



Scottish Information
Commissioner

**Decision 077/2007 Mr Hugh Hickman and Scottish
Borders Council**

Roads Trading Accounts for 2005

**Applicant: Mr Hugh Hickman
Authority: Scottish Borders Council
Case No: 200600603
Decision Date: 22 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 077/2007 Mr Hugh Hickman and Scottish Borders Council

Request for a copy of Scottish Borders Council's Roads Trading Accounts for 2005 – information provided by the Council – applicant dissatisfied and required further detail – whether request vexatious – whether information held

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): section 14(1) (Vexatious or repeated requests); section 17 (Notice that information is not held);

Local Government in Scotland Act 2003: section 10 (Trading operations and accounts); section 12 (Proper Accounting Practices).

The full text of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Hickman contacted Scottish Borders Council (the Council) by e-mail and requested a copy of its roads trading accounts for 2005. The Council provided Mr Hickman with a draft copy of its Statement of Accounts for 2004/05 and referred him to the section which provided details of the Roads Trading Operation Account.

Mr Hickman was unhappy with the Council's response and asked it to carry out a review. In his request for review Mr Hickman maintained that the Council had not supplied him with a detailed set of statutory road trading accounts and that the Roads Trading Operation Account contained within the Council's draft Annual Statement of Accounts for 2004/05 did not constitute the accounts which he had requested. The Council subsequently carried out a review and upheld its original decision, concluding that the information requested by Mr Hickman had been supplied and more detailed accounts were not held in the format he required.

Mr Hickman was dissatisfied with the outcome of the Council's review and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Hickman's request for information in line with Part 1 of FOISA.



Background

1. Mr Hickman sent an e-mail to the Council on 17 August 2005. In his e-mail Mr Hickman requested, amongst other things, a draft copy of the Council's Accounts for 2005 and "a detailed copy of the roads trading performance together with the evaluation policy on acquisition of plant". Mr Hickman visited the Council offices to discuss the matter further on 19 August 2005.
2. Mr Hickman then sent 4 further e-mails to the Council concerning his requests for information. These included an e-mail sent on 7 September 2005, in which Mr Hickman restated his request for a "copy of the statutory accounts relative to roads 'The Trading Operation'". In a further e-mail to the Council on 8 September 2005, Mr Hickman requested "the statutory abstract of the trading operation on the roads."
3. On 8 September 2005, Mr Hickman sent a letter to the Council in which he asked to be provided with a complete copy of the draft Accounts for 2004/05. Mr Hickman was of the view that he was entitled to such information under the provisions of the Local Government (Scotland) Act 1973 and the Local Authority Accounts (Scotland) Regulations 1985.
4. The Council responded to Mr Hickman's letter on 14 September 2005. In its letter the Council advised Mr Hickman that the legislation he had referred to conferred a right on a person to make copies of all or part of the accounts, but did not impose an obligation on the Council to provide a copy of these accounts to him, as he had contended. Instead, Mr Hickman was advised that his request fell within the provisions of FOISA and the Council was required under that legislation to comply with his request.
5. The Council provided Mr Hickman with a complete copy of its draft Statement of Accounts for 2004/05 along with its letter of 14 September 2005. This draft had been submitted to the Controller of Audit and had been made available for public inspection. Mr Hickman was informed by the Council that it was likely that changes to the draft would subsequently be made although these had not yet been finally agreed with the External Auditor. In relation to the Roads Trading Operation, the Council informed Mr Hickman that the statutory accounts for this were included within the Council's draft Annual Statement of Accounts at page 21.
6. Mr Hickman was not satisfied with the information the Council had provided. He maintained that the Council had not supplied him with a detailed set of statutory roads trading accounts and that the Council's draft Statement of Accounts for 2004/05 did not constitute the accounts which he had requested.



