

Decision Notice



Decision 136/2009 Fauldhouse Community Council and West Lothian Council

Submission to a legal adviser regarding a right of way dispute

Reference No: 200900558

Decision Date: 24 November 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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



Summary

Fauldhouse Community Council (the Community Council) asked West Lothian Council (the Council) for the Council's submission to an independent legal adviser regarding the status of the route at a particular area in Fauldhouse. Following a review, during which the Council released a number of documents to the Community Council and stated that it was satisfied that it had provided all of the information it held in relation to Community Council's request, the Community Council applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Council had dealt with the Community Council's request for information in accordance with Part 1 of FOISA, by providing all of the information it held in relation to the Community Council's request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement) and 15 (Duty to provide advice and assistance)

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. Following a lengthy involvement with parties on both sides of a right of way dispute, the Council agreed to seek specialist legal advice on whether a right of way existed through a property at a specified address in Fauldhouse. The Council sent documents and papers to an independent specialist legal adviser in order that he could give an opinion on the matter.
2. On 6 November 2008, the Community Council wrote to the Council requesting a copy of the Council's submission
3. The Council did not respond to the Community Council within 20 working days and, therefore, the Community Council wrote again to the Council on 17 December 2008 asking for a response.



4. On 17 February 2009, and again on 24 February 2009, the Community Council wrote to the Council requesting a review. The Community Council drew the Council's attention to the fact that it had not complied with FOISA by failing to respond to the original information request within 20 working days.
5. The Council notified the Community Council of the outcome of its review on 11 March 2009. The Council provided the Community Council with four appendices of information and stated that it was satisfied that it had provided the Community Council with its full evidential submission to the legal adviser in relation to the status of the route in question in Fauldhouse.
6. On 22 March 2009, the Community Council wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that the Community Council 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

8. On 23 June 2009, the Council was notified in writing that an application had been received from the Community Council and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was also asked specific questions about the way in which it had established what information it held in relation to the Community Council's request.
9. The Council replied on 31 July 2009, providing its comments and answers to the questions raised.
10. The investigating officer also contacted the Community Council and sought to determine what further information it believed the Council held with regard to the submission in question. The Community Council provided a response in an email dated 17 August 2009.
11. The submissions made by both the Community Council and the Council are summarised (where relevant) in the Commissioner's Analysis and Findings section below.



Commissioner's analysis and findings

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

Scope of the investigation

13. In this case, the Community Council disputes that the information provided to it by the Council is the full submission made by the Council to the legal adviser.
14. In this decision, the Commissioner must consider whether the Council holds additional information which was submitted to the legal adviser but which it has not disclosed to the Community Council.

Has the Council disclosed to the Community Council its full submission to the legal adviser?

15. In its review response of 11 March 2009, the Council provided the Community Council with the following information:
- (appendix 1) a copy of an initial set of papers and accompanying list sent to the legal adviser at the beginning of his brief, which had previously been provided by the Council to the Community Council in respect of a separate information request;
 - (appendix 2) a copy of a set of papers, along with an inventory, which, on receipt of the Community Council's information request, the Council had asked the legal adviser to return to them and which included papers provided directly to the legal adviser by the Community Council; further miscellaneous correspondence and other Council materials such as aerial photographs from the Council's planning and transportation department;
 - (appendix 3) a copy of a second set of papers which had been sent to the legal adviser by the Council during the course of his brief;
 - (appendix 4) a copy of the scope of the work carried out by the legal adviser.
16. The papers provided in the above appendices contained:
- copies of correspondence sent from and received by the Council in relation to the matter;
 - the title deeds for a specific address and the surrounding ownership;
 - historical ordinance survey maps;
 - committee papers;
 - planning papers;



- a copy of the relevant local plan;
- a note of publicly adopted roads/footpaths;
- a copy of the submission to the legal adviser made by the Community Council which it had given to the Council to send on to the legal adviser.

