitution of the Initiative
 - Copies of minutes for AGMs dated 26 October 2004 and 27 October 2003.
 - A copy of the minute of a special general meeting dated 27 October 2003
 - 9 sets of Minutes for Management Committee meetings dated between 19 January 2004 and 7 March 2005.
 - Notification that the details Committee members can be discerned from the minutes provided.
41. Mr M confirmed in a telephone call of 22 June 2005 that he had received this letter and associated documentation. He noted during this conversation that papers associated with the Special General meeting of 27 October 2003 had not been provided. Following telephone conversations with the Investigating Officer, the Council agreed to send copies of these to the applicant, again as a good will gesture. The Council noted that the original request did not explicitly seek these documents.



42. Mr M's request sought copies of the Initiative's Management Committee minutes for the previous 2 years, and so this would encompass any such documents held the Council dating back to February 2003. A number of steps were taken to ensure that the Council had provided all appropriate information that it held in response to the request.
43. In a letter dated 31 May, the Council was asked to confirm whether all minutes held by the Council for the period February 2003 to February 2005 had been included in the collection of documents provided to the applicant.
44. On 14 June, the Council confirmed that no further minutes were held by the Council for this period, as none were received from the Initiative during the period February 2003 to January 2004. The Council noted that funded organisations like the Initiative are not required by the Council to provide copies of their minutes and so this omission is not unusual.
45. To confirm this assertion, a fax was sent to the Initiative itself, asking for information about the sending of minutes of its meetings to the Council. The Initiative's response confirmed that it does not send all minutes to the council. However, minutes have been sent to the Council for "a year plus". This supports the Council's assertion that it had never held copies minutes for the full 2 year period requested by Mr M.

The Commissioner's analysis and findings

46. This application raised two separate questions in relation to the Council's response to Mr M's request for information about Chirnsyde Community Initiative. The first is whether the Council had correctly applied the exemption in section 25(1) of FOISA in its refusal notice of 24 February 2005. The second is whether the Council had breached the requirements of FOISA in the way it responded to Mr M's letters of 2 and 22 February.

Is the information reasonably obtainable other than by making a request under FOISA?

47. Section 25(1) of FOISA creates an absolute exemption from release where information can be obtained other than by making a freedom of information request. In this case, the Council argued that the applicant could access the information he had requested directly from the Initiative that created it.



48. During the course of the investigation, the Council decided to provide the information to the applicant in full. I am satisfied that the Council has now provided all relevant information that it holds in response to Mr M's request. Where there are gaps in this provision, this is because the Council does not hold the relevant information, not because it has chosen to withhold it.
49. In providing the information, the Council has made clear that it provided this information as a spirit of good will – not because it has revised its view on the application of section 25(1) of FOISA. It still holds that the information was rightly judged to be exempt from release, and that FOISA does not intend public authorities to act as post-boxes for other organisations.
50. The fact that the information has now been supplied to the applicant means that a full investigation and a decision from me on this issue are unnecessary. I therefore make no judgement on the arguments put forward by either the Council or the applicant in relation to the availability or otherwise of this information directly from the Initiative.

Making information available in a public library

51. The Council asked me to comment on the proposal it had made to make the information it holds available in the local public library for inspection, and whether this would be viewed as making the information reasonably obtainable in line with section 25(1) of FOISA.
52. As this proposal was not followed in this case, I have not considered it in detail or reached a view on whether I would consider the information to be exempt under section 25(1). I cannot make a decision in relation to a hypothetical scenario. However, I can make some general observations on the application of this exemption.
53. First of all, in order for the exemption in section 25(1) to apply, information must be accessible to the applicant from another source at the time at which a request is made. Making information available through the authority's library, or another channel after the request has been made would not make it exempt from release under section 25(1).
54. Secondly, section 11 of FOISA allows an individual to specify the format in which he or she would like to receive information, and wherever it is reasonably practicable to do so, the authority must give effect to this preference. In this particular case, Mr M had requested copies of the documents, and went on to reject an offer of access through the local library. In the absence of evidence showing that it is not reasonably practicable to provide the information in the form the applicant has requested, it is unlikely that I could accept that this approach was in compliance with section 11 of FOISA.



55. What if the Council were to now make these documents available to future interested parties through its library? Would they be exempt from release in response to any future requests? Possibly. For many people, particularly given that interest in this information is likely to be local, access through the local library will be quite sufficient.
56. For others, a person with a disability, for example, or someone who lives too far away, or who works during library opening hours, this access may not be reasonable. Wherever possible, information should be made available in a form that makes it widely available to interested parties. Access by on-site inspection only has the potential to exclude access to large groups of the population outside the immediate area. If they were to challenge the application of section 25(1) to such information, I would consider their case very seriously.

