



Scottish Information
Commissioner

**Decision 160/2006 - David M. Paterson and Aberdeenshire
Council**

Job-sizing toolkit

**Applicant: Mr David M. Paterson
Authority: Aberdeenshire Council
Case No: 200502967
Decision Date: 22 August 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Request for job-sizing toolkit – information withheld under sections 3(2)(a)(i) and 33(1)(b) of the Freedom of Information (Scotland) Act 2002

Facts

Mr Paterson requested a copy of software known as the job-sizing toolkit for posts in secondary schools in Aberdeenshire from Aberdeenshire Council. Aberdeenshire Council refused this request, citing section 3(2)(a)(i) and section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Outcome

The Commissioner found that Aberdeenshire Council did not deal with Mr Paterson's request for information in accordance with Part 1 of FOISA, in that it misapplied section 3(2)(a)(i) of FOISA to the information withheld and consequently failed to comply with section 1(1) of FOISA.

The Commissioner also found that Aberdeenshire Council did not deal with Mr Paterson's request for information in accordance with Part 1 of FOISA, in that it misapplied the exemption in section 33(1)(b) of FOISA and consequently failed to comply with section 1(1) of FOISA.

He required Aberdeenshire Council to release a copy of the job-sizing toolkit as requested by Mr Paterson.

Appeal

Should either Aberdeenshire Council or Mr Paterson 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 18 August 2005 Mr Paterson requested under the Freedom of Information (Scotland) Act 2002 (FOISA) by e-mail from Aberdeenshire Council (the Council) a copy of the job-sizing toolkit ('the toolkit') for posts in secondary schools in Aberdeenshire.
2. The Council responded by email (2 September 2005) stating that it held this information, but refused to disclose it. The Council stated that in terms of section 3(2) of FOISA it did not hold the toolkit. It explained that the toolkit was held by it on behalf of another person, the Scottish Negotiating Committee for Teachers (SNCT). The Council stated that were the toolkit to be regarded as being held by it, the information would then be exempt under sections 30(b), 30(c) and 33 of FOISA.
3. Mr Paterson wrote to the Council on 11 September 2005 requesting it review its decision to withhold the information.
4. The Council replied on 11 October 2005 upholding its refusal notice. The Council Review Panel had upheld the use of section 3(2) and section 33 of FOISA, but decided that the exemption in section 30 of FOISA was not established.
5. On 22 October 2005 Mr Paterson applied to the Scottish Information Commissioner for a decision as to whether the Council had dealt with his information request in accordance with FOISA.
6. The case was allocated to an investigating officer.

The Investigation

7. Mr Paterson's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.
8. My investigating officer contacted the Council for its comments on the application and for further information in relation to this case, in particular the information requested by Mr Paterson. The Council responded on 23 January 2006, providing:
 - Details of the Scottish Negotiating Committee for Teachers (the SNCT)



- A copy of 'A Teaching Profession for the 21st Century: Agreement reached following recommendations made in the McCrone Report' ('the Teaching Agreement')
 - Details of the Council's use of the toolkit
 - Convention of Scottish Local Authorities (CoSLA) Personnel Services Circular 4/05 dated 16 June 2005 on disclosure of the toolkit
 - Copies of SNCT Circulars - SNCT/24 of 4 April 2003 (Job sizing) and SNCT/28 of 27 February 2003 (Job sizing revised)
 - Copies of Council e-mails on the consideration of the applicant's request
9. In May 2000 the report of the McCrone Inquiry into professional conditions of service for teachers was published. A tripartite implementation group (the SNCT) was formed to examine those recommendations and consider proposals for implementation.
10. The toolkit was developed by a third party on behalf of the SNCT. The cost of developing it was met by the three bodies which comprise the SNCT. The SNCT comprises representatives from the Scottish Executive, CoSLA and the main teaching unions. Its committee has 22 members - three from the Scottish Executive, eight from CoSLA and eleven from the various teaching unions.
11. The toolkit is used by the Council's McCrone/Standards in Schools Team Project Manager to allocate job size scores to principal, head and depute head teachers within Aberdeenshire schools and to place each postholder against new pay scales agreed under the criteria stipulated in the Teaching Agreement.
12. The toolkit uses the answers given by the post holder to a standard questionnaire. This questionnaire is publicly available at:
- <http://www.ssta.org.uk/pdf/snct/SNCT-24.pdf>

The toolkit then allocates a score based on the data. Factors relevant to this score include number of staff managed, budgetary responsibility, school roll, etc. The job size scores are related to pay scales.



