

Decision Notice

Decision 270/2016: Mr Jason Rose and East Lothian Council

Minutes of the meetings of the Musselburgh Joint Racing Committee

Reference No: 201601470

Decision Date: 15 December 2016



Scottish Information
Commissioner

Summary

East Lothian Council was asked for the minutes of the Musselburgh Joint Racing Committee (MJRC) for 2014, 2015 and 2016. The Council refused the request on the basis that it held the minutes on behalf of MJRC rather than on its own behalf.

The Commissioner accepted that MJRC is a separate body from the Council and that the Council did not hold the minutes in its own right. This meant that the Council did not hold the minutes for the purposes of FOI.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 5 August 2016, Mr Rose made a request for information to the East Lothian Council (the Council). He asked for the minutes of the meetings of the Musselburgh Joint Racing Committee (MJRC) from 2014, 2015 and 2016.
2. The Council responded promptly, on 5 August 2016. It told Mr Rose that the minutes were held by MJRC rather than the Council, and that the Council did not hold the information.
3. On 9 August 2016, Mr Rose wrote to the Council requesting a review of its decision. He noted that MJRC is a jointly funded body comprising East Lothian councillors managing a Common Good asset and queried why the Council would not hold the relevant documents, and why the information could not be provided under FOISA.
4. The Council notified Mr Rose of the outcome of its review on 11 August 2016, which upheld its original decision that it did not hold the information in the minutes. The Council provided Mr Rose with some reasoning to explain its decision (discussed later in this decision).
5. On 16 August 2016, Mr Rose applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He noted that Musselburgh Racecourse is a Common Good asset, and believed it was in the public interest to disclose information which would allow scrutiny of whether the people of Musselburgh are achieving best use of their asset. He stated that no information is publicly available about the financial or strategic operation of the racecourse, despite the MJRC being listed as a committee of the Council and having councillors appointed to it.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Rose made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The Council responded with its submissions. Mr Rose was informed of the Council's position and his comments were also invited.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr Rose and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 3(2)(a)(i) of FOISA

10. 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 qualifications which are not relevant in this case. The information to be given is that held by the authority at the time the request is received. If the authority does not hold the information, it is required to give the applicant notice in writing to that effect (section 17(1) of FOISA).
11. Section 3(2)(a)(i) of FOISA states that if a Scottish public authority holds the information on behalf of another person, then the information is not held by that authority for the purposes of FOISA. Consequently, if the information requested in any given case is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.
12. The word "held", in relation to information requested under FOISA, has a specific meaning in section 3(2)(a)(i) of FOISA. When information is present within a Scottish public authority's premises and systems only because it is held on behalf of another person (in the legal sense, i.e. including another organisation), that information is not held by the authority for the purposes of FOISA.
13. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would if it held the information in its own right. The authority would not have power to delete or amend that information without the owner's consent, nor would it be able to apply its own policies and procedures to it. It might have restricted access to the information.
14. The Council's position is that it holds the minutes on behalf of MJRC. In its review response, the Council explained that it provides a clerking service to MJRC and, in return for reimbursement of its costs, it provides a minute taker for MJRC meetings. However, those minutes remain the property of MJRC and, while they are physically within the possession of the Council, the Council holds them on behalf of MJRC. MJRC is a separate legal body set up between the Council and Lothian Racing Syndicate Ltd. Although it is an associated committee of the Council for accounting purposes, the Council took the view that this does not change its status as a separate legal entity from the Council.
15. The Council provided the Commissioner with further submissions on why it considered MJRC to be separate from it in law and why the Council did not hold MJRC minutes, in terms of section 3(2)(a)(i) of FOISA.

16. The Council supplied a copy of the Minute of Agreement¹ which outlines the status of MJRC and the legal relationship between the Council and MJRC. The Council explained that the Minute of Agreement has been amended and updated several times over the years, but changes have not affected the fundamental role of MJRC. Legally, MJRC is an unincorporated association.
17. The Commissioner accepts that MJRC falls within the definition of "another person" for the purposes of section 3(2)(a)(i) of FOISA. The Interpretation Act 1978 (which applied to the interpretation of Acts of the Scottish Parliament when FOISA was enacted) defines "person" as including "a body of persons corporate or unincorporated": the definition of "person" in the Interpretation and Legislative Reform (Scotland) Act 2010 is in the same terms. MJRC therefore is a person within the terms of section 3(2)(a)(i) of FOISA.
18. The next question is whether the Council holds the information on behalf of MJRC, or in its own right. For the purposes of FOISA, information is held by an authority if it holds it "otherwise than on behalf of another person".
19. As noted, the Council provides a clerking service for MJRC and recharges the cost of this to MJRC. The minutes are taken by a member of the Council's Committees Team and stored electronically in a separate file on the Committees Team shared folder. Once written, the minutes are sent to the Chair of MJRC for checking and are then presented to the next meeting of MJRC for formal approval and adoption. The Council stated that access to the minutes is restricted to the members of the Committees Team who provide the clerking service.
20. Each case needs to be considered individually to determine whether a public authority holds information in its own right or solely on behalf of another person. There are various factors that will assist in determining whether a public authority holds information for the purposes of FOISA. Factors that would indicate that the information is held solely on behalf of another person include:
 - the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - the authority is merely providing storage facilities, whether physical or electronic.
21. Although not bound by it, the Commissioner has considered guidance² issued by the (UK) Information Commissioner (the ICO) which helps assess whether information is held by a public authority for the purposes of the Freedom of Information Act 2000 (FOIA). There are similarities between FOISA and FOIA in assessing whether information is held by a public authority. The ICO's guidance suggests that where the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information, this would be a factor indicating that information is held solely on behalf of another person.

1

http://www.eastlothian.gov.uk/download/meetings/id/6375/07_new_governance_arrangements_for_musselburgh_racecourse

2

http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

22. Mr Rose commented that elected members from the Council are members of MJRC. However, this on its own does not mean that the Council automatically holds the minutes of MJRC on its own behalf. Elected members can and do serve on other bodies; in such cases, the elected members generally do not represent the Council, but the body.
23. The Commissioner understands that the Common Good land is vested in the Council, and this gives the Council a general role in looking after the land. The Minute of Agreement specifies the rights and duties of MJRC (and Lothian Racing Syndicate Ltd) to make arrangements in respect of Common Good land.
24. Both the role of MJRC as specified in the Minute of Agreement and the way in which MJRC minutes are recorded and kept by the Council are factors which suggest that the Council holds the minutes on behalf of MJRC. While the Council uses its staff to take the minutes of MJRC meetings, that is only a small part of the work done overall by MJRC. The Commissioner considers this is analogous with the clerical and administrative support which local authorities provide to their elected members. The Council provides MJRC with administrative support, and, in this capacity, holds minutes of MJRC's meetings.
25. The Commissioner accepts that the Council's assertion is supported by the information available in the Minute of Agreement. She accepts that information held in this capacity will be wholly under the control of MJRC and must be deemed to be held by the Council on MJRC's behalf. She is satisfied that that MJRC is independent of the Council and accepts that although the Council stores the minutes, it does not hold them on its own behalf.
26. Having carefully considered the matter, and having reviewed both the Council's submissions and other information available, the Commissioner is satisfied that the Council does not hold the MJRC minutes for the purposes of FOISA, in terms of section 3(2)(a)(i). She accepts that the Council complied with FOISA in responding to Mr Rose's information request.

Decision

The Commissioner finds that East Lothian Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Rose.

Appeal

Should either Mr Rose or the Council wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement

15 December 2016

Appendix 1: 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.

...

3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
- (i) on behalf of another person; or

...

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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