

Decision Notice



Decision 156/2010 Mr James Esland and West Lothian Council

Compliance with required timescales

Reference No: 201000980

Decision Date: 07 September 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

This decision considers whether West Lothian Council (the Council) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Esland.

Background

1. On 22 February 2010, Mr Esland made a request through the Whatdotheyknow¹ website to the Council requesting a range of information relating to an escape of water at a specified address in Linlithgow.
2. On 11 March 2010, the Council emailed Mr Esland asking whether he was the tenant or a resident of the property in question. The Council also asked Mr Esland if he was acting on behalf of another person.
3. Also on 11 March 2010, Mr Esland emailed the Council stating that he was acting on behalf of another named person. Mr Esland provided the Council with the address of this person and his relationship to them.
4. As he had not received a response to his information request, Mr Esland requested a review of the Council's failure to respond on 6 April 2010. He subsequently emailed the Council on 3 and 10 May 2010 reminding it that a response was overdue.
5. As Mr Esland had still not received a response to his request for review, on 10 May 2010 he emailed the Commissioner's Office, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. On 11 May 2010, the Council emailed Mr Esland asking him to confirm an address for correspondence. The Council noted that the only postal address which it held for him was the address of the person on whose behalf he was acting. Mr Esland responded on the same day providing a different postal address to which correspondence should be sent.
7. In subsequent correspondence, Mr Esland advised the Commissioner that he had (on 18 May 2010) received a response to his request for review and had been provided with information in response to his original request. However, he remained dissatisfied with the way in which the Council had handled his request for information.

¹ www.whatdotheyknow.com



8. The application was validated by establishing that Mr Esland 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 2 July 2010, the Council was notified in writing that an application had been received from Mr Esland and was invited to comment on the application.
10. The Council responded, also on 2 July 2010 providing the investigating officer with a copy of its response to Mr Esland's information request which it advised had been posted on 18 March 2010 to the address of the person on whose behalf Mr Esland had stated he was acting.
11. The Council also provided a copy of its response to Mr Esland's request for review which had been posted to the alternative address provided by him on 18 May 2010.
12. The investigating officer subsequently contacted the Council on 8 July 2010 to enquire whether it had any record of the letter of 18 March 2010 having been posted.
13. The Council responded on 12 July 2010 stating that it does not record individual items of outgoing mail. However the letter in question had never been returned to it by the Royal Mail. The Council's submissions on this matter are considered more fully in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

Section 10 of FOISA (Time for compliance)

14. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
15. In this case, the Council's position is that it did respond timeously to Mr Esland's request by posting its response on 18 March 2010. The Council stated that it posted the response to the address provided by Mr Esland in his email of 11 March 2010 (the address of the person on whose behalf he was acting). As noted above, the Council explained that it does not record individual items of outgoing mail. However, the Officer who dealt with Mr Esland's information request recalls delivering the envelope containing the Council's response to its mail room for onward delivery by the Royal Mail. The Council also stated that the letter has never been returned to it by the Royal Mail.



16. Mr Esland has stated that he had routinely checked at the property address in question but had not received the Council's response letter. Additionally, he considered the Council should have been aware that the property in question was uninhabitable due to flood damage and should not therefore have directed any mail to that address. Mr Esland also noted that the Council had made no attempt to update its response on the Whatdotheyknow website.
17. The Council's position was that, in the absence of any other contact information having been provided to it, the assumption was made to send all correspondence to the address that had been provided by Mr Esland and it was only during ongoing correspondence that an alternative address had been intimated to it. Whilst noting Mr Esland's view that the property to which correspondence had been posted was uninhabitable, the Council's view was that this was the only correspondence address which it held at the time of its response to the information request. The Council also explained that many of the appendices that formed part of the information request were too large to send by email and therefore, information had to be sent by post.
18. The Commissioner has noted the views that have been expressed both by Mr Esland and the Council. In the absence of any conclusive evidence, the Commissioner is unable to form a definitive view on whether or not a response was actually issued to Mr Esland. However, he considers that, on the balance of probabilities, it is likely the Council did send its response of 18 March 2010 and in doing so complied with the requirements of section 10(1) of FOISA.

Section 21 of FOISA (Review by Scottish public authority)

19. Section 21(1) of FOISA gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for a review, again subject to exceptions which are not relevant to this case.
20. The Council did not provide a response to Mr Esland's requirement for review of 6 April 2010 until 18 May 2010.
21. The Commissioner therefore finds that the Council failed to respond to Mr Esland's requirement for review within the 20 working days allowed under section 21(1) of FOISA.
22. Although the Commissioner does not require the Council to take any remedial action in respect of this technical breach, it should be noted that his staff have recently carried out an assessment of the Council's practice with respect to information request handling under FOISA and the EIRs. This included an assessment of the Council's compliance with the timescales for responding to requests for information and requirements for review, and the findings of this will be discussed in the forthcoming assessment report.

Section 15 of FOISA (Duty to provide advice and assistance)

23. Section 15(1) of FOISA provides that 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.



24. As noted above, the Commissioner has concluded, on the balance of probabilities, that the Council's response to Mr Esland's information request was posted to the address of the person on whose behalf he was acting within the timescale required by section 10(1) of FOISA.
25. However, the Commissioner's view is that this address was provided to the Council for the purpose of identifying the person on whose behalf Mr Esland was acting, rather than to indicate the address to which a response should be sent.
26. Mr Esland made his request via the Whatdotheyknow website, and so it can be presumed that he would expect this site (which enables email communication between the public authority and requestor) to be used to issue a response, or at least to inform him that a response had been sent elsewhere.
27. The Commissioner considers that it would have been reasonable to expect the Council to inform Mr Esland via his chosen form of communication that a response had been sent via another channel, or to seek his confirmation of a suitable postal address prior to issuing a response to his information request.
28. Therefore, the Commissioner considers that the Council failed to provide reasonable advice and assistance to Mr Esland and consequently failed to comply fully with its duty under Section 15(1) of FOISA in this case. However, the Commissioner does not require the Council to take any action in respect of this breach in response to this particular application.

DECISION

The Commissioner finds that the Council partially failed to comply with the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to respond to Mr Esland's requirement for review within the timescales laid down in section 21(1) of FOISA and by failing to comply fully with its duty to provide advice and assistance to Mr Esland in terms of section 15(1) of FOISA.

The Commissioner does not however find that the Council failed to comply with the requirements of section 10(1) of FOISA in responding to Mr Esland's request.



Appeal

Should either Mr Esland 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.

Claire Sigsworth
Deputy Head of Enforcement
07 September 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) Subject to subsections (2) and (3), 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

...

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.

...

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.

...

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