

**Decision 027/2005 – Millar & Bryce Limited and Inverclyde
Council**

Refusal to provide access to the list of public roads other than by inspection

**Applicant: Millar & Bryce Limited
Authority: Inverclyde Council
Case No: 200501879
Decision Date: 26 September 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 027/2005 – Millar & Bryce Limited and Inverclyde Council

Information available for inspection – publication scheme – section 25 of Freedom of Information (Scotland) Act 2002 – whether information is reasonably accessible

Facts

Millar & Bryce Limited, a client of Macroberts Solicitors, requested a copy of Inverclyde Council's (the Council) register of public roads. The Council refused to provide a copy of the register, advising that it was contained within the Council's publication scheme and available for inspection. Macroberts sought a review of this decision on behalf of their client. The Council upheld its initial decision, noting that the register's inclusion within the publication scheme meant that the information was exempt under the terms of section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). Macroberts subsequently made an application to the Commissioner, again on behalf of their clients, for a decision as to whether the Council was correct not to provide them with a copy of the register.

Outcome

The Commissioner found that the Council had acted in accordance with its publication scheme by offering access to its list of public roads by inspection only. He found that the Council had correctly interpreted section 25 of FOISA and that the information was subject to an absolute exemption from release, other than in the form specified in the scheme. The Council was not required to provide a copy of the list of public roads to the applicant in response to their request.

The Commissioner found that the Council had breached the provisions of sections 16, 19 and 21 of FOISA by failing to provide a refusal notice as required and by failing to conduct a review of its decision within twenty working days of receipt of the applicant's request for review



Appeal

Should either Inverclyde Council or Millar & Bryce Limited wish to appeal against the Commissioner's 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 of receipt of this notice.

Background

1. Millar and Bryce Limited emailed the Council on 23 February 2005 to request a copy of its register of public roads (the register), as maintained under the terms of the Roads (Scotland) Act 1984. The e-mail expressed the preference that the register should be provided in electronic form, failing which, in hard copy.
2. The register is a document which a local authority must produce, maintain and make available for public inspection under the terms of the Roads (Scotland) Act 1984. It lists all the roads within a local authority area that have been "adopted" by the Council. The Council is the roads authority in relation to all roads it has adopted, and as such has a duty to manage and maintain the roads listed in its register.
3. The Council responded to this request in a letter dated 9 March 2005. This advised that the register and associated plans are contained within the Council's publication scheme and they are available for viewing. This letter did not refer to any exemption under FOISA, and did not point out the requester's right to request a review of the decision not to provide a copy of the register as requested.
4. The Council's publication scheme can be viewed online here: <http://www.inverclyde.gov.uk/documents/PublicationScheme.pdf>. It includes the register and associated plans on page 18 of the document, within the registers and plans class. At the time of Millar and Bryce's request, the publication scheme stated that these documents were available only for inspection.
5. Macroberts, acting on behalf of Millar and Bryce Limited, sought a review of the Council's decision in a letter dated 22 March 2005. The review was sought on the basis that the suggestion that the register is available for inspection is not compliant with the obligations of accessibility contained within FOISA. Therefore, a paper copy was sought once again.



6. Macroberts received the Council's (undated) response to its request for review on 23 May 2005. The Council upheld the decision not to provide a copy of the register, noting that the request had been refused under section 25 of FOISA. It commented that the register is available through the Council's publication scheme and so is exempt information.
7. Macroberts wrote seeking a decision from me on whether the Council had acted in accordance with Part 1 of FOISA. The application, dated 25 May 2005, was received on 26 May 2005. It stated that Macroberts believe that the section 25 exemption does not relate to the matters referred to, and that the suggestion that the register can only be viewed is not compliant with the obligations of accessibility contained within FOISA. The application also highlighted my own decision 001/2005 in support of its case.
8. This case was allocated to an Investigating Officer within my Office.

Investigation

9. Macroberts' application was validated by establishing that a request had been made to a Scottish public authority and had been appealed to the Commissioner only after requesting that the authority review its decision.
10. By this time, three other applications for decision by me had been made in relation to requests made by Millar and Bryce Limited for access to roads registers held by local authorities. An initial investigation was already ongoing in these cases to establish whether the register should be considered to contain environmental information. If roads registers contain environmental information, the four investigations would need to be conducted under the terms of the Environmental Information (Scotland) Regulations 2004 (EIRs) rather than FOISA.
11. The full commencement of the new investigation into Inverclyde Council's response to Millar and Bryce's request was postponed until I had reached a decision on this matter. However, following consideration of the comments made by the parties to the other three cases and relevant case law, I asked the Investigating Officer to investigate all of the applications relating to roads registers under FOISA.



