



Scottish Information
Commissioner

Decision 071/2005 Mr Mark Howarth and the Scottish Executive

Request for information on the involvement of MP and MSPs in negotiating the sale of two specific properties

Applicant: Mr Mark Howarth
Authority: Scottish Executive
Case No: 200502478
Decision Date: 9 December 2005

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Request for information on involvement by MPs and MSPs in choice and sale of property relating to the M74 – information not held section 17(1) of FOISA – whether records had been searched across whole authority

Facts

Mr Howarth sought information about the involvement by Members of Parliament, Members of the Scottish Parliament or their representatives in the choice, rental and sale of property at two locations connected with the M74 completion scheme. The Trunk Roads - Design & Construction Division in the Enterprise, Transport & Lifelong Learning Department of the Scottish Executive responded to this request. It advised that it did not hold any correspondence, notes and documents regarding any involvement by MPs, MSPs or their representatives in the issues outlined by Mr Howarth. Mr Howarth was unhappy with this response and indicated that his request was directed to the Executive as a whole and not just the M74 Project team. The Executive confirmed on review that it had examined its files and records and could not find anything relevant to Mr Howarth's request. Mr Howarth appealed to the Commissioner.

Outcome

The Commissioner found that the Scottish Executive complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Howarth's request for information. The Commissioner was satisfied that the Scottish Executive took all reasonable steps to determine that it did not hold the information requested by Mr Howarth and was justified in serving notice under section 17(1)(b) of FOISA.



Appeal

Should either the Scottish Executive or Mr Howarth wish to appeal against this decision, there is a right to 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. On 23 February 2005 Mr Howarth sent an email to the Scottish Executive (the Executive) requesting the following information:

All correspondence and notes held by the Scottish Executive relating to property at the following two locations:

38 Southcroft Road, Rutherglen G73 1UG

58 Southcroft Road, Rutherglen G73 1UG
2. The Executive responded to this request on 28 February 2005 asking Mr Howarth to be more precise in the information he was seeking. On 1 March 2005 Mr Howarth wrote again to the Executive with the same information request but which added a list of 5 questions setting out the exact information he sought.
3. The five questions were as follows:
 - a) the process by which the determination of the route through said property was arrived at
 - b) the process by which the ownership of said property was determined
 - c) how, when, by whom and with whom the sale of said property to Scottish Ministers was negotiated, arranged and concluded
 - d) any rental arrangements which pertain to said property which have come into force since the sale
 - e) any involvement by Members of Parliament, Members of the Scottish Parliament and their representatives in the issues outlined above



4. The Trunk Roads – Design & Construction Division of the Enterprise, Transport & Lifelong Learning Department responded to these requests on 23 March 2005. It replied to the first 4 questions. In relation to fifth question the author advised that he had “as yet been unable to source any correspondence in relation to this point. Investigations are continuing however and if this and other relevant correspondence is passed to me I will forward it to you immediately.”
5. On 31 March 2005 Mr Howarth sent an email to the Executive querying some of the information supplied. In relation to the fifth request he indicated that he was anxious that the Executive fulfilled its legal obligations in relation to this matter and reminded the Executive that it was now the twentieth working day from the date of his request.
6. The Executive responded to this email on the same day. The author advised that the Branch dealing with request was responsible for project management of the M74 Completion Scheme with regard to matters relating to land negotiation and purchase with assistance, as necessary, from the Solicitor's Office. He advised that, as such, any Ministerial involvement or requests for advice from Ministers or Members of the Scottish Parliament would normally be passed to his Branch. He confirmed that it did not hold any correspondence, notes and documents regarding any involvement by Members of Parliament, Members of the Scottish Parliament or their representatives in the issues outlined.
7. Mr Howarth responded to this letter on 1 April 2005. He advised that his request was directed to the Executive as a whole and not just to the M74 Project Team. He requested advice on how this correspondent might assist in the Executive's fulfilment of its obligations bearing in mind that the previous day was the twentieth working since his request was made.
8. There followed an exchange of emails between Mr Howarth and the Executive on this issue. On 13 June 2005 the Executive issued a formal notice of review of its response to Mr Howarth. The notice came from the Trunk Roads – Design and Construction Division. The Executive advised that it had concluded that its original response should be upheld. The officer carrying out the review advised that he had examined their files and records and could not find any papers, documents or other evidence which would show any involvement of either MPs, MSPs or their representatives in this acquisition.
9. Mr Howarth again raised his concerns that only the paperwork within the Trunk Roads Division had been examined and not information held by the whole Executive. Mr Howarth was advised by the Executive to contact my office.



