

Decision Notice

Decision 095/2016 Mr Stephen Calder and Aberdeenshire Council

Lease and insurance of land and buildings

Reference No: 201600039
Decision Date: 3 May 2016



Scottish Information
Commissioner

Summary

On 30 October 2015, Mr Calder asked Aberdeenshire Council (the Council) for information concerning the lease and insurance of the land and buildings which included the public bowling greens and tennis courts at Victoria Road/Balmoor Terrace, Peterhead.

Following a review, the Council informed Mr Calder they did not hold any information falling within the scope of his request. Mr Calder remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council did hold some relevant information. As the Council provided this information to Mr Calder during the investigation, she did not require the Council to take any action.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 30 October 2015, Mr Calder made a request for information to the Council, seeking copies of all documents relating to the lease and insurance of the land which includes the public bowling greens at Victoria Road/Balmoor Terrace, Peterhead, including a specific lease granted in 1920 and any other documentation to or from officers of Peterhead Town Council and its successor bodies, Grampian Regional Council, Banff & Buchan District Council and Aberdeenshire Council regarding the lease, renewal of lease and insurance of these lands and the buildings thereon.
2. The Council acknowledged Mr Calder's request on 3 November 2015.
3. On 28 November 2015, having received no response, Mr Calder wrote to the Council stating that, by law, it should have responded to his request promptly and within the statutory timeframe of 20 working days.
4. The Council responded on 3 December 2015. It informed Mr Calder that, following a full search, the Council had concluded that it did not hold the information requested. It did not, and never had, owned the land. The Council also informed Mr Calder that enquiries undertaken to ascertain whether information could be obtained from any other source had proved unsuccessful.
5. On 3 December 2015, Mr Calder wrote to the Council, submitting there was no suggestion that the Council owned the land, rather it had leased the land from the Feuars Managers since 1920. He believed the Council, as the successor body to Peterhead Town Council, must hold the information requested. Mr Calder refused to accept that the Council did not hold the information and requested a review of the Council's decision.

6. The Council acknowledged Mr Calder's request for review on 3 December 2015.
7. The Council notified Mr Calder of the outcome of its review on 5 January 2016, modifying its original decision. The Council acknowledged it had failed to respond to Mr Calder's request within the statutory 20 working day period and had therefore failed to comply with section 10(1) of FOISA. The Council apologised for this, explaining the delay in responding was attributable to a key member of staff being on annual leave.
8. The Council also explained that further searches and enquiries had been undertaken, which had not identified any information relevant to Mr Calder's request. It confirmed that, from an insurance perspective, the lease had been changed in 1995 and from then was held directly between the bowling club and the Peterhead Feuars Managers (PFM). Documentation for insurance from 1995 to date was therefore not held by the Council. The Council concluded, on the balance of probabilities, that it held no information falling within the scope of Mr Calder's request.
9. On 5 January 2016, Mr Calder wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Calder stated he was dissatisfied with the outcome of the Council's review because it had failed to provide the information he had requested. He believed the Council, as a successor body to Peterhead Town Council, must hold this information.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr Calder made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
11. On 28 January 2016, the Council was notified in writing that Mr Calder had made a valid application and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. These focussed on the searches carried out to identify and locate any information falling within the scope of Mr Calder's request. The Council was also asked to explain how it had been able to inform Mr Calder that the lease had changed in 1995.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both Mr Calder and the Council. She is satisfied that no matter of relevance has been overlooked.

Whether the Council holds any information

14. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
15. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. In this case, the Council notified Mr Calder that it did not hold the information he had requested.

16. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) actually held by the public authority.
17. In its submissions to the Commissioner, the Council acknowledged, but refuted, Mr Calder's belief that, as the successor body to Peterhead Town Council, it must still hold information on a lease granted in 1920. The Council considered this to be unrealistic.
18. In relation to historical information held by the Council, the Council explained that local government reorganisation in 1996 saw the disposal of large amounts of records, with all of Grampian Regional Council's records being either sent to archive storage or destroyed.
19. More recently, the Council explained, it had adopted a hot-desking policy. As this had developed across the Council, there were occasions where staff had been required to access rooms and cupboards not thoroughly examined for years, which could conceivably contain records from a predecessor Council. The Council explained it was only then that staff would consider which of these records to destroy.
20. Given that Aberdeenshire Council has been in existence for 20 years, the Council explained that the general advice was that records should be disposed of if there had been no need to access those records during that time. The Council confirmed this had all proceeded alongside the routine destruction of files in accordance with any agreed document management procedures.
21. The Council explained that, following fire damage to the pavilion in June 2014, the issue arose of whether the Council had any rights as lessees in respect of the land on which the pavilion was built.
22. The Council explained the searches and enquiries carried out to ascertain whether it held any information falling within the scope of Mr Calder's request.
23. As a result of enquiries made to its Legal and Governance service, the Council explained that a Senior Solicitor had confirmed (from his own knowledge and experience) that the land had never been owned by the Council but was owned by PFM, who had leased it to the Council's predecessors (Peterhead Town Council and Banff & Buchan District Council) – who, in turn, had leased it to Peterhead Bowling Club. It stated that the Senior Solicitor had confirmed he did not hold a copy of any lease between the Council's predecessors and the bowling club. The Council also confirmed that the comments regarding the insurance position (see above) were also based on the Senior Solicitor's recollections.
24. No further extensive searches across the Council were undertaken, as the Council believed contacting the legal and insurance experts would be reasonable and proportionate, and should capture any information that might be held.