7. Mr Hickman continued to correspond with the Council and criticised the way it had responded to his comments, claiming that the Council had not complied with the provisions of the Local Government in Scotland Act 2003. The Council responded to Mr Hickman by e-mail on 16 January 2006, informing him that the Council's Statement of Accounts included all of the information it was required by statute to disclose in relation to its trading operations.
8. The Head of Corporate Finance advised Mr Hickman that if the Council had failed to comply with a current statutory requirement in this regard, this would have been picked up by its external auditor, or by Audit Scotland or the Scottish Executive. The Council informed Mr Hickman that it would be more than happy to revisit the matter if Mr Hickman could identify any specific statutory provisions which required additional disclosures. He was also informed that the previous requirement to prepare a separate set of audited accounts for all Direct Labour Organisations (DLOs) and Direct Services Organisations (DSOs) was repealed when the compulsory competitive tendering legislation was replaced by the Local Government in Scotland Act 2003.
9. After contacting my Office for advice in relation to this matter, Mr Hickman sent an e-mail to the Council on 22 March 2006, asking for a review to be carried out as he was of the view that the Council had failed to supply him with "a copy of the statutory accounts of the Road Trading Operation for 2005". Mr Hickman added that he was of the view that "a note in the accounts of the Council does not constitute these accounts".
10. The Council's Freedom of Information Advice Group carried out a review and the Council responded to Mr Hickman on 30 March 2006. In its letter the Council informed Mr Hickman that the Advice Group had concluded that the Council had provided all of the information which had been required in the form of the draft Annual Statement of Accounts for 2004/05, and that no statutory accounts of the Roads Trading Operation existed in the format Mr Hickman had requested.
11. In its letter the Council reiterated its advice to Mr Hickman that under previous legislation, which applied to DLOs and DSOs, detailed accounts had to be produced but this requirement fell when the compulsory competitive tendering legislation was repealed.



12. The Council also informed Mr Hickman that in addition to considering his request for review of the information provided, the Advice Group had also considered section 14 of FOISA which deals with vexatious or repeated requests. The Council stated that, given the nature of Mr Hickman's correspondence with the Council, the Advice Group had agreed that all of the requests for information he had submitted had been dealt with appropriately but that any further requests would be considered vexatious in terms of section 14 of FOISA, as it was of the view that Mr Hickman's correspondence was clearly intended to disrupt the authority's work rather than obtain information.
13. Mr Hickman was dissatisfied with the outcome of the Council's review and, on 7 April 2006, applied to me for a decision.
14. The case was then allocated to an investigating officer who contacted Mr Hickman on 10 April 2006 in order to try and clarify the reasons for his dissatisfaction in relation to his application. The investigating officer asked Mr Hickman if the information he felt had been withheld from him was "Road Trading Accounts for the year 2005".
15. Mr Hickman responded on 10 April 2006 and confirmed that this was the case. Mr Hickman complained that the figures he had been given did not contain comparative figures for the previous year and that the Council had not demonstrated its commitment to best value.
16. Mr Hickman's appeal was validated on 24 April 2006 by establishing that he had made a valid request to a Scottish public authority and had appealed to me only after asking the Council to review its response to his initial request.

The Investigation

17. The investigating officer wrote to the Council on 24 April 2006, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to provide its comments in terms of section 49(3)(a) of FOISA, along with supporting documentation for the purposes of the investigation.
18. The Council was asked to provide a detailed analysis of any exemptions in FOISA that had been relied upon and its reasons for applying them. The Council was also asked to provide background information in order to explain why the accounts which had to be produced under previous legislation were no longer required when the compulsory competitive tendering legislation had been repealed.



19. The Council was also informed of Mr Hickman's contention that the roads trading operation account contained within the Council's draft Statement of Accounts for 2004/05 was, in his view, an inadequate response to his request. Mr Hickman had complained that "a note was included in the statutory accounts of the Scottish Borders Council which does not constitute the statutory accounts of the Road Trading Operation and identify specifically the costs / assets employed for that operation."
20. The Council acknowledged receipt of the investigating officer's letter on 26 April 2006. On 15 May 2006 the Council forwarded the information that was required for the purposes of the investigation and provided detailed responses to the points that had been raised in my investigating officer's letter. Further details concerning the Council's accounts were provided to the investigating officer by the Council during the course of the investigation.

The Commissioner's Analysis and Findings

21. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Hickman and the Council and I am satisfied that no matter of relevance has been overlooked.
22. It should be noted from the outset that the scope of my investigation was limited to the determination of whether or not Mr Hickman was entitled to obtain the information he had requested from the Council. It is not my role to investigate whether or not a public authority has produced adequate accounts in line with its statutory obligations.

Section 17 – information not held

23. The Council responded to Mr Hickman's original request by providing him with a full copy of its draft Annual Statement of Accounts 2004/05 which contained details of the Council's Roads Trading Operation Account, as required by statute under the provisions of the Local Government in Scotland Act 2003. Mr Hickman was not satisfied with the Council's response and he requested a review on the basis that the information he had been provided with did not constitute the detailed set of statutory roads trading accounts which he felt was required under the provisions of sections 10 and 12 of the Local Government in Scotland Act 2003.



