

Decision Notice



Decision 226/2011 Mr Stephen Glen and Dundee City Council

Inspection records and other related information concerning Paladin bins

Reference No: 201101313

Decision Date: 11 November 2011

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
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Summary

Digby Brown, Solicitors, on behalf of their client Stephen Glen requested from Dundee City Council (the Council) information relating to Paladin bins. The Council refused to disclose the information on the basis that it was exempt from disclosure under sections 33(1)(b) and 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, during which the Council withdrew its reliance on the exemption in section 33(1)(b), Mr Glen remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Council did not in fact hold any recorded information that would meet the terms of Mr Glen's information request. While he found that the Council had failed to deal with Mr Glen's request for information in accordance with Part 1 of FOISA by failing to notify Mr Glen in line with section 17 of FOISA that it did not hold the requested information, he did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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. On 10 November 2010, Digby Brown, Solicitors acting on behalf of Mr Glen (in this decision, all further references to correspondence with Mr Glen are to correspondence with his solicitors), wrote to the Council in relation to a document entitled "Management Regulations – Risk Assessment Proforma" which had been completed by the Council on 31 January 2006. Mr Glen noted that the risk assessment recommended that Paladin bins "need to be fully serviced on a regular six monthly cycle to ensure wheels are working correctly" and that "the economics of the bin design should be investigated for a more suitable alternative".



2. In this respect (and within the same letter), Mr Glen asked the Council for copies of the inspection documentation or records which were carried out on a six monthly cycle from January 2006 to the present date. Mr Glen also requested details on any documentation regarding the Council's efforts and endeavours to investigate finding a suitable alternative to the Paladin bins.
3. The Council responded on 5 April 2011, withholding the information in its entirety under the exemptions in sections 33(1)(b) of FOISA (on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council) and 36(1) (on the basis that it comprised information that was prepared in contemplation of litigation and would not be recoverable in legal proceedings).
4. On 8 June 2011, Mr Glen emailed the Council requesting a review of its decision. In particular, Mr Glen did not consider that the requested information could possibly have been prepared in contemplation of litigation.
5. The Council notified Mr Glen of the outcome of its review on 6 July 2011. The Council withdrew its reliance on the exemption in section 33(1)(b) of FOISA, but upheld its earlier reliance on the exemption in section 36(1).
6. On 14 July 2011, Mr Glen wrote to the Commissioner, stating that he 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 Mr Glen 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.

Investigation

8. On 21 July 2011, the Council was notified in writing that an application had been received from Mr Glen and was asked to provide the Commissioner with any information withheld from him. The Council subsequently responded by providing the information it considered fell within the scope of Mr Glen's request and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to explain the searches it had undertaken in order to ascertain that all relevant information had been identified and to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. The Council subsequently provided submissions on its application of the exemption in section 36(1) of FOISA to the withheld information.



11. Following additional correspondence with the investigating officer, the Council provided details of the searches it had undertaken in order to identify relevant information falling within the scope of the request.
12. In ongoing correspondence, the Council provided the Commissioner with additional information which it had identified and considered may fall within the scope of Mr Glen's request. The Council asked the investigating officer for his view on whether he considered this additional information to fall within the scope of the request.
13. The investigating officer subsequently suggested to the Council, having considered all of the information that the Council had identified as falling within the scope of the request, that in fact none of this information fell within the scope of the request and the Council did not actually hold any relevant information falling within the scope of the request.
14. The Council responded by agreeing that it did not hold any relevant information.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Glen and the Council and is satisfied that no matter of relevance has been overlooked.

Section 17 of FOISA – Notice that information is not held

16. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect.
17. In this case, the Council responded to both Mr Glen's request for information and his requirement for review by indicating that relevant information was held, and stating that the information requested was exempt from disclosure under FOISA.
18. When asked to provide the withheld information to the Commissioner, the Council provided certain information. On consideration of this information, the investigating officer noted that it did not appear to address Mr Glen's information request. As noted above, during the investigation, the Council was asked to explain the searches it had undertaken in order to ascertain whether (and what) relevant information was held.
19. In its correspondence with the investigating officer, the Council provided details of the searches it had undertaken in order to identify relevant information. The Council explained the searches that had been undertaken, which paper based systems had been searched and the search terms used to conduct electronic searches.



20. As a result of further searches undertaken during the investigation, the Council located additional information and provided this to the investigating officer, requesting his view as to whether this fell within the scope of Mr Glen's information request. In further communications, the Council agreed with the investigating officer's assessment that this information fell outwith the scope of Mr Glen's request, and indicated that it held no other information relevant to the request.
21. Having considered the information identified by the Council prior to and during the investigation, the Commissioner has reached the view that none of this falls within the scope of Mr Glen's information request. Having reviewed that information, the Commissioner considers that it does not constitute documentation relating to inspections of Paladin bins undertaken on a six monthly cycle. The information provided to the Commissioner also did not include any documentation regarding the Council's efforts and endeavours to investigate finding a suitable alternative to the Paladin bins.
22. Consequently, having considered the Council's submissions, along with the information provided to him, the Commissioner's view is that the Council did not (at the time of receiving his request) hold any information that would address Mr Glen's request.
23. Having concluded that the Council did not hold any recorded information falling within the scope of the request, the Commissioner finds that the Council failed to give proper notice in terms of section 17(1) of FOISA that it did not hold the information. In so doing, it breached Part 1 of FOISA.
24. However, this decision makes the position on this matter clear, and so no purpose would be served by now requiring the Council to notify Mr Glen that the information is not held and to rectify this breach.
25. Nevertheless, the Commissioner is concerned that the Council notified Mr Glen that it did hold relevant information that it considered exempt from disclosure under Part 2 of FOISA both in its initial response of 5 April 2011 and in its review response of 6 July 2011 without apparently having considered the nature of that information or whether it was actually relevant to the request.
26. The Commissioner would urge the Council to ensure that, in response to future information requests, it clearly establishes whether it actually holds any relevant information before advising requestors that the information is exempt from disclosure under Part 2 of FOISA.
27. The Commissioner notes that his remit in carrying out this investigation extends to the consideration of whether the Council actually holds the relevant information requested by Mr Glen. He cannot comment on whether a public authority ought to have conducted any particular activities. Consequently, in this instance, he cannot comment on whether the Council ought to hold recorded information or on whether it has failed to adhere to any previously stated courses of action.



DECISION

The Commissioner finds that Dundee City Council (the Council) does not hold recorded information that would meet the terms of the request made by Mr Glen, and that it did not hold such information at the time when it received Mr Glen's request.

The Commissioner finds that, by failing to give notice that it did not hold the requested information, the Council failed to comply with the requirements of section 17(1) and consequently breached Part 1 of the Freedom of Information (Scotland) Act 2002. For the reasons set out above, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr Glen 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
11 November 2011



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.
- ...
- (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.

...

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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Mr Stephen Glen
and Dundee City Council