Submissions from the Council

13. The Council confirmed that it held the information requested, but refused to supply a copy on the grounds of section 3(2) of FOISA. It claimed that legally it could not be said to hold the information since it held the toolkit on behalf of another person, namely the SNCT. The Council explained that SNCT was not a statutory body and that there was no legal relationship between it and SNCT in the sense of a contract or similar agreement between the Council and the SNCT regarding the toolkit. It explained that the relationship, as it existed, was between local authorities and the SNCT, and was laid out in the SNCT Constitution (included in annex G of 'A Teaching Profession for the 21st Century').
14. The toolkit is installed on the computer of the project manager and administrative officer. The Council explained that it held a CD copy of the software. It was explained that Management Services of the Council used the CD to upload the software onto their personal computers and that a copy was now held on a secure file server.
15. The software was described by the Council as 'a sophisticated Excel spreadsheet'. This spreadsheet is encrypted and password protected at several levels. The Council explained that it is unable to 'see behind' the software to see how it works or computes the scores. It only has the ability to use the toolkit.
16. When asked to explain how the exemption in section 33 applied to the toolkit, the Council explained that the SNCT had received a request for the toolkit from a company wishing to purchase the system and that SNCT members were interested in selling it to a commercial supplier to recover the costs incurred in development: an appropriate sale cost was in the course of being agreed. If the Council were to provide the toolkit under a FOISA request, the SNCT would be prevented from recovering its investment. The Council stated that the public interest favoured non-disclosure since SNCT paid collectively for the toolkit from public funds.
17. The Council provided a copy of a memo from CoSLA, on behalf of the SNCT, recommending non-disclosure of the software.
18. Additionally, the Council pointed out that another local authority had been approached by a private school wanting a copy of the toolkit but that it had not done so, agreeing instead to use the toolkit to job-size posts on behalf of the school.



Submissions for the applicant

19. Mr Paterson said that he did not think that the Council could be said legally not to hold the information if it had a role in the implementation of the material to which the toolkit related: in essence, that it was using the information.
20. He also stated that it was his view that it was in the public interest to have access to the toolkit since it had a significant effect on public sector workers. Mr Paterson highlighted that in his view the public interest in favour of disclosure outweighed the public interest against disclosure.

The Commissioner's Analysis and Findings

Whether the information is held by the Council on behalf of the SNCT – section 3(2)(a)(i)

21. The word “held” has a specific meaning in section 3(2) of FOISA that is not simply determined by the presence of information within the premises or information systems of a public authority. When information is present within a public authority’s premises and systems only because it is held on behalf of another person, that information is not held by the public authority for the purposes of FOISA.
22. The toolkit was created on behalf of SNCT by a third party. The Council does not maintain or adapt the software, it cannot add to or manipulate the software in the toolkit and there are encryptions which restrict the Council’s potential uses of the toolkit.
23. In one of my earlier decisions (Decision 008/2005 - Mr Shields and the Scottish Parliament) I considered whether information was held on behalf of another person and stated, in paragraph 31:

“If an authority holds information on behalf of another person or organization, it will not control that information in the same way as it would with information held in its own right. The authority would not have power to delete or amend that information without the owner’s consent; it would not be able to apply its own policies or procedures to it. It may have restricted access to it.”

I would like to make it clear that although the ability lawfully to amend, delete or disclose information is a significant factor which might indicate legal control, it is not a conclusive test. There is a distinction between a situation in which an authority would never have the ability to amend or process information in any way and a situation where an authority holds information in its own right



but is then subject to various contractual or other limitations on what it would otherwise be entitled to do with that information.

24. The concept of "holding" information for the purposes of FOISA is not simply a question of physical fact. For example, if the information in question was simply held on the Council's premises for storage or safe-keeping (e.g. an off-site archive) for SNCT then this could constitute information held 'on behalf of' another person' (i.e. SNCT), especially if the Council had no access to or control over the information. However, the Council uses the toolkit to implement one of its obligations, in its own right and not on behalf of any other person.
25. In this case, I am satisfied that the information in question is held by the Council in its own right, in conjunction with duties which it is obliged to perform by virtue of the Teaching Agreement. SNCT may have provided the toolkit, and the Council may be restricted in terms of the way in which it uses the information, but that does not mean that it is held on behalf of the SNCT.
26. As I have found that the information is not held by the Council on behalf of SNCT, I will now address the question of whether the information requested by Mr Paterson is exempt under the exemption cited by the Council.

Application of section 33(1)(b)

27. The Council referred to the exemption within section 33 of FOISA, but did not specify the subsection of section 33 it believed to apply. However, since it refers to the disclosure of the toolkit as substantially prejudicing the commercial interests of the SNCT I have understood the Council's argument as applying section 33(1)(b). Section 33(1)(b) states:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).'
28. The Council argued only in respect of SNCT as the person to which this section referred. I have assumed that SNCT is a person for the purposes of section 33(1)(b) of FOISA, although it does not appear to be a person in the strict legal sense. I shall therefore consider whether the exemption in section 33(1)(b) applies.
29. In considering this exemption, I take "commercial interests" to relate to a person's ability to participate in a commercial activity, e.g. the sale and purchase of goods or services. There is no requirement that these activities are profit-making before this exemption can be engaged, although it would be normal to expect a commercial enterprise to be organized for that purpose.



