

Decision Notice



Decision 160/2010 Ms Kirstin Scott and Scottish Borders Council

Title deeds for Council owned properties in Selkirk

Reference No: 201000065

Decision Date: 10 September 2010

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Ms Kirstin Scott (Ms Scott) requested from Scottish Borders Council (the Council) copies of title deeds for all Council owned properties in Selkirk. The Council's response claimed that the titles were exempt in terms of section 25(1) of FOISA, and provided some information to assist Ms Scott in locating the titles. Following a review, the Council upheld this decision, and provided further information to assist in her search. Following further correspondence with the Council, Ms Scott remained dissatisfied and applied to the Commissioner for a decision about the Council's handling of her request and in particular whether it was entitled to apply the exemption section 25(1) and whether it had provided sufficient assistance to her in locating the titles.

During the investigation, the Council provided further information and assistance to Ms Scott, allowing the request to be addressed to her satisfaction.

The Commissioner concluded that the Council had partially failed to comply with Part 1 of FOISA. He found that it was entitled to withhold most of the titles under section 25(1) of FOISA. By providing additional information to enable Ms Scott to locate these titles, the Council complied with its duty to provide advice and assistance in section 15(1) of FOISA.

However, the Commissioner concluded that the Council failed to respond to Ms Scott's request for information within the required timescale, and that it had incorrectly applied the exemption section 25(1) of FOISA to some of the titles. By failing to provide appropriate or sufficient information to allow the identification of these titles, the Commissioner also concluded that the Council failed to comply fully with its duty to provide advice and assistance.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 15(1) (Duty to provide advice and assistance) and 25(1) (Information otherwise accessible)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision.



Background

1. On 6 September 2009, Ms Scott emailed the Council, requesting copies of the title deeds for all property owned by the Council in Selkirk.
2. The Council sent an acknowledgement email to Ms Scott on 7 September 2009.
3. On 9 October 2010, Ms Scott emailed the Council asking for an update and, on receiving no response, wrote again on 13 October 2009, requesting a review of its handling of her request. She indicated that she had treated the failure to respond as a refusal, and that she now wanted this decision to be reviewed.
4. The Council sent a response to Ms Scott on 14 October 2010, apologising for the delay in responding to her original request. The Council provided Ms Scott with a schedule of Scottish Borders Council and Common Good land and property assets in Selkirk, drawn from its asset register. It explained that the titles were accessible within the Register of Sasines, and so the requested information was exempt from disclosure in terms of section 25 of FOISA.
5. The Council explained further that the enclosed schedule did not cover all public open spaces within Selkirk nor any remaining assets of housing land following the Scottish Borders Housing Association transfer. The Council went on to explain that it was presently trying to assist with identifying the titles for these assets so that Ms Scott could more easily obtain them from the Register of Sasines, and that it would also identify which land certificates covered the housing transfer so that Ms Scott could obtain copies of these too.
6. On 14 October 2009, Ms Scott emailed the Council to ask (1) which public open spaces within the town were missing from the schedule and asking (2) when the information to help her identify the assets would be available. She indicated that she wished the Council to conduct a review of her request and stated that she was unhappy with the Council's failure to respond to the request within the statutory 20 working day period.
7. The Council emailed Ms Scott on 15 October 2009, stating that it would arrange for a review to take place.
8. On 15 October 2009, Ms Scott emailed the Council again asking whether any of a number of specific assets listed in her email was missing from the schedule and whether they should be added. The Council responded the same day and advised that it would query the issue with the department concerned.
9. The Council wrote to Ms Scott in a letter dated 12 November 2009, with a response to her request for review of 14 October 2009. The Council upheld its decision that the titles were exempt in terms of section 25 of FOISA, because they were available from the Register of Sasines and/or the Land Register. Also, the Council provided further documents which it thought would assist Ms Scott in searching these registers and reiterated its apology for not having responded to her initial request timeously.