The Council's responses to Mr M's requests

57. I move on now to the second issue raised in this application. Has there been any breach of the provisions of the Act in the way the Council responded to Mr M's requests?
58. Mr M's letter to the Council of 2 February 2005 did everything that FOISA asks of an individual seeking information from a public authority. It was made in writing, clearly specified the information requested and provided the applicant's name and address for correspondence. The letter did not mention FOISA but there is no requirement that it should.
59. The letter makes clear that following previous attempts to access the information directly from the Initiative, Mr M was now asking the Council to provide the information. I do not agree that the letter should be read as a complaint against the Initiative or a request that the Council intervene to ensure that the Initiative provides the information.
60. This letter was clearly a valid request under FOISA and it should have been treated as such. The Council's response of 17 February 2005 was therefore inadequate. If the Council did not intend to provide the information directly, a full refusal notice should have been issued in compliance with sections 16(1) and 19 of FOISA. In particular, this notice should have set out which exemption was considered to apply to the information, and explained Mr M's right to request a review of this decision.
61. The Council responded to Mr M's request for a review of 22 February in the way it should have responded to the initial request of 2 February. In doing so, it failed to comply with its obligations under section 21(1) of FOISA to conduct a review of its decision, and under section 21(10) to inform the applicant of his right to appeal.



62. The Council argues that in the context of a long series of correspondence about the Initiative, it would be an unreasonable burden to expect its staff to recognise a request for information and ensure that it is responded to in line with FOISA rather than “business as usual”.
63. I agree with the Council that in many cases, “business as usual” will mean that FOISA and Scottish public authorities function more effectively than they would if every request was handled mechanically. Every day, requestors will seek and receive information as they are entitled to do under FOISA without even realising that they are using the law. And this is the way it should be; FOISA does not exist to inhibit the flow of information.
64. However, if “business as usual” means that people lose out on their rights or have to do more to exercise them, it will come into conflict with FOISA. In this case, the applicant only ensured that his request was handled in line with FOISA when he mentioned it in his second letter of 22 February. Had he not been so well informed about his rights, he may never have challenged the Council's response or realised that he had the right of appeal to my Office.
65. I do expect public authorities and their staff to recognise all valid requests made under FOISA, in whatever context they arise. FOISA does not require individuals to explicitly invoke their rights and this additional burden should not be placed upon them.
66. I do not agree that this expectation places an intolerable burden on public authorities. Where information can be provided without question or delay, then this can and should be done without undue bureaucracy. However, whenever an authority intends to refuse any request, it must ensure that an applicant's rights are adhered to and an appropriate response provided.

Was this a frivolous or vexatious application?

67. In its comments of 29 April, the Council indicated that it believed that Mr M already held the information he had requested, and so his application to my Office could be considered frivolous or vexatious under section 49(1) of FOISA.
68. In correspondence with both my Office and the Council, Mr M had indicated that the Initiative had partially fulfilled his request with a letter enclosing documents dated 16 February 2005. However, this correspondence had always asserted that certain documents, including the constitution and some of the Management Committee minutes, were not provided.
69. Mr M provided my Office with a copy of the Initiative's letter of 16 February, which listed enclosures including 1 year of management committee meetings (the request had sought 2 years). There was no reference to the Constitution being included with these documents.



70. In response to the Council's comments of the 29 April, Mr M was asked to confirm that he had not received further documents in fulfilment of his request since his previous correspondence with my Office. He confirmed that the same documents remained outstanding.
71. In the absence of any evidence to support the Council's claim that Mr M already had in his possession all the information he requested, I have no reason to doubt that his application is valid and made in good faith.

Responding to requests for information from my staff

72. Finally, I want to comment very briefly on the way in which the Council responded to requests from my Office. Despite a number of reminders, the Council took more than 2 months to respond to the invitation to comment on this case and provide the information required to fully investigate the case.
73. I am expected under FOISA to conclude my investigations within 4 months of receiving a valid application. Where I fail to issue a decision notice within this time, I must report this to the Scottish Parliament. Delays in receiving correspondence from public authorities constrain these time limits. It is therefore crucial that authorities provide information to my office in the timescales laid down by my Office.
74. Failure to do so will result in me serving a formal Information Notice on the public authority. If a public authority fails to comply with such a Notice, I can refer the matter to the Court of Session, where the failure can be treated as contempt of court.

Decision

I find that the Council has not dealt with Mr M's request for information of 2 February 2005 in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). Its written notice to the applicant of 17 February 2005 did not comply with the requirements of section 16(1) to and section 19 of FOISA.

I find that the Council did not carry out a review in terms of section 21(1) of FOISA in response to the applicant's request of 22 February 2005. Its written notice to the applicant did not comply with the requirements as set out in section 21(10) of FOISA.

The Council should review its procedures to ensure that they conform with sections 16, 19 and 21 of FOISA, and with paragraphs 63-71 of the Scottish Ministers' Code of Practice on the Discharge of Functions of Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Code).



The Council must, through staff training and revisions to the Council's processes take reasonable steps to ensure that:

- a request for information is recognised as a request to be dealt with under FOISA;
- refusal notices conform with section 16 of FOISA by stating that an exemption is being claimed, specifying the exemption and stating why the exemption applies;
- applicants are informed of their rights of review (as required by section 19 of FOISA) and
- requests for review are recognised and responded to in accordance with section 21 of FOISA and paragraphs 63-71 of the Code.

The Council must put these improvements in place no later than 3 months from the date of this notice.

Kevin Dunion
Scottish Information Commissioner
14 July 2005