



Scottish Information  
Commissioner

**Decision 016/2006 - Millar & Bryce Limited and  
Dundee City Council**

*Request for copies of extant notices served under section 90 of the  
Housing (Scotland) Act 1987*

**Applicant: Millar & Bryce Limited**  
**Authority: Dundee City Council**  
**Case No: 200500845**  
**Decision Date: 1 February 2006**

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

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Decision 016/2006 – Millar & Bryce Limited and Dundee City Council**

---

Request for extant notices served under section 90 of the Housing (Scotland) Act 1987 – withheld on the basis of section 12(1) – excessive cost of compliance – failure under section 15 – duty to provide advice and assistance

### **Facts**

---

Macroberts Solicitors (Macroberts), acting on behalf of their clients, Millar and Bryce Limited (Millar & Bryce), requested details of notices which remain extant under or pursuant to section 90 of the Housing (Scotland) Act 1987 from Dundee City Council (the Council). The Council refused, citing section 12(1) of the Freedom of Information (Scotland) Act. The Council claimed that the cost of responding to the information request exceeded the prescribed amount set by the Scottish Ministers.

### **Outcome**

---

The Commissioner found that the Council acted correctly in refusing to respond to Millar & Bryce's request under section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Commissioner also found, however, that the Council failed in its duty under section 15 of FOISA, by failing to assist Millar and Bryce in establishing whether relevant information could be provided within the upper cost limit.



## Appeal

---

Should either the Council or Millar & Bryce 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 of receipt of this notice.

## Background

---

1. On 1 January 2005, Macroberts, acting on behalf of their clients, Millar and Bryce, wrote to the Council requesting copies of “*all Notices or Orders made or served prior to 31 December 2004, and which remain extant as at 1 January 2005, under or pursuant to Section 90 of the Housing (Scotland) Act 1987.*” Macroberts also requested that, where the information contained personal data which is exempt under section 38 of FOISA, the information be provided with that data redacted.
2. Section 90 of the Housing (Scotland) Act 1987 (the HSA) concerns the declaration of Housing Action Areas, and permits authorities to secure the carrying out of work on properties within any such declared area, in order to ensure that those properties meet a tolerable standard and are in a good state of repair. A notice served under Section 90 of the HSA therefore will inform property owners, lessees and occupiers of the standard with which housing within the declared area must comply.
3. The Council responded on 28 January 2005, informing Macroberts that the information request was being refused. Section 12(1) of FOISA was cited as the reason for refusal. Section 12(1) states that public authorities are not obliged to comply with a request if the authority estimates that the cost of complying would exceed the amount prescribed in the FOISA Fees Regulations (currently set at £600).
4. Macroberts, again acting on behalf of Millar & Bryce, replied to this correspondence on 28 January 2005. In their reply, Macroberts requested a breakdown of the costs calculated by the Council, and also invited the Council to review its decision to withhold the information.



5. The Council's response to this request for review, dated 24 February 2005, upheld the decision to withhold the information on the basis of section 12(1) of FOISA. The Council stated that the requested information was held in 443 separate files, and retrieval of the information would require each file to be examined. The Council estimated that it would take 30 minutes to examine each file and extract the information, by a member of staff employed on the GS1/3 pay scale. As the cost per hour for staff members on this pay scale was stated to be £9.60, the cost of providing the information was estimated at £2,126.40, excluding reproduction charges.
6. On 4 March 2005, Macroberts submitted an application for decision to my Office on behalf of Millar & Bryce. This application was allocated to an investigating officer.

## The Investigation

---

7. The application was validated by establishing that Macroberts had made a request on behalf of their clients to a Scottish public authority, and had applied to me for a decision only after requesting the authority to review its decision.
8. In their application, Macroberts stated that they did not accept that the methodology proposed by the Council was plausible, as it suggested that the Council maintains no centralised records of the requested information, and the only method of extraction would be to review every file on the Council's system.
9. On 6 April 2005, my Office contacted the Council to invite comment and seek further information relating to the case. This information was provided on 6 May 2005. Following receipt and consideration of this response, the investigating officer visited the Council's premises in July 2005 to interview key staff directly, and examine the systems and processes used by the Council to store and access the relevant information. Additional information and comments were subsequently sought from the Council through various communications. The findings of this investigative work is summarised below.
10. The Council firstly informed my staff that the nature of the information requested by the applicant was misunderstood at the time of the initial request, and that this misunderstanding was not identified during the Council's review of the information request. As a result, the Council stated that the initial calculation of fees on the basis of analysis of 443 separate files was erroneous.



