



Scottish Information  
Commissioner

**Decision 101/2006 Mr Andrew Picken and the City  
of Edinburgh Council**

*Failure to respond to a request for information*

**Applicant: Mr Andrew Picken, Edinburgh Evening News  
Authority: City of Edinburgh Council  
Case No: 200600528  
Decision Date: 20 June 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 101/2006 Mr Andrew Picken, Edinburgh Evening News and the City of Edinburgh Council

***No formal response to information request or subsequent request for review in terms of the Freedom of Information (Scotland) Act 2002 (FOISA) – public authority held to have failed to comply with section 10(1) and section 21(1)***

### Facts

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1. Mr Picken requested various information relating to two public private partnership (PPP) projects in an email to the City of Edinburgh Council (the Council) dated 25 October 2005.
2. Mr Picken requested:
  - a) A copy of the contract between the Council and the Edinburgh Schools Partnership for the PP1 'Investing in Schools' project
  - b) A copy of the original business case for the PP1 'Investing in Schools' project
  - c) A copy of the contract between the Council and Axiom for the PP2 'Building Achievements' project
  - d) A copy of the original business case for the PP2 'Building Achievements' project
  - e) Confirmation of whether the Council covered the cost of the private consortiums' bidding fees for the PP1 'Investing in Schools' and PP2 'Building Achievements' projects. If so how much was paid to each respective private consortium?
3. A response was provided by the Council's Department of Children & Families by email on 30 November 2005. However, this did not address requests a) and b) in relation to PPP1. The Council's email explained that it was still trying to establish any legal prohibitions associated with the PPP1 documentation. The email assured Mr Picken that his request remained a priority and assured him that it was being actively pursued.
4. In the weeks following this response, Mr Picken wrote to the Council on a number of occasions seeking a response to the outstanding parts of his request, and then seeking a review of the Council's failure to respond. I understand that he also contacted Council officials by telephone on a number of occasions. Alongside any such informal contact, the following emails were exchanged between Mr Picken and the Council:



- a) 19 December 2005: Mr Picken followed up a request for a response to the outstanding parts of his request that appears to have first been made in a telephone conversation.
  - b) 9 January 2006: Mr Picken again followed up the request and noted that a response should have been provided in November.
  - c) 31 January 2006: Mr Picken wrote again asking for clarification on when he would receive a response to his outstanding requests. He noted that the response was 10 weeks late.
  - d) 8 February 2006: Mr Picken formally asked the Council to review its failure to respond to the outstanding requests for information. He noted that he was dissatisfied with the Council's response to his request on the following grounds
    - i. The Council had failed to respond within the time limit allowed.
    - ii. He had received no formal notice as to why the request was late.
    - iii. Identical requests to other public authorities had been completed without restrictions or delay.

Mr Picken sought acknowledgement of the request for a review, and an indication of when he could expect a reply.
  - e) 17 February 2006: Mr Picken noted that no acknowledgement had been received in response to the email of 8 February.
  - f) 17 February 2006: The Council's Corporate Services Department responded to Mr Picken's email of the same date, and acknowledged his request for review. This stated that the request for review was being dealt with, and that a response would be supplied within the timescales detailed within FOISA.
  - g) 24 February 2006: The Council's Department of Children & Families wrote to Mr Picken providing an update of its work in response to the initial request for information. This advised that external legal advice had been sought in relation to the request for information. This email advised Mr Picken of the right to request a review, and to ultimately make an appeal to me should he be dissatisfied with the handling of his request.
  - h) 9 March 2006: Mr Picken wrote to the Council's Corporate Services Department noting that he should have received a response to his request for a review by the previous day but none had been received. He asked for an update on the progress of the review.
5. Mr Picken applied to me for a decision in relation to this matter on 10 March 2006. His email explained the circumstances of the case and specified a number of reasons for his appeal. These were:
- The request was 4 months late without any decision.
  - The review request was also late.



- A similar request to another Council had been responded to promptly and fully. The PPP1 contract had been complete for some time, and Mr Picken considers that it is in the public interest that related information is released.