10. Mr Howarth appealed to me on 18 August 2005. He complained that the Executive had failed to give a satisfactory response to his question in respect of the involvement of MPs, MSPs or their representatives in the issues raised.
11. The case was allocated to an investigating officer.

The Investigation

12. Mr Howarth's appeal was validated by establishing that he had made a request for information to a Scottish public authority and had appealed to me only after receiving a notice of review with which he was dissatisfied.
13. The investigating officer contacted the Executive on 1 September 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Executive was asked to comment on the issues raised by Mr Howarth's case and to provide supporting documentation for the purposes of the investigation.
14. In particular, the Executive was asked to specify the steps it had taken to determine whether or not it held the information requested by the applicant. The Executive was also asked to provide information about how its review was carried out.

Submissions from the Executive

15. The Executive confirmed that the request was dealt with by the Branch in the Enterprise, Transport and Lifelong Learning Department (ETTLD) responsible for the project management of the M74 Completion Scheme with regard to matters relating to land negotiation and purchase. It advised that any information such as the type requested would, if it existed, be held by that branch.
16. In dealing with the request, however, the Executive advised that in addition to searching their own records, the Branch also contacted the Enterprise and Industry Division in ETTLD who had an interest in the M74 land issue and examined the papers that Division held relating to the M74 project. The Executive advised that no information was found relating to the information requested.
17. The Executive concluded that all reasonable steps had been taken to ascertain whether the information requested was held by the Executive.



18. The Executive also provided information on how the review was carried out. The review was carried out by the head of the team responsible for the promotion and construction of the M74 completion. The Executive advised that all papers held by file or electronically by the M74 Project Branch were examined. It was found that no information was held relating to the request.
19. The Reviewer noted that the original search had been extended to papers held by the Enterprise and Industry Division and that no information had been found.
20. The Reviewer concluded that he was satisfied that if any information of the nature requested by Mr Howarth had been held by the Executive it would have been referred to the M74 team to deal with and would have been formally recorded.
21. The Reviewer was also satisfied that all reasonable steps had been taken during the original consideration of the request to establish that no information was held.

Commissioner's analysis and findings

22. This investigation has focussed on the appropriateness of the search carried out by the Executive for information requested by Mr Howarth. On the one hand, Mr Howarth considers that a search should have been carried out across the whole of the Executive and not limited to the Branch and Division most likely to hold this information. By contrast the Executive has argued that it was reasonable to confine its search to the Branch and Division involved in the M74 Completion Scheme because any request would have been referred to those sections to deal with.
23. The extent of the searches carried out by an authority in response to an FOI will clearly depend on the type and extent of the information requested. I recognise that there may be cases where an authority-wide search of its records will not be relevant, necessary or justified in terms of the information requested. In other cases, it will be essential. In each case, the authority will need to identify the extent of the search required in the knowledge that it may have to justify this to the applicant and, ultimately, to me.
24. Where an authority is challenged on review by the applicant in connection with the search carried out it is clearly important that an authority addresses the concerns raised, extends its searching where appropriate, and explains the steps taken and why in its notice of review.



25. In this particular case neither the applicant nor the authority has indicated that they know of the existence of the kind of information being requested by the Mr Howarth. This will clearly be an important factor when considering the search that should to be carried out.
26. Further, the Executive has indicated that if information of the kind requested by Mr Howarth was held it would be held within the Branch and Division searched.
27. It seems likely that information relating to the M74 Completion Scheme (particularly information of direct relevance to the determination of the route, the acquisition of land and its subsequent management) would be held by the Branch and Division responsible for that project. In these circumstances I am satisfied that the Executive took all reasonable steps to establish that it did not hold the information requested by Mr Howarth.
28. Nevertheless, the type and extent of records search required and carried out in response to FOI requests are matters which my office will be addressing. In particular we will be investigating the capacity of authorities to carry out authority-wide key word searches in response to FOI requests.

Decision

I find that the Scottish Executive complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Howarth's request for information. I am satisfied that the Scottish Executive took all reasonable steps to determine that it did not hold the information requested by Mr Howarth and was justified in serving notice under section 17(1)(b) of FOISA.

Kevin Dunion
Scottish Information Commissioner
9 December 2005