11. The Council indicated that this misunderstanding arose as a result of the process used to filter information requests to relevant departments. This process led to the request being inappropriately summarised, with the result that the Council subsequently interpreted the request as being for details of all notices served under section 90 of the HSA, as opposed to only those notices which remained extant as at 1 January 2005.
12. The Council also informed my Office that, when the information request was reconsidered following receipt of the request for review, the case was again considered on the basis of the incorrect summary. The error was not, therefore, identified until Macroberts applied to me for a decision.
13. Following its reconsideration of the original information request, the Council informed my Office that the decision to withhold the information under 12(1) of FOISA (due to the excessive cost of compliance) still applied, albeit based on different calculations than those supplied to Macroberts.
14. The Council indicated that current records held on declared Housing Action Areas (HAAs) are varied and inaccurate. The Council also stated that it has never had any requirement to maintain a centralised record of the information requested by Millar & Bryce, and therefore no such central records exist.
15. While the existence of extant notices under section 90 of the HSA are considered when preparing Property Enquiry Certificates, the Council stated that this is possible due to the provision of a property name and/or address, which the Council described as the “key” to interrogating their systems. Different departments would then use this “key” to interrogate their individual systems and retrieve the information required. The Council also stated that, where this information was unavailable from Council systems, a site visit may be required in order to ascertain whether the work required by a section 90 notice had been completed.
16. The Council indicated that there would essentially be two stages involved in responding to the request. The first would involve the identification of all HAAs (and subsequently the individual properties which fall within those HAAs), while the second stage would involve establishing whether any notices served on individual properties remain extant. The Council stated that, while it would be relatively easy to identify HAAs, problems are likely to arise in identifying whether notices served in relation to each property are extant. This is because the Council currently holds no centralised record of the outcome of notices served under section 90 of the HSA.
17. In order to fully identify HAAs (and the individual properties on which notices would have been served), the Council stated that it would be required to review the following information sources:



- Copies of Final Resolutions held which have been issued by the Council in relation to 57 declared HAAs.
- An 8 page alphabetical list of HAAs, last updated in November 1998, which identifies active and completed HAAs, as well as properties to be developed.
- A 'cardex' system comprising 175 cards detailing information relating to only some of the total HAAs declared.

The Council stated that none of the above single sources contains a full and accurate list of all HAAs, and that all three sources would therefore require to be consulted and cross-referenced in order to ensure that as accurate a list as possible of HAA properties could be collated.

18. In order to ascertain whether any notices or orders served under section 90 of the HSA remained extant, the Council would refer to the following information sources:

- The cardex system described above. The Council state that individual Council officers often updated these individual cards with details of whether required work had been carried in particular areas or on particular properties, or whether grants had been issued in relation to particular properties. However the Council stated that this was not done consistently as a matter of policy, and that records were therefore uneven and inconsistent, and did not represent a complete record for all HAAs.
- The 8 page alphabetical list described above. The Council stated, however, that this list again does not contain comprehensive information relating to all HAAs or properties, so again would not provide full details of the information requested. The Council also pointed out that, as this list has not been updated since November 1998, any work concluded since then would not be recorded here.
- A 'UNIX Grant System'. This comprises a database which could be used to access details of grants awarded to the owners of properties within an HAA. The Council stated that the issuing of a grant in relation to a Final Resolution under section 90 of the HSA would provide an indication that the required work had been completed. The Council stated, however, that grant information stored within this system is destroyed after 10 years so any information available from this system would only date back to 1995.

The Council therefore indicated that, while some information could be gathered from the above sources, it is unlikely that *a full and accurate response, in terms of the provision of details of all 'notices or orders...which remain extant as at 1 January 2005'*, could be provided.



19. The Council also stated that, where such searches of existing information resources were not conclusive, a site visit would be required in order to conclusively determine the status of an individual property and confirm that required repairs had in fact been carried out. The Council noted, however, that this would not represent recorded information and would, therefore, fall outwith the scope of the legislation.
20. Despite these reservations, the Council provided a revised estimate of the cost based on the time required to review the various information sources described above. In this, the Council estimated that locating, retrieving and collating relevant information from the above information sources would take 53 hours. The Council indicated that this work should be carried out by a member of staff graded at the AP3 level, whose hourly rate was stated to be £20.75.
21. The Council also acknowledged, however, that the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) sets a maximum limit of £15 per hour per member of staff which can be charged for staff time in locating, retrieving or providing information. The Council therefore stated that the estimated charge for retrieving this information would be £795.00 (53 hours x £15.00). This figure exceeds the maximum prescribed amount of £600 set out in the Fees Regulations, and the Council therefore confirmed that the request would continue to be refused on the grounds of section 12(1) of FOISA.