Information identified during the investigation

25. During the investigation, the Council informed the Commissioner it had identified two items of correspondence with PFM, which it acknowledged as relevant to Mr Calder's request. The

Council confirmed it had received no response to its most recent letter to PFM, dated 25 June 2015.

26. The Council also acknowledged its previous response may have focussed too narrowly on the absence of an actual lease, and the information now identified ought to have been recognised as falling within the scope of Mr Calder's request.
27. The Council explained this information had not been located during the searches carried out, as it was not logged in the Legal and Governance service's document management system. The information was located in the Senior Solicitor's personal email inbox.
28. The Council wrote to Mr Calder on 11 March 2016, providing him with this information and apologising that these documents had not been identified earlier.
29. In response to this disclosure, Mr Calder wrote to the Council on 15 March 2016. Noting that the correspondence between the Council and PFM referred to the lease and the insurance, Mr Calder remained dissatisfied that no copies of these had been provided, as requested.

Evidence of Searches

30. As the Council's submissions failed to include any documentary evidence to support the searches and enquiries it had carried out, it was again asked to provide the Commissioner with such evidence.
31. In response, the Council provided copies of internal email correspondence with its Senior Solicitor and Senior Insurance Officer which, it submitted, led it to conclude that it held no relevant information relating to the lease or insurance of the land in question. Having considered this correspondence (which was, in the main, dated prior to Mr Calder's request), the Council was asked to comment on points arising from it, and to confirm (with evidence) the searches and other checks carried out in reaching the relevant conclusions.

Further evidence of searches

32. The Council provided evidence of the property searches it had instructed in relation to the land in question in September 2015. These searches, the Council submitted, identified no lease or other deed having been granted to the Council, the bowling club or any other party, in respect of the land in question. The Council's position was that it therefore had no contractual relationship of any kind with any party in respect of the land in question.
33. The Council also confirmed that a review was undertaken of its insurance property portfolio, which highlighted that the building was included. The Council's Corporate Finance Manager confirmed that this should not have been included on the portfolio following the change in the lease arrangements, however, as the Council had no insurable interest.
34. Referring to its Document Retention Policy, the Council explained that the relevant document retention period did not exceed 10 years. This led the Council to believe that any file relating to a 1995 lease between its predecessors and PFM (referred to in correspondence) would have been destroyed.
35. The Council also explained that its legal closed files were held in off-site storage. A search of the list of files sent to off-site storage confirmed that the file concerning the 1995 lease did not feature on that list. It further explained that, unless a file was worked on during the preceding 10 years, it would have been destroyed. The Senior Solicitor recalled that this file did exist, having worked on it at the time of the 1995 lease. This led the Council to conclude that this file had almost certainly been destroyed.

36. The Council confirmed that the 1995 lease (which excluded the land in question) was the only deed held relating to the areas leased from PFM which included those in the immediate vicinity of the pavilion area.

Commissioner's view

37. Having considered all the relevant submissions, the Commissioner is satisfied that the Council had, by the end of her investigation, taken adequate, proportionate steps to establish what information it held and which fell within the scope of the request. She accepts, on balance, that any information relevant to the request was capable of being identified using the searches described by the Council.
38. The Commissioner has no locus to comment on whether more information should have been held by the Council. The question she must consider in this case is: was all the relevant information held by the Council located and considered appropriately under FOISA? She is satisfied that, by the end of the investigation, it was.
39. The Commissioner would stress the importance of full and adequate searches of all appropriate locations, and the ability to be able to supply evidence of such searches when providing her with submissions. It is not sufficient to merely rely on the personal recollection of staff, however knowledgeable and experienced they may be. The Commissioner is concerned to note that, in this case, the Council had to be asked to explain, and provide evidence of, searches on three occasions, which resulted in extra work and unnecessary delays in the investigation.
40. The Commissioner is also concerned to note that the Council considered Mr Calder's request in a narrow fashion. It is clear, from the email correspondence evidencing the searches and enquiries carried out by the Council in November/December 2015 in relation to Mr Calder's request for review, that the Council had identified both of the documents provided to him during the investigation, yet the Council informed Mr Calder, in its review response, that it held no relevant information. It was only following his application to the Commissioner that the Council recognised this information as being relevant to his request.
41. The Commissioner is further concerned to note that the Council appears to infer, both in its submissions to her and in its email to Mr Calder dated 11 March 2016, that these documents were not identified until during the investigation, whereas it is clear from the Council's email correspondence (evidencing the searches carried out) that both documents were, in fact, identified during consideration of Mr Calder's request for review. She considers such practice to be inconsistent with the principles of openness and transparency underlying FOISA.
42. The Commissioner recognises and welcomes the fact that, on determining that the information identified was, in fact, relevant to Mr Calder's request, the Council took steps to ensure this information was provided to Mr Calder promptly. She also acknowledges the Council accepted it had considered Mr Calder's request too narrowly.
43. As the Council failed to provide Mr Calder with information covered by his request, which it later provided, having recognised it as falling within scope, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA in responding to Mr Calder's request.
44. In the circumstances, given she is now satisfied that the Council has provided Mr Calder with all relevant information held, the Commissioner does not required the Council to take any further action in this case.

Decision

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Calder.

The Council was not entitled to inform Mr Calder, in terms of section 17(1) of FOISA, that it did not hold any information falling within the scope of his request. In doing so, it failed to comply with section 1(1) of FOISA.

Given that the Council disclosed the information it held to Mr Calder during the investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr Calder's application.

Appeal

Should either Mr Calder or Aberdeenshire Council wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement

3 May 2016

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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