## Investigation

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6. Mr Picken's appeal was allocated to an investigating officer. It was then validated by establishing that that he had first made a valid information request to a Scottish public authority (i.e. the Council) under FOISA and had appealed to me only after asking the Council to review its failure to respond to the request.
7. I note that Mr Picken's application for a decision relates only to the outstanding parts of his request of 25 October 2005. This decision has not considered whether the Council acted in compliance with Part 1 of FOISA in its responses to the parts of his request which were addressed in its email of 30 November 2005.
8. A formal information notice was issued to the Council on 22 March 2006 in terms of section 50 of FOISA, requiring the Council to explain why the Council had failed to provide any substantive response to Mr Picken's information request and the subsequent request for review. The Council was also asked to comment on the application by Mr Picken in terms of section 49(3)(a) of FOISA.
9. The Council failed to respond to the information notice within the period specified, and so a reminder was issued on 18 April 2006. A response was then received on 27 April 2006. This explained that the Department of Children & Families had taken the view that it was necessary to assess the potential legal constraints on release of certain documents requested by Mr Picken. It noted that the assessment of these issues was still ongoing and that external legal advice had been instructed.
10. The Council also explained that the Department of Corporate Services was unable to conduct a review of Mr Picken's request without further information from the Department of Children & Families, including the results of the legal review. Copies of two internal memoranda relating to the Council's handling of Mr Picken's request were also supplied.
11. The Council noted that the legal advice requested was expected imminently, and it would then be in a position to respond to Mr Picken's outstanding requests.



12. In subsequent communications with this Office, the Council has confirmed that this legal advice has been received. However, at the time of writing, I understand that no response had been issued to Mr Picken.

### **The Commissioner's analysis and findings**

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13. I have found the Council's handling of Mr Picken's request for information fell far short of the requirements of FOISA in a number of respects.
14. Following the receipt of Mr Picken's request for information, the Council was required by section 10(1) of FOISA to supply its response promptly and no later than the twentieth working day after the date of receipt. No response has yet been supplied, nearly 8 months after the request was first sent. There has therefore been a significant breach of this requirement in this case.
15. In the absence of a response to some of his requests, Mr Picken sent a number of written follow-up emails to the Council over December 2005 and January 2006. In February 2006, he formally invoked his right to request a review of the failure to respond. The Council acknowledged this email and indicated that a response would be supplied in line with the requirements of FOISA.
16. Section 21(1) of FOISA states that, following receipt of a request for a review, a public authority should comply promptly; and in any event by not later than the twentieth working day of receipt. Section 21(4) of FOISA states that in response to a request for review, an authority may:
  - a) confirm a decision complained of, with or without modifications as considered appropriate.
  - b) substitute for any such decision a different decision; or
  - c) reach a decision where the complaint is that no decision had been reached.
17. In the absence of a decision in response to the initial request, the appropriate response to Mr Picken's request for a review would have been for a substantive response to his initial request to be supplied. This did not happen. Again, after a 4 month wait, I find that the Council has failed to comply with the requirements of section 21(1) of FOISA.



18. In this case, it is clear that the Council was aware of its legal obligations under FOISA to Mr Picken. The Council has explained that the Director of the relevant department did not feel able to provide a response to Mr Picken's request without detailed legal advice. That may well be the case, but I am at a loss to understand why, having spent almost 8 months considering and seeking advice on the request, the Council has still not found itself able to issue a response to Mr Picken.
19. It is for the Council to make a decision on what information is exempt or otherwise from release under FOISA. If it needs to consult any third parties in interpreting its obligations, then this must be done within the timescales set out within FOISA. It is not acceptable for the provisions of FOISA to be flouted as the Council has done in this case.

## **Decision**

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I find that the City of Edinburgh Council (the Council) failed to comply with the requirements of sections 10 and 21 of the Freedom of Information (Scotland) Act 2002 in response to parts a) and b) of Mr Picken's request for information as set out in paragraph 2. of this decision.

I require the Council to respond to parts a) and b) of Mr Picken's request within 6 weeks of the receipt of this decision, either by providing him with the information or by issuing him with a notice in terms of section 16 or 17 of FOISA.

## **Right of appeal**

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Should either Mr Picken or the Council wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**20 June 2006**