24. However, the Council's draft Annual Statement of Accounts 2004/05, which had been provided to Mr Hickman, state at page 2: "The provisions of the Local Government in Scotland Act 2003 repealed the Compulsory Competitive Tendering legislation and the former DLOs and DSOs ceased to exist on 31 March 2003. During 2003/04 the Council decided that only the former Roads DLO represented a 'significant trading operation'. A further review of trading operations was carried out in 2004/05, which came to the same conclusion. The Roads Trading Operation has therefore been separately identified and accounted for in these statements."
25. The Council informed Mr Hickman that its Freedom of Information Advice Group had reviewed his information request and the response that had been issued by the Council and it was of the view that the Council had provided all of the information which was required in the form of the draft Annual Statement of Accounts for 2004/05.
26. After considering in detail the contents of Mr Hickman's correspondence, the Council concluded that Mr Hickman's request for more detailed information concerning the Roads Trading Account was in fact a request for Accounts for the Roads Trading Operation with the same content and in the same format as required for the former Roads Direct Labour Organisation under the Local Government, Planning and Land Act 1980 and the Local Government Act 1988. Having considered Mr Hickman's comments in his correspondence with the Council, I am of the view that this would indeed appear to have been the case.
27. However, the Council advised Mr Hickman that the requirement to produce such accounts fell away when the compulsory competitive tendering (CCT) legislation was repealed by the Local Government in Scotland Act 2003. Consequently, no statutory accounts for the Roads Trading Operation existed in the format that Mr Hickman had requested.
28. In its submissions to my Office, the Council argued that when the extract for the Roads Trading Operation from 2004/05 was compared with the equivalent page for the former Roads DLO in the 2002/03 Annual Accounts, taking into account the fact that Trading Operations were no longer permitted to maintain their own reserves (and therefore ignoring the "Apportionment" account in the 2002/03 document), there was a remarkable similarity between both sets of information. The Council also asserted that it could be argued that the information now disclosed in the Council's Accounts was more than that disclosed under the previous regime.



29. My investigating officer contacted the Council during the course of the investigation to determine whether the detailed information that Mr Hickman had requested could in fact be provided to him by the Council. The Council acknowledged that whereas much of the raw data existed in its accounting and other records, the data not been aggregated or analysed in such a way so as to enable the Council to be able to produce the same type of Accounts that were published under the previous statutory regime.
30. The Council also pointed out that it did not hold all of the required raw data to enable it to prepare trading accounts in the format required by Mr Hickman (i.e. in the same format or scope as under the former CCT regime) and therefore the information which would be required in order to satisfy the terms of Mr Hickman's request for detailed accounts was not held under section 17 of FOISA.
31. As regards the Council's "statutory accounts relative to roads", Mr Hickman was advised by my investigating officer that the Council's finalised Audited Statement of Accounts for 2004/05 could be viewed on the Council's website: <http://www.scotborders.gov.uk/council/departmentsandservices/corporateresources/corporatefinance/7333.html>. It was brought to Mr Hickman's attention that the associated External Auditors Report was also available on the Council's website: <http://www.scotborders.gov.uk/pdf/7335.pdf>.
32. Mr Hickman was advised that in their report the Council's external auditors had stated that in 2004/2005 the Council had complied with the Code of Practice on Local Authority Accounting in Great Britain "in all material aspects" and the audit of the Council's Accounts had been performed in accordance with the Code of Practice and Statement of Responsibilities published by Audit Scotland. The auditors stated that they were generally satisfied that the Council had properly discharged its duties in accordance with the Statement of Responsibilities.
33. Mr Hickman, however, appeared to be of the view that the Council had failed to comply with a number of statutory requirements in the way it had presented its Roads Trading Accounts. Mr Hickman was advised that it was not within my remit as Scottish Information Commissioner to rule on whether or not a public authority has properly carried out its statutory duties in relation to its accounting practices. Mr Hickman was therefore advised to direct his complaint to the Scottish Public Services Ombudsman (SPSO), who can consider complaints of maladministration in relation to Scottish public authorities after the complainant has followed the formal complaints process of the organisation concerned.



34. Mr Hickman decided not to follow this advice and instead elected to direct a letter of complaint to the Director of Corporate Services in Audit Scotland. In his letter Mr Hickman suggested that, in relation to the Council's trading operations, there had been "a breakdown in audit scrutiny" by the appointed auditors. This is not a matter I can consider further.

Conclusion

35. Having examined this case in detail and having considered the information and the submissions that have been provided to me for the purposes of my investigation it is my view that the Council complied fully with Mr Hickman's request. Mr Hickman had requested a copy of the statutory accounts of the Roads Trading Operation for 2005 and, in my opinion, the terms of his request were met by the Council providing him with a copy of its draft Annual Statement of Accounts 2004/05 which included details of the Council's Roads Trading Operation Account for 2004/05.
36. On the basis that the information which Mr Hickman had requested from the Council was provided to him, and the fact that Council did not hold all of the raw data that would be required to enable it to provide Mr Hickman with the detailed set of accounts he subsequently requested (i.e. of similar scope and format to those produced in line with previous legislation which has since been repealed), I am of the opinion that the Council complied fully with the provisions of FOISA in informing Mr Hickman that such information was not held by the Council in terms of section 17 of FOISA.

