



Scottish Information
Commissioner

Decision 032/2005 – Millar & Bryce Limited and Fife Council

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

Applicant: Millar & Bryce Limited

Authority: Fife Council

Case No: 200501486

Decision Date: 6 October 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 032/2005 – Millar & Bryce Limited and Fife 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 Fife 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 Solicitors sought a review of this decision on behalf of their client. The Council upheld its initial decision. Macroberts subsequently made an application to the Commissioner, again on behalf of their clients, for a decision as to whether the Council was correct not to provide them 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 Fife 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 16 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 e-mail 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 15 March 2005. 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 Transportation services offices. The Council considered that the register is otherwise accessible and so exempt from release under section 25 of FOISA.
4. The Council’s publication scheme can be viewed online here: www.fife.gov.uk/uploadfiles/Publications/c64_FINALFIFEDIRECTVER21MAR2005.pdf. The register is listed on page 58 of the scheme, in the class “public roads” within the Transport and Streets category, and the “availability” column makes clear that it is available for inspection only.
5. Macroberts, acting on behalf of Millar and Bryce Limited, sought a review of the Council’s decision in a letter dated 22 March 2005. The review was sought on the basis that the suggestion that the register is available for inspection is not compliant with the obligations of accessibility contained within FOISA. A copy of the register was sought once again.
6. The Council responded on 12 April 2005. It upheld the initial decision, noting that given the provisions of sections 25(1) and 25(3) of FOISA, the register is reasonably obtainable because access was being offered accordance with the Council’s publication scheme.



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 15 April 2005, was received on 18 April 2005. Macroberts' application noted their client's view that in addition to making its register available for inspection, the Council has an obligation to make it accessible in some form that allows remote requestors to gain access to the information without the inconvenience of attending council offices around the country.
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 the Commissioner 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 records only whether the Council is responsible for the maintenance and upkeep of a road (i.e. whether it is adopted by the Council); it does not provide any information about its state. The Council concluded that the information contained in the register falls short of what would be required to constitute environmental information.
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 8 August 2005. It 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.

20. The Council noted that under the terms of section 23 of FOISA, it has adopted a publication scheme that was approved by me. It concluded that the applicant is not entitled to a copy of the register because the register is reasonably obtainable, as provided for by section 25(3) of FOISA, by virtue of the Council making it available (for inspection only) in accordance with its approved publication scheme.
21. The Council also noted that it has resisted issuing copies of the register in the past because it is only accurate on the day of issue. Furthermore, it pointed out that as a text record, the interpretation of the extent of the adoption is not always clear. Because of this, the Council's existing procedures allow for those viewing the register to seek clarification from staff if the extent of the adoption is not clear.



The Commissioner's analysis and findings

22. 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?

23. 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.
24. 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.
25. 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.
26. 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

27. 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.
28. The Council's publication scheme was first approved on my behalf on 16 April 2004. An amended version was re-approved 25 April 2005. Both these versions indicated clearly that the register was only available for inspection.
29. As the Council noted, 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).



30. 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.
31. 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.
32. 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)
33. 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.
34. In this particular case the information provided to me in the course of the investigation suggests that the Council could relatively easily produce copies of its register on request.



35. The register is maintained as both a Microsoft Access database and a paper record. The Council was able to provide me, by e-mail, with spreadsheets showing the lists of adopted roads and roads footpaths contained within the register. The paper record consists as two A4 bound documents of A4 size with 327 pages for roads and 194 pages for remote footpaths.
36. The Council estimates the cost of reproducing the printed register at £30, including staff time and reproduction costs. Had the Council made provision for copies 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.
37. Given the ease with which copies of the register might have been made available through the Council's publication 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.
38. 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.
39. Although I am keen to work informally with the Council to resolve this matter, I will, if necessary, 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.

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