



Scottish Information
Commissioner

**Decision 030/2005 – Millar & Bryce Limited and East
Renfrewshire Council**

Refusal to provide access to the list of public roads other than by inspection

**Applicant: Millar & Bryce Limited
Authority: East Renfrewshire Council
Case No: 200501393
Decision Date: 6 October 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 030/2005 – Millar & Bryce Limited and East Renfrewshire Council

Information available for inspection – publication scheme – section 25 of Freedom of Information (Scotland) Act 2002 – whether information is reasonably accessible

Facts

Millar & Bryce Limited, a client of Macroberts Solicitors, requested a copy of East Renfrewshire Council's (the Council) register of public roads. The Council refused to provide a copy of the register, stating that it was available for inspection at council offices. As this arrangement is detailed in the Council's publication scheme, the information was considered exempt from release under section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). Macroberts sought a review of this decision on behalf of their client. The Council upheld its initial decision. Macroberts subsequently applied to the Commissioner for a decision as to whether the Council was correct not to supply their clients with a copy of the register.

Outcome

The Commissioner found that the Council had acted in accordance with its publication scheme by offering access to its list of public roads by inspection only. He found that the Council had correctly interpreted section 25 of FOISA and that the information was subject to an absolute exemption from release, other than in the form specified in the scheme. The Council is not required to provide a copy of the list of public roads to the applicant.

Appeal

Should either East Renfrewshire Council or Millar & Bryce Limited wish to appeal against the Commissioner's 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. Millar and Bryce Limited emailed the Council on 23 February 2005 to request a copy of its register of public roads (the register), as maintained under the terms of the Roads (Scotland) Act 1984. The email expressed the preference that the register should be provided in electronic form, failing which, in hard copy.
2. The register is a document which a local authority must produce, maintain and make available for public inspection under the terms of the Roads (Scotland) Act 1984. It lists all the roads within a local authority area that have been “adopted” by the Council. The Council is the roads authority in relation to all roads it has adopted, and as such has a duty to manage and maintain the roads listed in its register.
3. The Council issued a refusal notice on 1 March. This stated that the Council does not make copies of the register available to the public, but noted that it was available for inspection in the Council’s Roads and Transportation Offices during normal working hours. The notice stated that as this availability is noted within the Council’s publication scheme, the information is considered “otherwise accessible” under section 25 of FOISA.
4. The Council’s publication scheme can be viewed online here: http://www.eastrenfrewshire.gov.uk/publication_scheme_2005_02_02.doc. It includes the register on page 31 of the scheme, within the Roads Maintenance class. The Roads Maintenance class description includes two other types of information, and the class as a whole is described as being made available in printed form, and by inspection. The following statement is made on page 16 of the scheme:

Format: Please note that where a broad range of material is described in a class, and that information is described as “Made Available” in a variety of ways, that not all the information will be available in every format specified.
5. Macroberts Solicitors (Macroberts), acting on behalf of Millar and Bryce Limited, sought a review of the Council’s decision in a letter dated 8 March 2005. The letter stated that the Council’s publication scheme made the information available for inspection or in paper form, and that it was inconvenient for the client to visit the premises. Therefore, a paper copy was sought once again.



6. The Council responded on 6 April 2005. It stated that the publication scheme made clear that not all documents listed in a class of information will be available in all the formats specified for that class. In this case, it reasserted, the information was made available only for inspection and the Council's original decision was upheld.
7. Macroberts, again acting on behalf of Millar & Bryce Limited, wrote seeking a decision from me on whether the Council had acted in accordance with Part 1 of FOISA. The application, dated 8 April 2005, was received on 11 April 2005. This asserted that it was not clear whether inspection solely at Council offices would be compliant with the accessibility requirement in section 25 of FOISA.
8. This case was allocated to an Investigating Officer within my Office.

Investigation

9. Macroberts' application was validated by establishing that a request had been made to a Scottish public authority, and had been appealed to me only after requesting that the authority review its decision.
10. This case was investigated alongside three other similar appeals from Macroberts regarding refusals by other local authorities in Scotland to provide copies of their roads registers.

Initial consideration of whether the register is environmental information

11. The request for a copy of the register was made and dealt with under FOISA. However I felt it was prudent to give consideration as to whether the register contained environmental information. If it is environmental information, then any request for access would have to be considered under the terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs) rather than FOISA.
12. The first category of information that Regulation 2 of the EIRs defines as Environmental Information is:
"any information in written, visual, aural, electronic or any other material form on-
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements".



