



Scottish Information
Commissioner

**Decision 040/2006 Toravon Homes Ltd and Falkirk
Council**

*Request for internal communications regarding a planning
application*

**Applicant: Toravon Homes Ltd
Authority: Falkirk Council
Case No: 200501284
Decision Date: 8 March 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 040/2006 Toravon Homes and Falkirk Council

Internal communications regarding a planning application – information not held – section 17 – Records management – section 61

Facts

Through its solicitor, Toravon Homes Ltd requested from Falkirk Council copies of records of internal communications relating to a planning application which it had made. Falkirk Council provided Toravon Homes Ltd with copies of two letters, dated 20 February 2004 and 5 March 2004 in response to the request. Toravon Homes Ltd requested that Falkirk Council review its response, arguing that further information was held. As a result of the review carried out, Falkirk Council located and disclosed a copy of a further email to the applicant. Toravon Homes Ltd remained convinced that Falkirk Council held further information and applied to the Scottish Information Commissioner on that basis.

Outcome

The Commissioner found that Falkirk Council did not comply with section 1(1) of FOISA by providing Toravon Homes Ltd with all the information it held relevant to the applicant's request, in response to either the initial request for information or the request for review. The Commissioner was, however, satisfied that Falkirk Council had since carried out adequate searches of its systems for the information requested and therefore had taken all steps that could reasonably be expected to establish that it held no further documents in relation to the applicant's request. He was satisfied that all of the information the Council had located had been provided to the applicant.

The Commissioner did not require Falkirk Council to take any action as a result of his decision.



Appeal

Should either Toravon Homes Ltd or Falkirk 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 of receipt of this notice.

Background

1. On 21 January 2005, P.H. Young & Co, Solicitors, on behalf of Toravon Homes Ltd wrote to Falkirk Council (the Council) requesting the following:
 - a) any letters, memos and/or emails passing between the Convenor of the Council's Development Services Committee and any officer of its Development Services Department relating to the outcome of a planning application made to the Council by Toravon Homes Ltd, or consideration of whether the application should be determined by the Committee or by the Director of Development Services acting under delegated powers. .
 - b) any minute or record of any discussion between the Convenor of the Development Services Committee and any officer of the Development Services Department relating to the outcome of the planning application made to Falkirk Council, or consideration of whether the application should be determined by the Committee or by the Director of Development Services acting under delegated powers.
2. On 4 February 2005, the Council sent P.H. Young & Co copies of two letters, dated 20 February 2004 and 5 March 2004, both of which had been disclosed previously.
3. Toravon Homes Ltd was dissatisfied with the Council's response, and so wrote through its solicitor on 14 February 2005, requesting that the Council review the way in which it dealt with the request on the basis that further information was held.
4. The Council responded to the request for review on 15 March 2005, disclosing a copy of a further email, dated 24 January 2005. This email postdated the request for information and therefore was outwith the scope of the request.



5. Toravon Homes Ltd remained dissatisfied with the outcome and its solicitor applied to the Commissioner on its behalf on 1 April 2005. The application stated that Toravon Homes Ltd had reason to believe that the Council held further information in relation to its request, pointing to an email which had come into its possession separately. It went on to note that the authority had taken more than the statutory limit of 20 working days to respond to its request for review, as set out by section 21(1) of the Freedom of Information (Scotland) Act 2002.
6. Given that in terms of Section 74(2) of FOISA the request for review would not have been deemed to be received by the Council until the third day after posting, I am satisfied that the Council did in fact respond to the request within the required period of 20 working days. Therefore, I will not comment on this matter further.

The Investigation

7. Toravon Homes Ltd's appeal was validated by establishing that it had made a request for information to a Scottish public authority, and had appealed to me only after asking the authority to review its response to its request.
8. A letter was sent to the Council on 12 April 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues that Toravon Homes Ltd had raised and on the application as a whole.
9. The Council responded on 6 May 2005, advising that it had searched the relevant planning application file and the email records of those officers who might reasonably have been expected to come into contact with the case on receipt of the original request. The same records were searched again in response to the request for review and the additional email had been found and copied to P.H. Young and Co: no explanation could be advanced for this document not having been found earlier. A further search had been undertaken in response to my investigating officer's letter and a copy of the email identified by Toravon Homes Ltd (see paragraph 5) had been traced (this was copied to the investigating officer): this had been in a folder not checked during the earlier searches. To the extent that subsequent searches had disclosed further information, the Council accepted that it had not fully searched its files in response to the applicant's initial request for information. Further, it acknowledged that its keeping and locating of records, particularly electronic records, required to be improved.



10. A representative of Toravon Homes Ltd contacted the investigating officer on 6 June 2005, stating that as Toravon Homes Ltd had learned of the existence of two further emails which might fall within the scope of the request, they were not satisfied that the Council had provided all of the information that it held. The investigating officer raised the matter with P.H. Young & Co on 9 June 2005 and it transpired that the emails were referred to within a precognition given to them. The solicitor sent a copy of the precognition to the investigating officer on 14 June 2005.
11. The investigating officer then wrote to the Council again, seeking copies of any policies relevant to the retention of electronic communications and asking it to comment on the applicant's claims that further emails were in existence. The Council responded on 20 June 2005, stating that the emails in question would have been deleted prior to the request for information having been made. The Council supplied a copy of the policy, highlighting page 7, which states that all obsolete emails should be deleted from Council systems. Further enquiries were then made into the destruction of the emails in question, from which it transpired that they were deleted between November and December 2004 as part of a general "housekeeping" exercise. The Council was unable to provide an audit trail for the relevant records, or documented evidence of the reasons for destroying the information.

The Commissioner's Analysis and Findings

12. I have been asked to investigate whether the Council holds any further information falling within the scope of the applicant's request. Having considered all the Council's submissions, I am satisfied that the Council has carried out adequate searches of its systems for the information requested and therefore has taken all steps that could reasonably be expected to establish that it holds no further documents in relation to the applicant's request. I am satisfied that all of the information it has located has been provided to the applicant. I do have to observe, however, that the Council did not identify all of the relevant documents in its initial searches and therefore did not provide all of the information requested prior to an application being made to me. Accordingly, it did not comply with section 1(1) of FOISA in responding to the applicant's request for information.



The two “missing” emails

13. Bearing in mind that I have found Falkirk Council to hold no additional information in relation to the applicant’s request, I will now consider the additional communications referred to in the precognition copied to me by the applicant’s solicitors. These are communications which the applicant understands to have existed and which may have been relevant to the request. Given that I accept that they do not now exist, it is not possible to explore their relevance to the applicant’s request further.
14. The Council advises that all emails to the intended recipient of these communications were deleted prior to the applicant’s request for information being made and, on balance, I am satisfied that this is the case (and, for that matter, that they were deleted prior to provision for making information requests under Part 1 of FOISA coming into force on 1 January 2005). In the circumstances, there does not appear to be any question of non-compliance with Part 1 of FOISA for me to consider in relation to these communications and therefore I will not consider the matter further in this decision notice.

Decision

I find that Falkirk Council did not comply with section 1(1) of FOISA by providing Toravon Homes Ltd with all the information it held relevant to the applicant’s request, in response to either the initial request for information or the request for review. I am, however, satisfied that Falkirk Council has now carried out adequate searches of its systems for the information requested and therefore has taken all steps that could reasonably be expected to establish that it holds no further documents in relation to the applicant’s request. I am satisfied that all of the information the Council has located has been provided to the applicant..

I do not require Falkirk Council to take any further action as a result of his decision.

Kevin Dunion
Scottish Information Commissioner
8 March 2006