

Decision Notice



Decision 071/2010 Mr J Mohan and Dundee City Council

Development and redevelopment of school sites

Reference No: 200901696/97/98/99/70

Decision Date: 19 May 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Mohan submitted five separate requests to Dundee City Council (the Council) requesting information relating to the development and redevelopment of certain school sites. The Council responded by giving Mr Mohan notice that no relevant information was held in relation to one of his requests, while failing to provide a response in relation to the others. Following reviews, in which the Council provided Mr Mohan with a response to part of one of his requests and, in respect of the remainder, claimed or adhered to its earlier decision that no information was held, Mr Mohan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Mohan's request for information in accordance with Part 1 of FOISA. While accepting the Council's submissions in respect of the remaining requests, he did not accept that it held no information falling within the scope of request 2. He required the Council to carry out adequate searches with a view to identifying and locating any further relevant information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority)

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. In separate emails sent on the following dates, Mr Mohan requested the following information from the Council:

Request 1 (22 May 2009)

Copies of any missives and any option agreement pertaining thereto, in respect of

- a. *the sale or disposal of the former Bellfield Nursery site*



- b. *the sale or disposal of the St Josephs Primary School site, including related car park, football pitch and after school club grounds*
- c. *The acquisition of the Logie (former Harris annexe) site by Dundee City Council.*

Request 2 (22 May 2009)

Copies of any development plans pertaining to

- a. *The former Bellfield Nursery site*
- b. *The St Josephs Primary School site, including related car park, football pitch and after school club grounds.*
- c. *The Logie (former Harris annexe) site.*

Request 3 (25 May 2009)

Copies of any documents pertaining to any potential dispensation being required to ensure that the Logie (former Harris annexe) site can be used for the purposes covered by the Director of Education's report 69-2009.

Request 4 (26 May 2009)

- a. *Dates and copies of minutes for all meetings since 1 January 2007 between representatives of the Economic Development Department and representatives of the Al-Maktoum Institute*
- b. *Copies of all correspondence since 1 January 2007 between representatives of the Economic Development Department and representatives of the Al-Maktoum Institute, except where already covered by the meetings in a.*

Request 5 (26 May 2009)

- a. *Dates and copies of minutes of all meetings since 1 January 2007 between representatives of the Education Department and representatives of the Al-Maktoum Institute*
- b. *Copies of all correspondence since 1 January 2007 between representatives of the Education Department and representatives of the Al-Maktoum Institute, except where already covered by the meetings in a..*

- 2. The Council responded to request 3 on 18 June 2009, stating that it did not hold the information requested.
- 3. The Council did not provide a response to any of the other information requests submitted by Mr Mohan.
- 4. On 23 June 2009, Mr Mohan wrote to the Council requesting a review of its decision in response to request 3. Mr Mohan drew the Council's attention to certain legislation and a report from its Director of Education, on the basis of which he believed that it should hold relevant information. The Council notified Mr Mohan of the outcome of this review on 4 August 2009, upholding its original decision that no relevant information was held.



5. On 25 June 2009, Mr Mohan wrote to the Council separately in respect of the four remaining requests, seeking a review on the basis that he had not received a response to any of these. The Council responded to these requests for review on 7 July 2009 (in the case of requests 2 and 5) and 16 July 2009 (request 1), in each case upholding its original decision that no relevant information was held.
6. The Council provided a response to Mr Mohan's request for review in respect of request 4 on 29 June 2009, providing information in response to the first part of this request and confirming in respect of the second part that it held no relevant information.
7. On 10 September 2009, Mr Mohan wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of Council's reviews in respect of all five of his requests and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Mohan 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

9. On 9 November 2009, the Council was notified in writing that five applications had been received from Mr Mohan. The investigating officer asked the Council to provide its comments on the applications (as required by section 49(3)(a) of FOISA) and to respond to specific questions. In particular, the Council was asked to provide submissions in support of its contention that it did not hold certain of the information requested by Mr Mohan, with particular reference to the searches it had undertaken to confirm this.
10. A response was provided by the Council, and this was followed by further correspondence with both parties in the course of the investigation. Additional clarification was obtained from the Council in a meeting.
11. The submissions received from both parties, insofar as relevant, will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



Section 17 – Notice that information is not held

13. Section 17(1) of FOISA requires that where a Scottish public authority receives a request for recorded information that it does not hold, then it must give the applicant a notice in writing to that effect. The Council gave Mr Mohan notice to this effect in response to all five of his requests for information (with the exception of the first part of request 4 – see above), either in response to the request itself or on review. It maintained this position in its submissions to the Commissioner.
14. In order to determine whether the Council dealt with Mr Mohan's requests correctly, therefore, the Commissioner must be satisfied whether, at the time it received Mr Mohan's request, the Council held any information which would fall within the scope of those requests.
15. With this in mind, the investigating officer asked the Council what searches it had carried out to determine whether any relevant information was held. Further correspondence and a meeting sought to clarify the steps the Council had taken to establish what relevant information it held.
16. The Council's position was that, with the exception of the information provided in response to the first part of request 4, it held none of the information requested when it received the requests. It advised that no searches had been carried out as the Director of Education and the then Director of Economic Development knew that the requested information did not exist. It maintained that if the information had existed, that would have been known to the one of those Directors. In the course of the investigation, a search was carried out of one file in the possession of the Director of City Development, which the Council considered might contain relevant information, but no such information was found. The Council also advised that a search of files held by the Chief Executive had failed to identify any relevant information.
17. The Council did not believe it was required to search for information it knew not to exist. Further, it did not believe it had a duty to provide advice and assistance (under section 15 of FOISA) in the particular circumstances of this case, because the information did not exist. In the circumstances, it was of the view that there was no advice or assistance it could give Mr Mohan beyond confirming that it did not hold the information. The Council believed it had given as much information as it considered it could at the time.
18. Referring to the nature and timing of the various processes to which Mr Mohan's requests related, the Council also explained why it held no relevant information when it received those requests. It acknowledged that it did hold certain relevant information subsequently.



