

**Decision 175/2007 Millar & Bryce and Perth & Kinross Council**

*Request seeking copies of notices or orders served under various statutes*

**Applicant: Millar & Bryce**  
**Authority: Perth & Kinross Council**  
**Case No: 200601929**  
**Decision Date: 27 September 2007**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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Fife  
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## **Decision 175/2007 Millar & Bryce Limited and Perth & Kinross Council**

***Request for a copy of all Notices or Orders served under various statutes during the period 6 January to 8 June 2006. The Council deemed requests to be vexatious in terms of section 14(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) – Commissioner found the requests were not vexatious.***

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 14(1) (Vexatious or repeated requests).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Re-use of Public Sector Information Regulations 2005

Scottish Ministers Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002

### **Facts**

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Millar & Bryce Limited (Millar & Bryce) made 37 separate information requests to Perth & Kinross Council (the Council). These sought copies of all statutory Notices or Orders served, discharged, released or extant under specified statutes between 6 January and 8 June 2006. The Council responded by advising Millar & Bryce that it was refusing to comply with its requests in terms of section 14(1) of FOISA because it considered them to be vexatious. Millar & Bryce was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and, as a result, notified Millar & Bryce that it upheld its original decision. Millar & Bryce remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Millar & Bryce's request for information in accordance with Part 1 of FOISA. He found that the Council was wrong to consider the request to be vexatious and required the Council to comply with Millar and Bryce's information request.



## Background

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1. On 8 June 2006, Millar & Bryce wrote 37 separate emails to the Council requesting the following information:

A copy of all Orders made, served, discharged or released and those which remain extant (i.e. works and/or monies still outstanding to the Council) during the period 6<sup>th</sup> January to 8<sup>th</sup> June 2006, under or pursuant to a range of named Acts and Regulations, including the Building (Scotland) Act 2003 and the Housing (Scotland) Act 1987.

2. The Council emailed Millar & Bryce on the same day, advising them that it was still awaiting confirmation from them in relation to previous FOI requests they had submitted, as to whether they planned to use the information they sought for commercial purposes. It advised Millar & Bryce that the commercial use of information supplied in response to a FOI request requires the Council's permission. The Council also informed Millar & Bryce that it was willing to supply them with any information that it held in relation to their information requests, upon receipt of confirmation that the supplied information will not be re-used for commercial purposes. Millar & Bryce were then advised to contact the Council if they were interested in discussing the possibility of licensing the re-use of information for commercial purposes.
3. On 14 June 2006 Millar & Bryce wrote to the Council and asked it for details of the exemption(s) under FOISA that it was relying on to withhold the information they had requested. Millar & Bryce informed the Council that it was not aware of any grounds under FOISA that permitted a public authority to withhold information where it suspected that the applicant may re-use the sought data for commercial purposes. The Council did not respond to this letter and on 15 September 2006, Millar & Bryce wrote to the Council again, requesting a response.
4. On 20 September 2006, the Council wrote to Millar & Bryce. In this letter, the Council advised Millar & Bryce that it was refusing to comply with their 37 information requests because it considered these to be vexatious in terms of section 14(1) of FOISA. The Council maintained that Millar & Bryce had ignored its attempts to enter dialogue to establish (a) whether information previously supplied in response to requests under FOISA was being re-used for commercial purposes, and (b) the appropriate arrangements under which to supply any future information requested.



5. The Council stated that it felt that assurances were required that information it supplied would not be re-used for commercial purposes without its permission. The Council argued that, in the light of the multiple requests it had received from Millar & Bryce, and its refusal to enter into dialogue with the Council, the requests went beyond the bounds of reasonable behaviour and were vexatious, by seeking to access information without charge under FOISA, while ignoring the Council's attempts to discuss licensing arrangements.
6. On 11 October 2006, Millar & Bryce wrote to the Council requesting a review of its decision.
7. On 3 November 2006, the Council wrote to notify Millar & Bryce of the outcome of its review. The Council advised Millar & Bryce that it upheld, in full, its original decision to consider the requests vexatious.
8. On 7 December 2006, Millar & Bryce wrote to my Office, stating that they were dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Millar & Bryce had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

## **The Investigation**

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10. On 22 February 2007, the Council was notified of the application and was invited to provide comments on the matters raised by Millar & Bryce and on the application as a whole, in terms of section 49(3)(a) of FOISA 2002. The case was then allocated to an investigating officer.
11. The Council responded in full on 11 April 2007.



### **Submissions from the Council**

12. In its submissions, the Council acknowledged that it had made several errors in processing the requests. It submitted that the email it had sent Millar & Bryce on 8 June 2006 was not part of the Council's FOI process and that it should not have been sent. The Council argued that this email was poorly worded and ambiguous and submitted that this had contributed to a misunderstanding of the Council's position by the applicant. The Council explained that the letter it sent Millar & Bryce on 20 September 2006 was its 'official' response to this request, and that its position was set out in full in this letter. The Council also apologised that this letter was not sent within the 20 day timescale set out in FOISA, and submitted that although it had been drafted timeously, it had not been posted. No explanation could be provided for this error, as the officer concerned had since left the Council.
13. The Council noted that it was aware that Millar & Bryce offered a property search service and it believed that they had entered into agreements with some other Scottish local authorities for the supply and re-use of relevant information. The Council contended that it did not understand why Millar & Bryce were unwilling to engage with the Council in relation to their requests, nor why they had ignored the Council's attempts at contact. The Council submitted that it considered the vexatious nature of the requests to derive from the refusal of the applicant to discuss the matter with the Council.