12. The Investigating Officer wrote to the Council on 12 July 2005, to confirm that a full investigation would now be conducted under FOISA. The Council was invited to comment on the case under section 49(3) of FOISA. It was asked to provide information about the format in which the register was held, and the practicalities and costs that would be involved if it were to produce a copy of the register. The Council was also asked to provide copies of its procedures for responding to requests for information, and requests for review under FOISA, and an explanation for the delay in responding to the request for review in this case.
13. The Council's reply to this letter was received on 25 July 2005.

The Council's submission – technical failures

14. The Council confirmed that the request for review from Macroberts had been received by the Council's Roads and Transportation Service on 22 March 2005, and passed onto the Managing Solicitor for attention. Due to an oversight and human error, it was then not passed to the Head of Legal Services to conduct the review until 20 May 2005. The response was then issued to Macroberts on the same day.
15. This response was therefore provided 42 working days after the request for review was received, considerably outwith the 20 working day period within which section 21 of FOISA requires an authority to conduct a review.
16. The Council confirmed that this was an error that would not be expected to be repeated now that additional resources were available for dealing with requests under FOISA, and a Freedom of Information Officer has been recruited. I understand that this Officer has recently updated the Council's procedures for handling requests under FOISA in the light of experience to date, and to address shortcomings identified through the internal review process.
17. The Council also confirmed that the initial refusal issued to Millar and Bryce Limited by its Roads and Transportation Service did not fulfil the requirements of a refusal notice under FOISA. This letter did not set out which exemption was being relied upon when refusing the request for a copy of the register (as required by section 16 of FOISA) and it did not point out the right to request a review of the decision and to apply to me for a decision (as required by section 19 of FOISA). Although the guidance issued to Council staff had made clear that such information should be provided, this was not followed in this case. However, the Council noted that procedures have since been tightened within this Service to ensure compliance with FOISA.



The Council's submission – section 25

18. The Council noted the contents of section 25 of FOISA, which states:

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

(2) For the purposes of subsection (1), information-

(a) may be reasonably obtainable even if payment is required for access to it;

(b) is to be taken to be reasonably obtainable if-

(i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

(ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

19. The Council observed that section 25 created an absolute exemption where information is otherwise accessible. Information made available under the terms of an authority's publication scheme is specifically defined (in section 25(3)) as being 'reasonably obtainable'.
20. The Council also noted that it did not consider the decision referred to by the applicant (001/2005 - Mr L and the Lothian and Borders Safety Camera Partnership) to be relevant to this case.



The Commissioner's analysis and findings

21. The main question for me to address in this case is whether the fact that access to the register was made available in line with the Council's publication scheme is sufficient to make the information exempt under section 25 of FOISA. However, I will first comment briefly on the technical aspects of this case.

Technical breaches of the Act

22. I conclude that, as the Council acknowledged, there were failings in its responses to the request for information and then the request for review made by Macroberts and their clients.
23. When refusing any request for information under FOISA, a formal notice must be issued stating the reasons for this. Section 16 requires that the exemption that applies to the information must be cited. Section 19 requires that the requestor should be alerted to their right to request a review of the decision and to their rights to apply to me for a decision. The Council's letter of 9 March did none of these things.
24. When a request for review is received by an authority, section 21(1) of FOISA requires that a review be conducted promptly, and no later than the twentieth working day after receipt. The 42 working days taken in this case is therefore an unacceptable delay.
25. The Council has acknowledged both of these failures and has assured me that steps have been taken to tighten procedures and ensure future compliance. I am satisfied that the Council's procedures (copies of which were provided to me) are adequate, if followed, to ensure compliance with FOISA and that the Council has taken appropriate steps to avoid similar errors in future. I will require no further action to be taken in relation to this breach of FOISA.

Is the register exempt information under Section 25 of FOISA?

26. Section 23 of FOISA requires each public authority, as defined by FOISA, to adopt and maintain a publication scheme, approved by me. The purpose of this scheme is to provide access to information that an authority readily makes available, without an applicant having to go through the formal request process within FOISA.
27. Each publication scheme sets out the classes of information that are published by the authority, and, for each class, details the manner in which the information is made available, and whether or not a charge will apply.