10. Ms Scott and the Council subsequently engaged in further correspondence, within which Ms Scott sought clarity on her questions regarding the lists of properties provided to her. Within this correspondence, Ms Scott requested (in an email dated 23 November 2009) confirmation from the Council that it would be able to provide the land certificate numbers, subjects, types of deed, granters, grantees, dates of recording and dates of register to assist her in her search for the titles for the properties detailed within the schedule to the Council's response of 14 October 2009.
11. This particular email was handled by the Council as a new information request. Ms Scott, however, informed the Council that she did not consider this to be a new request, but part of the request set out in paragraph 1. She indicated that she could not obtain the titles from the Register of Sasines or, presumably, the Land Register without the relevant information. She also indicated that if the Council wished to rely upon the exemption in section 25 in response to her request, then it seemed reasonable and appropriate that the Council provided the necessary information to enable her to find and access the relevant titles.
12. On 12 January 2010, Ms Scott emailed the Commissioner, stating that she was dissatisfied with the Council's failure to respond to her request of 6 September 2009 within 20 working days and citing section 10 of FOISA. She stated that she was also dissatisfied that the Council had not provided sufficient information to make the title deeds she was seeking reasonably obtainable for the purposes of the exemption in section 25 of FOISA. Further, she stated that she did not understand why the Council had treated her email of 23 November 2009 as a new request. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
13. The application was validated by establishing that Ms Scott had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

14. The investigating officer contacted the Council on 15 February 2010, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
15. The Council responded to the Commissioner on 9 March 2010. It explained that it had made an offer to Ms Scott to visit Council offices in order to provide assistance in her searches. The Council stated that Ms Scott would be given access to any title deeds she wished to see and copies would be provided.



16. Between 22 March 2010 and 30 July 2010, a series of meetings took place between Ms Scott and the Council. The outcome of these meetings was that Ms Scott was satisfied that she had received most of the information she was seeking in her request and accepted that it would be unlikely that the Council would be able to locate any further information to assist her, given that it did not hold some of the titles requested.
17. However, Ms Scott remained dissatisfied with the way her request had been handled and stated that she wished the Commissioner to address this in a decision.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Ms Scott and the Council and is satisfied that no matter of relevance has been overlooked.

Section 10(1) of FOISA

19. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
20. The Council failed to respond to Ms Scott's request within this timescale, and only responded once Ms Scott had requested a review of its failure to respond.
21. Therefore, the Commissioner finds that the Council failed to respond to Ms Scott's request for information of 6 September 2009 within the 20 working days allowed under section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA.
22. The Commissioner notes that the Council subsequently provided a substantive response to Ms Scott on 14 October 2009, following her request for review. In the circumstances, he does not require any action to be taken in relation to this breach.

Section 25 of FOISA

23. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
24. The Council submitted that the titles sought by Ms Scott were exempt in terms of section 25 of FOISA because they were available from the Register of Sasines and/or the Land Register.



25. In this case, it is not disputed between the parties that titles for properties are generally publicly accessible documents. They can generally be found within the Land Register or Register of Sasines, which are held and made available (for a fee) by the Registers of Scotland¹. However, Ms Scott's contention is that the particular titles she was seeking were not reasonably accessible to her without assistance from the Council in identifying those relevant to her.
26. In his briefing on section 25², the Commissioner has made clear that a public authority applying this exemption needs to also be alert to its duty to provide advice and assistance to a requestor in terms of section 15(1) of FOISA. Paragraph 3.7 of the briefing notes that the authority should take steps to ensure that the exact information requested is actually reasonably accessible elsewhere. It should not assume that the applicant will know where and how the information can otherwise be obtained, and it should provide guidance on how it can be accessed.
27. In this case, once a response was provided to Ms Scott, the Council cited section 25 of FOISA, and provided some information to assist her in identifying the relevant titles. In further correspondence and in response to Ms Scott's further request for review, additional information was supplied.
28. On 14 October 2009 the Council supplied Ms Scott with a schedule of Scottish Borders Council Common Good Land and property assets in Selkirk from the Council's Asset Register as follows:
- Titles for housing: for all these titles the Council gave street names, type of deed, Granter, Grantee, date of recording and for some of the titles it also gave the land certificate number.
 - Titles other than for housing: for these titles the Council gave a description/name, a current location or street address and in most cases a post code.
 - The Council explained that the schedule did not contain all public open spaces, contained only defined assets and did not contain any remaining assets of housing land from the Scottish Borders Housing Association transfer. The Council also stated that the schedule did not contain full details of the land certificates for the housing transfer land and said it would get back to Ms Scott on this.
29. On 12 November 2009 the Council supplied Ms Scott with the following further information:
- Titles for housing: seven further street addresses giving street names, type of deed, Granter, Grantee, date of recording and, for one of the titles, the land certificate number.