The Council's submissions

17. On 23 June 2009, the investigating officer asked the Council to provide details of the steps taken to retrieve the information requested, including the searches undertaken relating to the request, whether any information had been destroyed and whether audit trails had been checked.
18. The Council was also asked by the investigating officer to comment on the Community Council's assertion that the disclosed information does not fully cover the whole of the Council's submission to the legal adviser.
19. In response, the Council confirmed that a Principal Solicitor of the Council followed an audit trail incorporating both paper files and electronic files. Documents were recalled from the legal adviser's office and each email/fax/letter was matched up with documentation referred to in the audit trail. The Council's entire electronic file was searched. The Council re-checked that no further information had been sent to any other service within the Council in relation to this matter and found only one item (a planning application, plans and consent) which had been sent to the legal adviser by a planning officer in a different Council office. This item had been included in the information released to the Community Council.
20. The Council reiterated that it had provided its full evidential submission to the Community Council and that it did not hold any additional information. It also confirmed that it had found no evidence of any information falling within the scope of the information request having been destroyed, deleted or archived.

The Community Council's submissions

21. In its application to the Commissioner, the Community Council confirmed that it had received title deeds, opinions by Council employees, planning applications, archived materials and an audit trail of correspondence between the Council and the legal adviser or Council employees, but that it was seeking evidence which would support its argument against the asserted right of way.
22. On 17 August 2009, the investigating officer wrote again to the Community Council regarding its assertion that there must have been further evidence provided to the legal adviser which was not included in the information provided to the Community Council. The investigating officer asked the Community Council to give an indication of what it believed this further evidence to be and on what basis the Community Council believed that such evidence had not been disclosed.



23. In response, the Community Council stated that the Council's submission to the legal adviser is a compilation of documents with no substantive evidence which would lead anyone to an opinion that there is not a right of way through the area in question. The Community Council stated that a document within the submission showed that there is such a right of way. The Community Council asserted that there must be additional documents which categorically show the legal adviser that there is not a right of way at this location.
24. The Community Council stated that as it did not see any evidence within the Council's submission to the legal adviser to support the assertion that there is no right of way, and as it did see documentation which supports the existence of an asserted right of way through the area in question, this was the whole reason for its dissatisfaction.

Considerations

25. In deciding whether the Council has complied with FOISA in its response to the Community Council's information request, the Commissioner must consider whether the Council has supplied to the Community Council the information described in the Community Council's actual information request, i.e. a copy of the Council's submission to the legal adviser regarding the status of the route at Fauldhouse.
26. The Commissioner notes that the Community Council's information request did not ask for specific documentation within that submission which would support a particular position or viewpoint in relation to the right of way dispute, but simply asked for a copy of the complete submission made to the legal adviser.
27. In a letter dated 24 October 2009, sent to both the Community Council and the occupier of the aforementioned property, the Council explained that it had been agreed by the Community Council and the other party in the dispute that the Council would appoint and fund an investigation to be undertaken by an independent lawyer with specialist experience in planning matters, with both the Community Council and the other party agreeing to abide by the outcome of the lawyer's investigation.
28. The Commissioner accepts that the Community Council may not have seen evidence within the Council's submission to the legal adviser which supports the assertion that there is no right of way. However, the Commissioner can only investigate whether the actual submission was provided in its entirety to the Community Council, not whether the submission contained specific arguments for or against either side of the dispute.
29. Similarly, the Commissioner cannot comment on whether the Council should have recorded any or more information about a particular matter or process. Consequently, in this instance, he cannot comment on whether the Council ought to hold further recorded information.
30. The Commissioner is of the view that the information provided to the Community Council is largely that which would be expected to be contained within a file of documents relating to a land dispute, e.g. plans, title deeds, ordinance survey maps and historical documents.



31. The Council has provided detailed information as to the steps which were taken in searching for the information in question, and the Commissioner has been provided with no concrete evidence which would lead him to doubt that the submission provided to the Community Council was not the full evidential submission provided by the Council to the independent legal adviser.
32. Taking into account the Council's submissions, and the steps it has taken to determine whether or not additional information exists or is held by it, the Commissioner is satisfied that the Council has provided all information which falls within the scope of the Community Council's information request and that, in doing so, it acted in accordance with Part 1 of FOISA.

Recent Court of Session Opinion

33. The Commissioner notes that the information request by the Community Council was for copies of documents and that in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
34. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between the Community Council and the Council that the Council questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the Council has subsequently had with the Commissioner that the Council was unclear as to what information the Community Council sought.
35. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.

DECISION

The Commissioner finds that West Lothian Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in relation to the matters specified in the application made by Fauldhouse Community Council.



Appeal

Should either the Community Council or the 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
24 November 2009



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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).