### **Submissions from Millar & Bryce**

14. Millar & Bryce argued that in its responses to their FOI requests, the Council had indicated that it was only prepared to release the sought information if they enter into a licensing agreement with the Council. Millar & Bryce contended that under FOISA, public authorities are not permitted to enquire why a requester is seeking information. Millar & Bryce further contended that this is a misapplication of FOISA and does not conform to the guidelines set out in the *Scottish Ministers Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002* (Section 60 Code).
15. Millar & Bryce also argued that the Re-use of Public Sector Information Regulations 2005 (the "Re-Use Regulations"), under which any licensing arrangements would be made, are a separate matter and should not restrict or prohibit the Council from responding to a request made under FOISA. Millar & Bryce also denied that, at the time of their requests, they had entered into agreements with any other local authority regarding the licensing of the sought information, and argued that even if they had it was not relevant to these FOI requests.



16. Millar & Bryce asserted that the Council had provided them with similar information on 3 occasions prior to refusing to deal with these requests. They argued that by complying with the 3 earlier requests, it is clear that the Council did not consider the requests to be unduly burdensome or lacking in clarity. Subsequently, Millar & Bryce asserted that the approach taken by the Council, in deeming their requests vexatious, was obstructive and demonstrated a failure to comply with FOISA.

## **The Commissioner's Analysis and Findings**

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17. In coming to a decision on this matter, I have taken into consideration the submissions provided by both Millar & Bryce and the Council and I am satisfied that no matter of relevance has been overlooked.
18. I must decide whether the Council acted in accordance with Part 1 of FOISA in refusing to supply the information to Millar & Bryce on the basis that the requests they submitted were vexatious.

### ***Section 14(1) – Vexatious or repeated requests***

19. Section 14(1) of FOISA states that section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
20. The term “vexatious” must be applied to the request and not to the requester. In some cases, a public authority may consider that a single request is vexatious. A public authority may also wish to treat as vexatious the latest in a series of requests which have imposed a significant burden on the public authority, particularly where the request:
  - a) does not have a serious purpose or value
  - b) is designed to cause disruption or annoyance to the public authority
  - c) has the effect of harassing the public authority or
  - d) otherwise would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate.
21. The Section 60 Code makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious and that the power to refuse to respond to a request on the grounds contained in section 14(1) of FOISA should be used sparingly and should not be abused simply to avoid dealing with a request for information.



22. Paragraph 5 of the Section 60 Code also states the following:

Staff should also be aware that, in giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest or that they will be treated differently if they do so."

23. In this case, the Council has deemed the requests vexatious on the basis that Millar & Bryce have refused to enter into negotiations with the Council in respect of the information they seek. In particular, the Council asserted that Millar & Bryce have refused to confirm whether they plan to re-use the information for commercial purposes, and they have also ignored requests from the Council to contact them to discuss a licensing agreement for the requested information.

24. I have considered the arguments set out by the Council in support of the application of 14(1) and I do not accept that the requests are vexatious. It is my view that the requests submitted by Millar & Bryce do not meet any of the criteria set out in paragraph 20 of this decision, and while these should not be considered to be the only grounds on which I might accept that a request is vexatious, I am not satisfied that the Council has provided valid alternative reasons that apply in this case.

25. Millar & Bryce's requests for information are clearly expressed and the Council has never questioned the clarity of the requests nor has it indicated that responding to the requests would be particularly burdensome.

26. The prevailing concern of the Council in this case seems to be whether Millar & Bryce are re-using information obtained through FOISA for commercial purposes. However, the Section 60 Code makes it clear that an applicant's reasons for requesting information under FOISA are not relevant to their request. The approach set out in this Code is consistent with the general rights created by FOISA which do not distinguish between different types of requestor or purposes of a request.

27. Additionally, I would argue that the Re-use Regulations exist separately from FOISA to provide the statutory framework for the re-use of public sector information. Unlike FOISA, applicants seeking information under the Regulations must state the purpose for which the information will be re-used. However, in this case the information requests were clearly submitted under FOISA. If the Council was concerned about the misuse of its intellectual property, it should have pursued these concerns within the appropriate statutory or legal context, rather than attempting to use the provisions of FOISA as a method of enforcing other legal obligations.



28. Having concluded that the requests made by Millar and Bryce were not vexatious, I find that the Council has misapplied section 14(1) to the requests in this case.

## **Decision**

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I find that Perth & Kinross Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests from Millar & Bryce.

I find that Millar & Bryce's requests were not vexatious under section 14(1) of FOISA.

I therefore require Perth & Kinross Council to respond to Millar & Bryce's initial requests for information within 45 days after the date of intimation of this decision notice.

## **Appeal**

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Should either Millar & Bryce or Perth & Kinross Council wish to appeal against this 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 after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**27 September 2007**





## Appendix

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### 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.

##### **14 Vexatious or repeated requests**

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.