

Decision Notice



Decision 025/2012 Mrs Eileen Kerwin and Dundee City Council

Accident Reports and risk assessments

Reference No: 201101451

Decision Date: 7 February 2012

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mrs Kerwin requested from Dundee City Council (the Council) information held relative to a specific accident. The Council responded by informing Mrs Kerwin that the information was being withheld in terms of section 33(1)(b) and 36(1) of FOISA. Following a review, as a result of which the Council confirmed that the information was exempt in terms of section 36(1) of FOISA, Mrs Kerwin remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council advised that it did not hold the requested information. Following the investigation, the Commissioner accepted that this was the case, but also found that the Council had failed to notify Mrs Kerwin that it did not hold the information when dealing with her request, in breach of section 17(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information not held)

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

Background

1. On 4 April 2011, solicitors acting on behalf of Mrs Kerwin wrote to the Council with reference to a specified accident, requested the following information:
 - a) Accident Reports or Investigation Reports following the accident.
 - b) Risk Assessment, Economic Assessment or Workplace Assessment or similar documentation regarding the layout of a specified office current at the time of the accident, as well as any updated assessments carried out since. The request specified that such documentation should be provided with specific reference to the use of the computer in that office.



- c) Under the terms of the Health & Safety (Display Screen Equipment) Regulations 1992, an analysis of the relevant work station under Regulation 2, a note of the training provided to the work station users under Regulation 6 and a note of all and any information provided to the work station users under Regulation 7.
2. Subsequent references to communications with Mrs Kerwin should be read as including communications with her solicitors acting on her behalf.
3. The Council responded on 29 April 2011, indicating that it was withholding the information in terms of sections 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality) of FOISA.
4. On 24 May 2011, Mrs Kerwin wrote to the Council requesting a review of its decision.
5. The Council notified Mrs Kerwin of the outcome of its review on 21 June 2011. It withdrew any reliance upon section 33(1)(b) of FOISA, while continuing to apply section 36(1).
6. On 19 July 2011, Mrs Kerwin wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mrs Kerwin 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.

Investigation

8. On 2 September 2011, the Council was notified in writing that an application had been received from Mrs Kerwin and was asked to provide the Commissioner with any information withheld from her. The Council responded, stating that it now appeared that it did not hold any information falling within the scope of Mrs Kerwin's request. It acknowledged that a response in terms of section 17(1) would have been appropriate in the circumstances and apologised for any misunderstanding.
9. The investigating officer subsequently contacted the Council, 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. In particular, the Council was asked to explain the steps it had taken to establish that it held no information falling within the scope of Mrs Kerwin's request.
10. The Council provided submissions in support of its position that it did not hold any information. These will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mrs Kerwin and the Council and is satisfied that no matter of relevance has been overlooked.

Information held by the Council

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain restrictions which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The restrictions contained in section 1(6) are not applicable in this case. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. While the Council's response to Mrs Kerwin's requirement for review was to the effect that the information was being withheld in terms of section 36(1) of FOISA, during the investigation the Council submitted that it did not hold any information falling within the scope of Mrs Kerwin's request. Had that been the case, the Council should have issued a notice in terms of section 17(1) of FOISA, stating that no information was held.
14. In correspondence with the investigating officer, Mrs Kerwin indicated her surprise that no information was held, stating that she understood a report of the accident to have been recorded in a "daily log".
15. While this point raised by Mrs Kerwin may be relevant in considering whether there should be a reasonable expectation that relevant information should be held by the Council, ultimately the question for the Commissioner in this case is whether the Council actually held any information falling within the scope of Mrs Kerwin's request.
16. In its correspondence with the investigating officer, the Council provided details of the searches it had undertaken in order to identify relevant information. This included a description of the resources searched and confirmed that the "daily log" referred to by Mrs Kerwin made no reference to the accident in question.
17. Having considered all relevant submissions and the terms and context of Mrs Kerwin's request, the Commissioner accepts that during the investigation the Council took adequate steps to establish whether it held any information which fell within the scope of that request. He also accepts that it was reasonable in all the circumstances for the Council to conclude that it did not hold any relevant information.
18. Given that no such information is (or was) held by the authority, the Council had a duty to issue a notice in writing to that effect to comply with the terms of section 17(1) of FOISA. Given that the Council failed to provide such a notice to Mrs Kerwin, the Commissioner finds that the Council failed to comply with the requirements of section 17(1).



19. The Commissioner is concerned that it appears to have taken the Council until an application had been made to the Commissioner before it took any appropriate steps to determine whether it held the requested information. While no useful purpose would be served by requiring the Council to take any specific action in this case, the Commissioner would urge the Council to ensure that, in response to future information requests, it takes reasonable steps to establish whether it actually holds any relevant information before purporting to withhold that information from requestors. Future breaches of this kind may lead to the Commissioner taking action under his Enforcement Strategy.

DECISION

The Commissioner finds that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by not providing Mrs Kerwin with a notice in terms of section 17(1) of FOISA that the information requested was not held. The Commissioner does not require the Council to take any action in respect of this failure in response to Mrs Kerwin's application.

Appeal

Should either Mrs Kerwin or Dundee City 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
7 February 2012



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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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