¹ <http://www.ros.gov.uk/>

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2663&SID=107>



- A list of Council-owned housing in Selkirk, including the properties' function (e.g. Housing – 28 Aged Persons' Houses at Elm Park), description (e.g. areas of ground extending to 25.6 acres and strip of ground between Housing Estate and River Ettrick) and form of title (e.g. Two Dispositions in favour of Selkirk Town Council dated 1946 and 1965) for each.
 - A list of Selkirk common goods assets, including the function, description and form of title (e.g. Roads; piece of ground in Mill Street; Disposition in favour of Selkirk Town Council dated 1940.)
30. On receipt of the above, Ms Scott pointed out to the Council that the list originally provided on 14 October 2009 did not include the same level of detail as the list provided on 12 November 2009, in that the functions, descriptions and forms of title were not provided for non-housing assets. Ms Scott said that, while the list of 14 October 2009 was helpful, it was not as useful as the list of 12 November 2009 in enabling her to access the titles in the Registers. She asked the Council to provide her with the same details for the first list as she had received for the second.
31. Having looked into the search methods and requirements for title location in some detail, the Commissioner notes that in order for Ms Scott to locate the titles in the Register of Sasines and Land Register, she would have required to possess some specific information to identify which titles she was seeking - examples being
- a specific numbered street address,
 - the defined boundaries of the land being searched,
 - a description of the use of the land or postal addresses for any properties that may border the land,
 - details of who owns the land now, details of who owned it previously, and details of when it changed hands.
32. The Commissioner accepts, however, that the information provided to Ms Scott on 14 October 2009 and on 12 November 2009 would have enabled her to be able to locate most of the titles for Council owned properties in Selkirk. The titles that could be identified using the information supplied by the Council were for the most part assets for which the Council had provided the type of deed, the granter, the grantee and the date of recording of the deed or the functions, descriptions and forms of title.
33. The Commissioner notes that to locate undefined asset titles, where no plan or boundary description is available, supplementary information (beyond that supplied by the Council) would be required in order for the information was to accessible to Ms Scott. For example, the Rosebank Quarry former tip site was listed by the Council, but the title could not have been identified by Ms Scott without access to additional information to assist her search.



34. In addition to this, the Commissioner notes that some of the titles (one example being Selkirk Old Jail) were not actually recorded in the Register of Sasines or Land Register as the Council's responses had claimed. In order for such titles to be reasonably accessible to Ms Scott, she would also have required to know which deeds were in fact recorded in the Burgh Registers and which Burgh Register they were recorded in.
35. In the light of the above, the Commissioner is of the view that the majority of the titles requested by Ms Scott were reasonably accessible to her. The Commissioner notes that the information provided to Ms Scott alongside the Council's responses in October and November 2010 provided sufficient assistance and information to enable her to locate and access the majority of the titles within publicly accessible registers. For the majority of the relevant titles, therefore, he concludes that the Council correctly found the titles to be exempt from disclosure under section 25(1) of FOISA at the time of the Council's review of its handling of her request.
36. However, for some of the titles, the Commissioner accepts Ms Scott's contention that these were not reasonably accessible to her based upon the information available to her following the Council's review. In some instances, the titles were not available from the Register of Sasines and/or Land Register as the Council had indicated. In these and other cases, the titles would be publicly available, but could not be located by Ms Scott (and so were not reasonably accessible) without access to further information.
37. The Council did not supply the Commissioner with sufficient evidence to show how Ms Scott may have otherwise obtained these titles on the basis of the information provided by it at the point of the review.
38. With respect to these titles, the Commissioner concludes that the Council incorrectly applied the exemption in section 25(1) of FOISA. Since he has concluded that the exemption was incorrectly applied, he also concludes that the Council breached section 1(1) of FOISA by failing to supply these titles.
39. However, the Commissioner notes that this failure has been rectified to Ms Scott's satisfaction by steps taken by the Council following her application for a decision. The Commissioner does not require any further action to be taken in response to this breach.

Section 15(1) of FOISA

40. The Commissioner will now go on to consider the level of advice and assistance provided to Ms Scott and whether the Council complied with its duty to advise and assist Ms Scott in dealing with her request, as required by section 15(1) of FOISA.
41. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.