30. As I have said in previous decisions, for example Decision 134/2006 - Mr K and Glasgow Caledonian University (at paragraph 38), section 33(1)(b) will not apply simply because an authority fears it will suffer financial loss as a result of disclosure: the authority needs to demonstrate the commercial aspects of its activities or interests which would (or would be likely to) be prejudiced substantially were the information to be disclosed. This applies also to instances such as this where an authority is claiming that it is a third party whose commercial interests would, or would likely to, be prejudiced substantially in terms of section 33(1)(b).
31. In order to assess whether the SNCT has commercial interests, I have looked at, amongst other things, the Constitution document of this non-statutory body. Annex G of 'A Teaching Profession for the 21st Century' is the Constitution of the SNCT. Paragraph 2 of the Constitution provides the scope of this body:
- 'The Committee's remit is to consider salaries and conditions of service for registered teachers, music instructors, educational psychologists and advisers who are employed by Council Authorities in Scotland. The objectives of the negotiating body are:
- to create a salaries and conditions of service structure that contributes to a highly motivated teaching profession and underpins the delivery of a quality education service;
 - to ensure that the outcome of negotiations secures, and maintains, appropriate levels of remuneration for the profession to enhance professional status;
 - to ensure that salaries and conditions of service reflect professional status, including the commissioning from time to time of research on the comparative external position in order to inform its deliberations.'
32. Looking at the scope of the SNCT, as provided above, I see nothing indicative of objectives of a commercial nature or of commercial interests.
33. The functions of the SNCT are specified at paragraph 5 of Annex G of the same document. These functions are:
- To negotiate sustainable collective agreements on salaries and conditions of service which contribute to the development of a highly skilled and motivated teaching profession (5.1.1)
 - To promote and support the application of such agreements in Scottish local government and the education service in particular, for the benefit of teaching staff, pupils and communities (5.1.2)
 - To promote co-operation between Scottish Executive, employers and recognised teaching organizations (5.1.3)



- To support the promotion of equality and the avoidance of discriminatory practices in employment (5.1.4)
 - To support the promotion of Continuing Professional Development (5.1.5)
 - To provide advice and assistance to education authorities, recognised teaching organisations and employees on salaries and conditions of service matters (5.1.6)
 - To provide a national conciliation service for the resolution of disputes that cannot be resolved locally (5.1.7)
 - To settle, ultimately differences of interpretation and/or application of the national agreement that cannot be resolved locally (5.1.8)
 - To undertake any activity which assists the functions of the Committee stated above (5.1.9)
34. Again, these functions do not indicate that the SNCT engages in a commercial function or has commercial interests. Only function 5.1.9 could possibly include the provision for activity (which could be commercial), but no evidence was presented of an activity under function 5.1.9 which would bring it within section 33(1)(b) of FOISA.
35. Having looked at the nature of the SNCT as evidenced by its constitution, I find nothing to indicate that it is a commercial entity or has commercial interests.
36. I shall now consider the point made by the Council that the SNCT has expressed an intention in the future to sell the toolkit, and whether that activity, were it to happen, would constitute a commercial activity such that the SNCT could be said to have a commercial interest which would fall within the scope of section 33(1)(b) of FOISA.
37. Although the Council indicated that the SNCT was intending to put in place agreements to allow it to sell or charge for the toolkit and to recoup the investment in the creation of the toolkit, no evidence was provided to my office of any such agreements, or anything preparatory to such an agreement, or indeed of any legal ownership of the toolkit by SNCT. It was explained that informal approaches for purchase of the toolkit had, to date, been rejected by the SNCT. However, it was explained that there was the possibility that in future the SNCT might investigate whether the implementation of sale of the toolkit, although any consideration of this had been no more than tentative. It was accepted that any such distribution by way of sale was in no way imminent.



38. The Council has submitted that the toolkit has commercial value since, for example, private sector schools might wish access to it. However, the Council did not detail the loss of business which would occur, or would be likely to occur, if the information were disclosed, or (for example) specify what advantage (if any) would accrue to a commercial competitor from disclosure. The SNCT at present is not a legal entity receiving a budget or generating income and its legal rights in the toolkit do not appear to be entirely clear. Whilst I accept that the SNCT may have a financial interest in the toolkit as an interest which may allow it to recoup in future the investment in the toolkit's creation, I do not regard that interest as a commercial interest and I do not accept that it necessarily follows that the SNCT has commercial interests relating to the toolkit.
39. To conclude, I do not accept that the SNCT has commercial interests such as would engage section 33(1)(b) of FOISA.
40. On the basis of the evidence presented, I find that the Council applied the exemption in section 33(1)(b) of FOISA wrongly to the toolkit. Therefore I do not have to consider the application of the public interest test.

Decision

I find that Aberdeenshire Council (the Council) has not dealt with Mr Paterson's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002, in that it misapplied the exemption in section 33(1)(b) of FOISA to the information withheld and consequently failed to comply with section 1(1) of FOISA.

I find that the Council has not dealt with Mr Paterson's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002, in that it misapplied section 3(2)(a)(i) of FOISA to the information withheld and consequently failed to comply with section 1(1) of FOISA.

I require the Council to release a copy of the job-sizing toolkit as requested by Mr Paterson in his request of 18 August 2005.



I cannot require the Council to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require Aberdeenshire Council to release the information to Mr Paterson within 2 months of the date of this decision notice.

Kevin Dunion
Scottish Information Commissioner
22 August 2006