

Decision Notice



Decision 026/2013 Councillor Stuart Currie and East Lothian Council

Support to political groups for manifestos

Reference No: 201102105

Decision Date: 21 February 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

Councillor Currie asked East Lothian Council (the Council) for information on work done by Council officers on the manifestos of two political groups on the Council. The Council withheld the information on the basis that it was intended for future publication, subsequently changing its position and notifying Councillor Currie that the information was withheld because its disclosure would substantially prejudice the effective conduct of public affairs.

During the Commissioner's investigation, the Council advised that it did not hold the requested information. The Commissioner accepted that this was the case, also finding that the Council had failed to give Councillor Currie the appropriate notice to this effect.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information 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 4 July 2012, Councillor Currie wrote to the Council and requested the following information:
 - All information and work done by council officers in relation to the manifestos of the East Lothian Labour Group and East Lothian Conservative Group prior to elections on 3 May 2012, to include approximate costs of any manifesto commitments
 - All information from 4 May until 15 May 2012 on any work by council officers to cost any commitments from the same manifestos
 - As both manifestos were adopted as the policy of the council with immediate effect from 15 May 2012, all papers and work done by council officers on the two manifestos.

He requested that the information include all views and costings of individual policy commitments which were now policy. As the policies were not in formulation (having been adopted with immediate effect as the policies of the Council from 15 May 2012), Councillor



Currie expect detailed information on each area of decided policy.

2. The Council responded on 2 August 2012, indicating that it was withholding the information in terms of sections 27 of FOISA (Information intended for future publication).
3. On 17 August 2012, the Council further responded to Councillor Currie's request. It informed Councillor Currie that the information held was not in fact intended for future publication, but that it was exempt from disclosure in terms of section 30(c) of FOISA (Prejudice to effective conduct of public affairs). It further stated that the balance of public interest lay in the withholding of the information.
4. On 11 September 2012, Councillor Currie wrote to the Council requesting a review of its decision. He did not accept the Council's arguments on section 30(c).
5. The Council notified Councillor Currie of the outcome of its review on 12 October 2012. It upheld that the original decision as correct and provided some further explanation.
6. On 17 October 2012, Councillor Currie 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 Councillor Currie 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 26 October 2012, the Council was notified in writing that an application had been received from Councillor Currie and was asked to provide the Commissioner with any information withheld from him. The Council responded, stating that it now appeared that it did not hold any information falling within the scope of Councillor Currie's request. It explained that, in responding to Mr Currie, it had tried to be helpful rather than responding in terms of section 17(1) of FOISA (Information not held) and apologised for any misunderstanding. 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.
10. The Council provided submissions in support of its position that it did not hold any relevant information. These will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Councillor Currie and the Council and is satisfied that no matter of relevance has been overlooked.

Information held by the Council

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain restrictions which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The restrictions contained in section 1(6) are not applicable in this case. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. While the Council's response to Councillor Currie's request was to the effect that the information was intended for future publication, followed by a further response that it was being withheld in terms of section 30(c) of FOISA, during the investigation the Council submitted that it did not hold any information falling within the scope of Councillor Currie's request. Had that been the case, the Council should have issued a notice in terms of section 17(1) of FOISA, stating that no information was held.
14. In its correspondence with the investigating officer, the Council provided background details of how the Council dealt with Councillor Currie's request. It explained that the process of dealing with the request had been subject to a number of misunderstandings. In particular, the Council Plan was initially understood to have been based on actual costings (which would subsequently be published). Only after the response had been issued to Councillor Currie was it confirmed that the Council Plan contained solely strategic plans rather than actual fully costed policies. Given that work had only just begun (at the time of the submissions) to cost the elements of the Council Plan, there were no records to search when the Council was dealing with Councillor Currie's request: the issue was therefore discussed thoroughly in meetings with the relevant managers.
15. Having considered all relevant submissions and the terms and context of Councillor Currie's request, the Commissioner accepts that the information requested by Councillor Currie was not held by the Council at the time it received the request. Given that the Council Plan contained solely strategic aims rather than fully costed policies, it was reasonable in all the circumstances for the Council to conclude that it did not hold any relevant information.
16. Given that no such information was held by the authority, to comply with the terms of section 17(1) of FOISA, the Council had a duty to issue a notice in writing stating that it did not hold the information.



17. The Council explained that, having provided the initial response that the information was intended for publication, and having discovered that the information was not actually held, subsequent responses were an attempt to inform Councillor Currie that the information was not held.
18. The Commissioner notes that while the Council's review outcome of 12 October 2012 provided Councillor Currie with some further explanation of its position in relation to the information requested, it also upheld "the original decision" and confirmed that the public interest "would not be best served by releasing the information". This cannot, therefore, be considered to inform Councillor Currie that the information was not held. Neither, of course, can the Council's second response to the request, which informed Councillor Currie that the information was being withheld under section 30(c) of FOISA.
19. Given that the Council failed to provide the requisite notice to Councillor Currie, the Commissioner finds that the Council failed to comply with the requirements of section 17(1) of FOISA.
20. The Commissioner is concerned that it appears to have taken the Council until an application was made to her before it explained adequately that the information requested was not held. While no useful purpose would be served by requiring the Council to take any specific action in this case, the Commissioner would urge the Council to ensure that, in response to future information requests, it takes reasonable steps to establish what relevant information it holds – and then, should it not hold the information, that it communicates that position clearly to the requester, in accordance with section 17(1) of FOISA.

DECISION

The Commissioner finds that East Lothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Councillor Currie's request, by failing to provide him with a notice in terms of section 17(1) of FOISA that the information requested was not held. Being satisfied that the Council does not (and did not, at the time it received the request) hold the information, the Commissioner does not require the Council to take any action in respect of this failure in response to Councillor Currie's application.



Appeal

Should either Councillor Currie or East Lothian 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
21 February 2013



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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