13. If a road is an aspect of “land”, does its inclusion on the register tell us something about the state of that land? For example, does it show that it will be maintained to a certain standard? The Investigating Officer wrote to both Macroberts and the Council seeking their views on whether or not the register should be considered to contain environmental information.
14. Macroberts’ response to this request indicated that they would be content for the investigation to proceed under the terms of the EIRs, and indeed that given the different provisions contained within these, this would be their preference.
15. The Council responded that it did not consider the register and its contents to be environmental information (as did the other local authorities which were consulted in relation to the parallel cases). Its response noted that the register provides only information about the legal status of the roads, i.e. that they are adopted by the Council; it does not provide any information about its state. The Council observed that the register itself does not even detail the location of the roads, as such further information is contained in supplementary plans.
16. Having considered the responses of Macroberts and the Councils involved in these cases, and having considered relevant case law, I have concluded that the register and its contents do not constitute environmental information as the register itself provides no direct information on the state of the road as ‘land’.
17. As a result, I asked the Investigating Officer to continue to investigate this and parallel cases under FOISA.

The Council’s submission

18. The Investigating Officer wrote to the Council again on 12 July 2005, to confirm that a full investigation would now be conducted under FOISA. The Council was invited to comment on the case under section 49(3) of FOISA. The Council was also asked to provide information about the format in which the register was held, and the practicalities and costs that would be involved if it were to produce a copy of the register.
19. The Council’s reply to this letter was received on 25 July 2005. Its comments responded in detail to Macroberts’ concerns that availability for inspection only may not be compliant with the accessibility requirements of section 25 of FOISA.



20. The Council noted the contents of section 25 of FOISA, which states:

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

(2) For the purposes of subsection (1), information-

(a) may be reasonably obtainable even if payment is required for access to it;

(b) is to be taken to be reasonably obtainable if-

(i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

(ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

21. The Council also noted the requirements of section 11 of FOISA, which allows an applicant to express a preference for the format in which information is provided to him or her. This requires that, where reasonably practicable, the authority holding the information should give effect to that preference if the applicant requests a copy of the information, a digest or summary, or the opportunity to inspect.

22. The Council observed that where the exemption in section 25 applies, section 11 would have no effect, otherwise, it would make redundant the requirement in section 23(2) of FOISA, that a publication scheme specify the manner in which information is made available.



23. The Council concluded that the information is available in accordance with its publication scheme, is reasonably accessible and is therefore exempt under the terms of section 25. It commented that the onus is on the applicant to establish that the information is not reasonably accessible. In this case, the Council did not accept that a commercial organisation could not reasonably access the Council offices for the purpose of inspecting the register.

The Council's comments on the applicant's reasons

24. The Council raised a further issue in its comments on the case. While stating that this was not a part of its consideration in refusing the initial request and its review, it asked for my views on the relevance to this case of the applicant's intended use of the information requested.
25. Millar and Bryce Limited is a company which offers a commercial property searching service. The Council states that it must therefore be assumed that the request was made in order to facilitate business purposes. It suggests that although the reasons for a request should not be taken into consideration when determining the response to a request under section 1(1) of FOISA, it may be relevant when determining whether information is reasonably accessible for the purposes of section 25. The information is freely available, just not in the form that is convenient for the applicant. While FOISA is intended to create a culture of openness, the Council suggests that its purpose is not to make information available in a format that suits the commercial requirements of a private sector company. I will comment on this issue below.

The Commissioner's analysis and findings

26. The main question for me to address in this case is whether the fact that the register is made available in line with the Council's publication scheme is sufficient to make the information exempt under section 25 of FOISA.

Is the register exempt information under Section 25 of FOISA?

27. Section 23 of FOISA requires each public authority, as defined by FOISA, to adopt and maintain a publication scheme, approved by me. The purpose of this scheme is to provide access to information that an authority readily makes available, without an applicant having to go through the formal request process within FOISA.



28. Each publication scheme sets out the classes of information that are published by the authority and, for each class, details the manner in which the information is made available, and whether or not a charge will apply.
29. Section 25(3) of FOISA creates the presumption that where information is made available in accordance with an authority's publication scheme, it is reasonably accessible, and so subject to an absolute exemption from release under the terms set out in Part 1 of FOISA. Instead, the information should be made available under the terms set out in the publication scheme.
30. In this case, I am satisfied that Macroberts' clients have been offered access to the scheme in line with the terms set out in the publication scheme (detailed in paragraph 4 above). The register is therefore exempt from release by virtue of section 25 of FOISA. This means that the Council is not required to provide the information in the form the applicant requests, and its response in this case was compliant with the requirements of Part 1 of FOISA.