42. As noted above, where the exemption in section 25(1) is applied, the Commissioner would expect an authority to provide sufficient advice and assistance to the applicant to ensure that the information is actually reasonably accessible to them. Failure to do so can lead to a breach of the duty under section 15(1).
43. In her appeal to the Commissioner, Ms Scott explained the context of her request and expressed dissatisfaction on the basis that she considered she had not been provided with enough information to allow her to locate the titles that she was seeking. Ms Scott explained that she was still (at that point) waiting for further information to enable her to locate the titles.
44. The Commissioner must consider whether an authority has complied with its obligations under Part 1 of FOISA as at the point where it notifies the applicant of the outcome of its review. In this case, this is as at 12 November 2009.
45. The Commissioner's conclusions with respect to the Council's compliance with its duty under section 15(1) are closely related with those drawn above with respect to the exemption in section 25. With respect to the majority of the titles requested by Ms Scott, the Commissioner has concluded that the Council supplied reasonable and appropriate advice and assistance by providing information to assist Ms Scott in locating the relevant titles.
46. However, in some cases, the information provided was not sufficient to enable her to do so. With respect to these titles, the Commissioner can only conclude that the Council failed to provide relevant or sufficient advice and assistance. He would comment that instead of simply writing to Ms Scott in the first instance citing section 25, it would have been prudent for the Council to have carried out a sample search of its own to see whether some of the undefined asset titles could have been identified in the Register of Sasines or the Land Register from the information it was intending to provide to Ms Scott. If the Council had, for example, tried searching for the Old Selkirk Jail, based just on the information given to Ms Scott in the first instance, then it would have found that the title was not obtainable from these sources.
47. On the whole, the Commissioner is of the view that the Council had complied with its duty under section 15(1) of FOISA by 12 November 2009, when it advised Ms Scott of the outcome of its review. By providing a list of relevant properties and details to enable the titles to be located, it did provide Ms Scott with a high quality of advice and assistance enabling her to obtain most of the information she sought.
48. However, the Commissioner concludes that the Council failed to comply fully with its obligations under section 15(1) because this advice and assistance did not enable Ms Scott to access all of the relevant titles.
49. However, the Commissioner would note that since the time of its review, the Council has provided a significant amount of further assistance to Ms Scott, which arguably goes well beyond its obligations within section 15 or Part 1 of FOISA more generally. This has allowed any deficiencies in the initial handling of Ms Scott's request to be rectified and for her request to be addressed to her satisfaction.



50. In the circumstances, the Commissioner does not require the Council to take any action in response to this breach.

The request of 23 November 2009

51. Finally, the Commissioner would comment on the point raised by Ms Scott as to whether her email of 23 November 2009 should have been treated as a new information request.
52. As noted above, this email pointed out to the Council that list of properties originally provided on 14 October 2009 did not include the same level of detail as the list provided on 12 November 2009, in that the functions, descriptions and forms of title were not provided for non-housing assets. Ms Scott said that while the list of 14 October 2009 was helpful, it was not as useful as the list of 12 November 2009 in enabling her to access the titles in the Registers. She asked the Council to provide her with the same details for the first list as she had received for the second.
53. Ms Scott has indicated that she considered that this request formed part of her initial request, since the information she highlighted was required in order to allow her to identify the relevant titles.
54. The Commissioner has considered this point in the light of his conclusions above. Since he has found that the information supplied by the Council on 14 October 2009 was, in most cases, sufficient to allow identification of the titles for the relevant property, he does not consider that, in most cases, the Council was required to supply the additional information sought in the email of 23 November.
55. In these circumstances, the Commissioner has concluded that the email of 23 November 2009 was correctly considered by the Council as a new and distinct request for information, and as such it has not been considered further in this case.

DECISION



The Commissioner finds that Scottish Borders Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Ms Scott. The Council was entitled to withhold most of the titles requested by Ms Scott under the exemption in section 25(1) of FOISA. By providing additional information that would have enabled Ms Scott to locate these titles, the Council complied with its duty to provide advice and assistance in terms of section 15(1) of FOISA. In these respects, the Council complied with Part 1 of FOISA.

However, the Council breached the requirements of Part 1 by failing to respond to Ms Scott's request for information within the timescales laid down by section 10(1) of FOISA. The Council incorrectly applied the exemption section 25(1) of FOISA to some of the titles requested by Ms Scott, and in so doing, the Council failed to comply with section 1(1). By failing to provide appropriate or sufficient information to allow the identification of these titles, the Commissioner also concluded that the Council failed to comply fully with its duty to provide advice and assistance in terms of section 15(1) of FOISA.

Given that the Council has since taken significant steps to rectify these breaches, to the satisfaction of Ms Scott, the Commissioner does not require the Council to take any further action in response to this failure.

Appeal

Should either Ms Scott or the 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.

Margaret Keyse
Head of Enforcement
10 September 2010



Appendix

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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

25 Information otherwise accessible

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

...