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

---

### **The Council's Review**

22. I would first like to comment on the Council's failure to recognise at review stage that its interpretation of the original request, and therefore the estimate of the work required in order to fulfil it, was erroneous.
23. The requirement to conduct a review under FOISA provides public authorities with the opportunity to consider the issues which arise from a particular information request afresh, providing that authority with the opportunity to reassess its handling of the initial request, and consider whether that request has been processed fully in accordance with FOISA. In conducting its review in relation to this case, the Council failed to identify that the request had been misinterpreted, and that subsequently both the information identified, and the cost for providing it, was erroneous.



24. The Council has, however, informed my staff that its procedures have been reviewed following its experience of responding to this information request, and that, as a result of the misunderstanding in this case, the Council no longer summarises requests before delegation to an appropriate officer for response.

### **The Council's Methodology**

25. In their application to me, Macroberts disputed the Council's assertion that it maintains no centralised records of the requested information, and that the only method of extraction would therefore be to manually review individual files.

26. As noted above, the Council revised its assessment of the nature of the request and of where the information could be correctly located, following Macroberts' application to me. Despite this, however, the core argument put forward by the Council remained the same. This was:

- that the information was not centrally accessible
- that retrieval of information which might be provided in response to the request would require a manual review of relevant files
- that the cost of this manual review would exceed the prescribed amount set out in the Fees Regulations.

27. In order to assess the validity of this position, a member of my staff visited the Council's premises to inspect the systems used and interview key staff, to establish whether it was in fact the case that information cannot be extracted from the existing systems.

28. During this visit, the Council made it clear that it has never been asked to, nor has it had any need to maintain, a centralised record of notices served under section 90 of the HSA. It was also demonstrated that the existing Council databases are not designed to record details of such notices.

29. The Council also stressed in its submissions to my Office that it considers the methodology outlined above, as the only way in which the requested information could be accessed. Even then, it stressed that the information would be unlikely to be wholly accurate and complete.

30. As a result of the submissions provided by the Council, and the subsequent investigation and site inspection carried out by my investigating officer, I am satisfied that the requested information cannot be readily accessed through the Council's existing IT systems. As such, I concur with the Council's position that the methodology proposed in paragraphs 16-19 above is the only way in which relevant information could be identified by the Council.





### The Council's assessment of charges

31. The Council assessed, when considering the information held which might be provided, that the cost of locating, retrieving and providing that information would exceed the prescribed upper limit in the Fees Regulations of £600. The Council therefore informed this Office that the request would continue to be refused on the grounds of section 12(1) of FOISA.
32. As noted in paragraphs 20-21 above, the Council indicated that the cost of carrying out the work described under **paragraphs 16-19** above would be £795.00.
33. It was noted by my Investigating Officer that the staff required to conduct this work appeared to be graded at a higher level than those staff required to respond to the Council's initial interpretation of the request (AP3 staff as opposed to GS1/3 staff). The Council was asked to provide an explanation for this discrepancy. This was considered to be particularly relevant given that, were the work to be carried out by staff on the GS1/3 scale, the cost of retrieving the information would fall within the £600 upper cost limit.
34. In response, the Council stated that this was a result of the initial misunderstanding over the nature of the request. The Council stated that when the misunderstanding had been resolved and the request was considered again, it was concluded that it would be necessary for the work to be carried out by a staff member at AP3 level. AP3 level staff were described as having the relevant skills and experience required to carry out the work, while GS1/3 level staff were described by the Council as providing clerical support. The Council therefore intimated that the additional work required to review and collate the various information sources would require staff with a detailed knowledge of the relevant department's records and systems, as well as the skills required to identify, assess and collate the information.
35. In addition, the Council stated that the original calculation of the hourly rate for GS1/3 staff was estimated incorrectly, in that the original response did not take account of holidays, training, sickness absence and other 'non-productive' time in calculating working hours.
36. Following consideration of this issue, I find that, in this case, it is appropriate that the work undertaken be carried out at staff at the AP3 level and that, therefore, the levied charge of £15 per staff hour is appropriate. I agree with the Council that the work required to identify appropriate information would require members of staff with detailed knowledge of the relevant records systems, as well as knowledge of the departmental processes involved in issuing and monitoring notices or orders under section 90 of the HSA.