Section 14 – vexatious request

37. In dealing with Mr Hickman's request for review the Council's Advice Group considered section 14 of FOISA which relates to vexatious requests. In its letter to Mr Hickman of 30 March 2006, the Council stated that, given the nature of his correspondence with the Council, the Advice Group had concluded that all of his information requests had been dealt with appropriately but that any further requests would be considered vexatious in terms of section 14 of FOISA, on the grounds that Mr Hickman's correspondence was "clearly intended to disrupt the authority's work rather than obtain information".



38. In stating that further requests would be considered vexatious, I have taken the view that the Council was not arguing that this was applicable to the particular request which led to Mr Hickman's application to me. The information was not refused to Mr Hickman on the basis that this request was regarded as being vexatious; nor did it form part of the Council's submission to me. The Council did, however, indicate that it was now of the view that this request was vexatious during my investigation, in an email dated 16 March 2007. It advised that more detailed arguments in this connection would follow. In fact, these further arguments have not been supplied to me and therefore (more than 2 months after that email) I have simply an assertion that the exemption under section 14 of FOISA should have applied in the circumstances, with reference to the volume of correspondence involved.
39. Whilst I have sympathy with authorities which are overwhelmed with requests where it is clear that they have provided all of the information which they can, or where there is clearly no information to provide, I cannot accept an assertion in the absence of more detailed arguments as to why this request should have been regarded as vexatious. This is particularly so in this case when it appears so clear from the outcome of the Council's own review that it would regard future requests as vexatious. (I should say in passing that whilst the Council may feel it is giving Mr Hickman fair warning of its intentions it will nevertheless only be able to come to the conclusion that a request is vexatious by considering any actual request and not just the requester.) In all the circumstances, therefore, I am not prepared to conclude that the Council would have been entitled to deal with Mr Hickman's request as vexatious in terms of section 14(1) of FOISA.

Decision

I find that Scottish Borders Council (the Council) complied fully with section 1(1) of FOISA in dealing with Mr Hickman's request for a copy of the statutory accounts in relation to roads by providing him with a draft copy of its Roads Trading Operation Account 2004/05.

I find that the detailed set of accounts subsequently requested by Mr Hickman is not (and was not at the time of Mr Hickman's request) held by the Council for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA), and therefore that the Council was not under a duty to provide Mr Hickman with the information he had requested. I therefore find that the Council acted in accordance with Part 1 of FOISA in giving Mr Hickman notice that the information was not held in terms of section 17 of FOISA.



On the basis of the arguments presented to me, I do not find that the Council would have been entitled to deal with Mr Hickman's request as vexatious in terms of section 14(1) of FOISA.

Appeal

Should either Mr Hickman or Scottish Borders Council wish to appeal against this decision, there is a right to 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.

Kevin Dunion
Scottish Information Commissioner
22 May 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

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.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

Local Government in Scotland Act 2003

10 Trading operations and accounts

- (1) It is the duty of a local authority to conduct each of its significant trading operations so that, as respects that operation—
 - (a) in relation to every three year period; and
 - (b) taking every year with the two previous years,revenue is not less than expenditure.



(2) In subsection (1) above, the references to a local authority's significant trading operations are references to those of its trading operations for which it must, in accordance with proper accounting practices, disclose trading accounts and, in this subsection, "proper accounting practices" is to be construed in accordance with section 12(2) below.

12 Proper accounting practices

(1) It is the duty of a local authority to observe proper accounting practices.

(2) In subsection (1) above and in paragraph (b) of section 99 (auditor to be satisfied that proper accounting practices have been observed) of the 1973 Act, the references to proper accounting practices are references to accounting practices which fall within one or more of the following—

(a) those which the local authority is required to observe by virtue of any enactment;

(b) those which have been specified in guidance issued for the purposes of this section and that section by the Scottish Ministers;

(c) those which, whether by reference to any generally recognised, published code or otherwise, are regarded as proper accounting practices to be observed in the preparation and publication of accounts of local authorities.

(3) In the event of a conflict in any respect between the practices within paragraph (a) of subsection (2) above and those within paragraph (b) or (c) of that subsection, only those within paragraph (a) are to be regarded as proper accounting practices in that respect, and in the event of a conflict in any respect between those within paragraph (b) and paragraph (c) of that subsection, only those within paragraph (b) are, in that respect, to be so regarded.