Access to information for inspection only

31. Although I have found that the Council has acted in accordance with FOISA in this case, I wish to comment further on some of the issues this investigation has raised.
32. The Council's publication scheme was approved on my behalf on 28 April 2004. The version of the scheme that was approved made clear, more so than the version currently on the Council website, that the register was available by inspection only. In this version, the items available in the Road Maintenance Class were listed alongside formats specific to them. For the roads register, the only method listed alongside it was inspection.
33. Section 25(3) of FOISA states that where information is made available in accordance with a publication scheme, it will be absolutely exempt from the wider provisions relating to requests for information made under section 1(1).
34. However, the provision in section 25(2)(b) of FOISA suggests that documents available for inspection only were not intended to be considered reasonably accessible as a matter of course, even where those documents are required to be made available for inspection by or under any enactment. Section 25(2)(b) states that information will be considered reasonably obtainable where the public authority that holds it is required to communicate it to members of the public **otherwise than making it accessible by inspection**. The Roads (Scotland) Act 1984 requires each local authority to make its register available for inspection. However, given the provisions of section 25(2)(b), fulfilment of this requirement would not be sufficient to make it reasonably accessible for the purposes of FOISA. It is the inclusion within the approved publication scheme that has made it such.



35. The purpose of publication schemes produced under section 23 of FOISA is to make information held by Scottish public authorities freely available. I consider making information available on an inspection only basis is overly restrictive, since it makes access difficult for those who live or work outside the immediate area, or who are unable to attend an authority's premises during opening hours.
36. In my *Guide to publication schemes under the Freedom of Information (Scotland) Act*, I made clear my views on access by inspection only:
- “There is no definition of “to publish” in the Act. The Commissioner considers that the phrase means to make information publicly available and does not believe that publication is limited to producing items in bound or printed form. Within a publication scheme, information may be available in hard copy and on the Internet, whereas other information may only be available on CD-ROM. **There may be very exceptional cases where material which is only available upon inspection at a specified place can be considered to be published because, for example, the material is too costly to produce in a hard copy or electronic format. These cases are likely to be rare.**”
- (Paragraph 4.6 –see: www.itspublicknowledge.info/Documents/psg.doc)
37. Notwithstanding this guidance, publication schemes have been submitted and approved which contain information available only by inspection, and for which it has not been demonstrated that the information could not be made available in any other form.
38. In this particular case the information provided to me in the course of the investigation suggests that the Council could relatively easily produce printed copies of its register on request. The register consists of a binder containing 118 loose leaf A4 pages which detail basic information about each adopted road's name, start and end points, and subsidiary information such as area name and ward number. The register is supplemented by plans that show the extent of these roads. The size and age of these plans would make them more difficult to reproduce, but as they do not form part of the register itself, I have not considered these further here.
39. The Council estimates the cost of reproducing the register itself (excluding the supplementary plans) at £25 - £30. Had the Council made provision for paper versions of its register to be made available through its publication scheme, it would have been able to charge for the provision of paper copies, whilst still making the actual register available for inspection at no cost.



40. Given the ease with which copies of the register might have been made available through the Council's scheme, it is clear that it should not have been included within the scheme for inspection only in the light of my guidance cited above.
41. The Council has been alerted to my concern at this finding, and has been asked to consider voluntarily amending its publication scheme to rectify this situation. I have also recommended that the Council review entries for any other inspection only items to ensure that only those for which there are good reasons for this status remain. This approach would avoid further cases such as this arising in future. I understand that the Council is to consider this request shortly.
42. Should this problem not be resolved informally, I will consider using my powers under section 23(5) of FOISA to revoke the approval of the Council's publication scheme and to ensure that appropriate amendments are made.

Reasons for a request

43. Finally, the Council has asked me to comment on whether the reasons for the request are relevant to the consideration of this case. The Council suggests that it is not the intention of FOISA to require the Council to provide information to a commercial organisation in the form most convenient to it.
44. I consider the purpose of FOISA to be that of making information (where it is not exempt) accessible widely; not just for the current requester, but also for any others who may seek the same information in future. One effect of this may well be to make it more conveniently available to commercial organisations, but that is not relevant to the decision making process. FOISA makes no distinction between types of requester or the reasons for their request and so the outcome of deliberations on any request should be the same regardless of who requests information and why.
45. It should be noted that although FOISA provides access to information to anyone who requests it, subject only to the consideration of the exemptions listed in Part 2, it does not entitle the recipients to then reuse the information without restriction. The rights of the Council as the producer and holder of the intellectual property in its information still hold once access has been provided under FOISA.
46. Since coming into force in July 2005, the Reuse of Public Sector Information Regulations 2005 provide the framework in which public bodies can license and charge for reuse of its information, or refuse a request for reuse. Therefore, release under FOISA does not automatically mean that any individual or organisation is permitted to reuse that information for its own purposes, commercial or otherwise.



Decision

I find that the Council has dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002, as detailed above.

Kevin Dunion
Scottish Information Commissioner
6 October 2005