37. I am therefore of the opinion that the Council acted correctly in refusing the information request under section 12(1) of FOISA, on the grounds that providing a response to the request would exceed the upper cost limit set out in the Fees Regulations.

### **The information held by the Council**

38. I would also like to take this opportunity to comment further on the accuracy of the information held by the Council which may have been provided in response to the request.

39. In the initial request submitted to the Council, Macroberts sought, on behalf of Millar & Bryce, copies of *“all Notices or Orders made or served prior to 31 December 2004 and which remain extant as at 1 January 2005, under or pursuant to section 90 of the Housing (Scotland) Act 1987”*.

40. As the Council has indicated in its submissions, and as confirmed by my staff during the course of this investigation, the recorded information held by the Council in relation to the fulfilment of notices served under section 90 of the HSA is erratic and incomplete.

41. The Council holds information across various sources which, when reviewed and collated, would reveal a proportion of properties where it is clear that the section 90 notice remains extant. This process would also allow a significant number of properties to be eliminated from the list where it is clear from the information available that the work on a particular property, street or HAA has been completed.

42. However, the Council also states that, due to the nature of the recorded information held, this process will inevitably reveal a proportion of properties where it cannot be absolutely confirmed whether or not any such notice remains extant.

43. When the Council currently responds to property enquiries which seek information on a single, identified property, the Council state that such cases are confirmed either by drawing on the non-recorded knowledge of staff working within the relevant area or, where this is unreliable, visiting the property to assess whether the work has been completed. With regards to the Millar & Bryce request, the Council has indicated that such site visits may have to be carried out on a proportion of properties before a fully accurate response could be provided.



44. The Council also indicated that site visits may be required if accurate data were to be provided in circumstances where a notice had been served on a tenement property. While it may be the case that records show that such a property has had common repairs carried out, it may not be recorded whether each individual flat within the tenement had been improved to the required standard. In such cases, site visits may be required in order to confirm whether notices in relation to each flat had been fulfilled or remained extant.
45. It is clear therefore that, while details of a proportion of notices or orders which are extant would be identified by the Council using the methodology outlined in **paragraphs 16-19** above, this methodology will not allow for the accurate identification of all extant notices.
46. It should be remembered, however, that FOISA only provides a right of access to **recorded** information held by Scottish public authorities. It does not require a public authority to create new information in response to requests, nor to undertake additional work (such as the site visits described above) to ensure that information held is accurate and/or up-to-date.
47. Conversely, FOISA also does not permit public authorities to withhold information simply because the authority is concerned about the accuracy or validity of the information, or because it believes the information it holds could be misinterpreted by the recipient. In such circumstances authorities may consider providing comment alongside the information release, in order to ensure that the applicant is fully aware of any concerns held by the authority.
48. As detailed earlier, however, in the case of the Millar & Bryce request, the process of locating and retrieving this information would have exceeded the upper cost limit set out in FOISA. As a result, the Council was not required to make such considerations in this case.

### **Duty to advise and assist**

49. I would finally like to comment on the Council's approach to the duty to advise and assist provided by section 15 of FOISA. Under section 15, authorities have a duty to assist those making information requests. The 'Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002' (the Section 60 Code) provides authorities with guidance on the interpretation of this duty.
50. With regards to cases where the cost exceeds the upper limit set out in the fees regulations, paragraph 20 of the Section 60 Code makes clear that authorities should aim to provide:

*“An indication of what information could be provided within the cost ceiling, in instances where a request would be refused on cost ground.”*



51. While it is not immediately clear whether, in this case, meaningful or valuable information could have been provided to Millar and Bryce within the upper cost limit, nevertheless the Council should have, in its communications with Macroberts, attempted to establish whether the request could have been rephrased or limited in any way in order to facilitate compliance within the upper limit.

52. In this case however, the Council failed to do so and, as a result, failed in their duty under section 15 of FOISA.

## **Decision**

---

I find that the Council acted correctly in refusing to respond to Millar & Bryce's information request under section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the grounds that the estimated cost of complying with the request would exceed the amount prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.

I also find, however, that the Council failed in its duty under section 15 of FOISA, by failing to assist Millar and Bryce in establishing whether relevant information could be provided within the upper cost limit.

I do not require the Council to take any remedial action in relation to this failure.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**1 February 2006**