19. Mr Mohan was dissatisfied with the responses he received from the Council in response to his requests and requirements for review and, during the course of the investigation, provided the investigating officer with reasons why he considered the Council should have held certain information of relevance to his requests. In relation to requests 1 and 2, Mr Mohan made reference to an Education Committee report, the content of which he believed suggested that other information should be held which would address these requests. He also referred to a letter he had received (in response to an information request to the Scottish Government) which suggested, in his view, that relevant information should be held by the Council in respect of request 2. Mr Mohan also provided comment as to why he believed information should be held which would address requests 3, 4 and 5, commenting that the Council's responses lacked credibility given the scale of the proposed project.
20. Having considered the Council's submissions, together with the subject matter of the information requests made and the submissions received from Mr Mohan, the Commissioner accepts, on the balance of probabilities, that no relevant information was held by the Council, at the time of receiving Mr Mohan's requests, in respect of four of those five requests. In reaching this conclusion, the Commissioner has taken into consideration the Council's submissions in respect of the timing of the various processes involved.
21. The Commissioner therefore accepts the Council's submissions that it held no information falling within the scope of Mr Mohan's requests 1, 3, 4 (with the exception of the information provided) and 5.
22. With regard to request 2, however, the Commissioner notes that Mr Mohan has a copy of a letter (received by him in response to a request he made to the Scottish Government) from the Council to the Scottish Government setting out broad plans for the former Harris Annexe site. This letter is dated 22 May 2009. Request 2 was received by the Council on the same date and the Commissioner is therefore of the view that the Council would have held the information in the letter on receipt of the request. Although the Council has advised that it did not consider the letter to fall within the scope of the request (as it "only described the Council's intention and sought [the Government's] informal opinions"), the Commissioner considers the request to be broad enough to cover planning for the future use of the site in question at any level of detail.
23. The Commissioner accepts that Mr Mohan has a copy of the 22 May letter and that there would be no purpose to be served in requiring the Council to provide him with that information again. Given the terms of the letter, however, he finds it difficult to accept that the Council held no recorded information on development plans for the site prior to the letter being composed. In the case of request 2, therefore, the Commissioner takes the view that the Council was not entitled to claim that it did not hold any relevant information and also that, on the balance of probabilities, it is likely that it held further information falling within the scope of the request. Consequently, he considers it appropriate to require the Council to carry out adequate searches with a view to identifying and locating such information and, in respect of any such information located, to respond to Mr Mohan in accordance with Part 1 of FOISA (or, if the information located is environmental information as defined in regulation 2(1) of the Environmental Information (Scotland) Regulations 2004, in terms of those Regulations).



Technical breaches

24. In his application to the Commissioner, Mr Mohan stated that he was dissatisfied with the Council's failure to respond to his information requests within the timescales specified in FOISA.
25. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case. Of Mr Mohan's five information requests, the Council only responded to request 3 within that timescale. The Commissioner therefore finds that the Council failed to comply with section 10(1) of FOISA in responding to requests 1, 2, 4 and 5.
26. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to certain exceptions which are not relevant in this case. In the case of request 3, the Council did not respond to the relative requirement for review within that timescale and thereby failed to comply with section 21(1).
27. In its submissions to the investigating officer, the Council explained that it tried to respond to all FOISA requests promptly and in any event within 20 working days. It submitted that where this was not achieved it was generally because of pressure of business on officers. It pointed out, however, that in seeking to address this issue it had recently appointed a full-time Freedom of Information Officer.
28. The Commissioner notes that the Council has now employed a full-time officer to deal with Freedom of Information requests. He also notes that the Council's compliance with technical requirements such as this can be considered further in his Office's forthcoming assessment of its practice.
29. In the circumstances, bearing in mind the Council's eventual response as detailed in "Background" section above, the Commissioner does not require the Council to take action in relation to these particular breaches in response to Mr Mohan's application.



DECISION

The Commissioner finds that Dundee City Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mohan.

The Commissioner finds that by providing Mr Mohan with notices under section 17 of FOISA in response to the majority of his information requests, the Council complied with Part 1.

However, the Commissioner finds that the Council failed to comply with Part 1 of FOISA in providing Mr Mohan with a notice under section 17 of FOISA in respect of request 2. He is satisfied in that case that the Council held information falling within the scope of the request and that, on the balance of probabilities, it was likely to hold further information. Consequently, he requires the Council to carry out adequate searches for information falling within the scope of request 2 and, in respect of any information located as a result of these searches, to respond to Mr Mohan in accordance with Part 1 of FOISA (or, as appropriate, the Environmental Information (Scotland) Regulations 2004).

The Commissioner also finds that the Council failed to comply with section 10(1) of FOISA in relation to Mr Mohan's requests 1, 2, 4 and 5, and with section 21(1) of FOISA in relation to the requirement for review following his request 3. In the circumstances, he does not require the Council to take any action in respect of these particular breaches in response to Mr Mohan's request.

Appeal

Should either Mr Mohan 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
19 May 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) ... , 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
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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.

...



21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...