28. Section 25(3) of FOISA creates the presumption that where information is made available in accordance with an authority's publication scheme, it is reasonably accessible, and so subject to an absolute exemption from release under the terms set out in Part 1 of FOISA. Instead, the information should be made available under the terms set out in the publication scheme.
29. In this case, I am satisfied that Macroberts' clients were offered access to the scheme in line with the terms set out in the publication scheme (detailed in paragraph 4 above). The register is therefore exempt from release by virtue of section 25 of FOISA. This means that the Council was not required to provide the information in the form the applicant requested, and its response in this case was compliant with the requirements of Part 1 of FOISA.

Access to information for inspection only

30. Although I have found that the Council has acted in accordance with FOISA in this case, I wish to comment further on some of the issues this investigation has raised, and the steps that have been taken to address these.
31. The Council's publication scheme was approved on my behalf on 26 May 2004. A revised version was approved on 2 September 2005. Both of these versions of the scheme made clear that the register was available by inspection only.
32. Section 25(3) of FOISA states that where information is made available in accordance with a publication scheme, it will be absolutely exempt from the wider provisions relating to requests for information made under section 1(1).
33. However, the provision in section 25(2)(b) of FOISA suggests that documents available for inspection only were not intended to be considered reasonably accessible as a matter of course, even where those documents are required to be made available for inspection by or under any enactment. Section 25(2)(b) states that information will be considered reasonably obtainable where the public authority that holds it is required to communicate it to members of the public **otherwise than making it accessible by inspection**. The Roads (Scotland) Act 1984 requires each local authority to make its register available for inspection. However, given the provisions of section 25(2)(b), fulfilment of this requirement would not be sufficient to make it reasonably accessible for the purposes of FOISA. It is the inclusion within the approved publication scheme that has made it such.
34. The purpose of publication schemes produced under section 23 of FOISA is to make information held by Scottish public authorities freely available. I consider making information available on an inspection only basis is overly restrictive, since it makes access difficult for those who live or work outside the immediate area, or who are unable to attend an authority's premises during opening hours.



35. In my *Guide to publication schemes under the Freedom of Information (Scotland) Act*, I included my views on access by inspection only:

“There is no definition of “to publish” in the Act. The Commissioner considers that the phrase means to make information publicly available and does not believe that publication is limited to producing items in bound or printed form. Within a publication scheme, information may be available in hard copy and on the Internet, whereas other information may only be available on CD-ROM. **There may be very exceptional cases where material which is only available upon inspection at a specified place can be considered to be published because, for example, the material is too costly to produce in a hard copy or electronic format. These cases are likely to be rare.**”

(Paragraph 4.6 –see: www.itspublicknowledge.info/Documents/psg.doc)

36. Notwithstanding this guidance, publication schemes have been submitted and approved which contain information available only by inspection, and for which it has not been demonstrated that the information could not be made available in any other form.
37. In this particular case the information provided to me in the course of the investigation made clear that the Council could relatively easily produce printed or electronic copies of its register on request. The register is maintained in printed and electronic form (the latter in a Microsoft Access database). A copy of the database was provided to me on CD Rom. The paper record consists 121 A4 pages.
38. The Council estimates the cost of reproducing the printed register at £40. Had the Council made provision for paper versions of its register to be made available through its publication scheme, it would have been able to charge for the provision of paper copies, whilst still making the actual register available for inspection at no cost.
39. Given the ease with which copies of the register might have been made available through the Council’s scheme, it is clear that it should not have been included within the scheme for inspection only in the light of my guidance cited above.
40. On 5 September 2005, the Council was alerted to my concern at this finding and was asked to consider revising its publication scheme to make the register more widely available. The Council was also advised to consider reviewing any other documents that are currently available only for inspection to ensure that only those for which there is a good reason for this status remain.



41. The Council submitted an amended version of its publication scheme, which offers copies of the register, on 6 September 2005. This amendment was approved on the same date. This means that the access restrictions found in this case are no longer in place. I also understand that the Council's Freedom of Information Officer is reviewing other documents included within the publication scheme only for inspection to see if further amendments can be made to widen access to these.
42. I welcome the Council's prompt and positive action in response to my concerns in this case.

Decision

I find that the Council acted in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 in applying the exemption in section 25 and refusing to provide a copy of the register of public roads to the applicant.

I find that the Council breached the provisions of Part 1 the Freedom of Information (Scotland) Act 2002 (FOISA) as set out in paragraphs 23 and 24 above by failing to provide a refusal notice as required by sections 16 and 19. It also breached the requirements of section 21 of FOISA by failing to conduct a review of its decision within 20 working days of the receipt of a request for review. However, given the steps which the Council has since taken to improve its handling of requests under FOISA, I do not require it to take any remedial steps under section 49(6)(b).

Kevin Dunion
Scottish Information Commissioner
26 September 2005