

Decision Notice



Decision 070/2012 James Campbell Architects & Environmental Consultants
and the University of Aberdeen

Information related to a Teaching Company Scheme and SMART Application

Reference No: 201101184
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Margaret Keyse

Acting Scottish Information Commissioner

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Summary

James Campbell Architects & Environmental Consultants (Mr Campbell) made nine requests to the University of Aberdeen (the University) for information related to a Teaching Company Scheme and SMART Application

The University responded by providing information in respect of some of his requests, stating that the information pertaining to his first request was owned by a private company and not by the University, and stating that it did not hold any information in respect of the remainder of his requests, in terms of section 17(1) of FOISA. Following a review, Mr Campbell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which Mr Campbell confirmed that he already had the information he was seeking in his first request (and the University subsequently claimed this information to be exempt in terms of section 25(1) of FOISA), the Commissioner found that the information requested was either not held, in terms of section 17(1) of FOISA, or exempt in terms of section 25(1) of FOISA in that it was otherwise reasonably obtainable by the applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and 2(a) (Effect of exemptions); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible)

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.

All references in this decision to “the Commissioner” are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



Background

1. The background to these requests stretches back to a period several years ago, when Mr Campbell's architects' practice was involved in a joint working project with the University on a Teaching Company Scheme (TCS) Programme, a publicly funded research programme, and on the putting together of a SMART Application for related funding, both in respect of an invention of an air-permeable cladding. Mr Campbell's practice subsequently withdrew from the joint project, and at that point a laptop containing project materials was taken from his practice and returned to the University. Intellectual property rights to the project information were assigned from the University to a private spin off company (company X) on 12 November 2008.
2. On 21 April 2011, Mr Campbell wrote to the University and made the following requests:

TCS Programme 3594

- (1) *What information was on the laptop used by [named individual 1] for the TCS Programme No 3594 between the University of Aberdeen and James Campbell Architects & Environmental removed from James Campbell's practice office on 10 March 2003 by [named individual 1] and handed back to the University? Please supply me with the details of all of the information on the laptop at the time of its return to the university.*
- (2) *Did the University retain any of the information, programmes, presentations and records on that laptop upon its return? If so, please list where this information is now held, who has access to it and how this information has been used by a) the university b) any individuals. If any of the information has been destroyed, please outline which information was destroyed and when.*
- (3) *Is any of the information in question retained on any backup or archive systems? If so, who has accessed this information and when.*
- (4) *Was any information from the laptop (as above) copied to or provided to anybody on CD or on any other laptop/computer or on any other portable media? If so, what use was made of that information and by whom?*

SMART Application

- (5) *In respect of the jointly prepared SMART application dated 10/11 January 2002 between James Campbell and [named individual 2] please supply me with information as to how the content of the application was used by the University? In particular, please confirm whether it was used by any employees of the University and whether any of the information in the application was copied to or provided to anybody else? If so, what use has been made/is now being made of that information?*
- (6) *In respect of the above matters, what information did [named individual 2] have/obtain and what information did [named individual 1] have/obtain?*
- (7) *Please provide me with the [University's] guidelines/policies for its employees and its students when working under the TCS and SMART application schemes relating to*



confidentiality of information, data protection and intellectual property rights. When doing so, please ensure you provide me with the policies/guidelines which were in place circa 1 November 2000 to 31 Dec 2003. Please also confirm whether any third parties are covered by these guidelines/policies in respect of the TCS and SMART application schemes.

(8) Has the University conducted any disciplinary or conduct related investigations into any of its employees or students who were working under the SMART application or Teaching Company Scheme (TCS) programmes during the period 1 Nov 2000 to 31 Dec 2003? If so please state how many investigations with dates and outcomes.

(9) Has the university been requested to carry out any investigation by any party at any time on these programmes and if so for what reason?

3. The University responded on 24 May 2011, providing information in respect of requests (2), (3), (4), (7), (8) and (9) and advising, in line with section 17 of FOISA, that it did not hold information which would answer requests (5) and (6). In respect of request (1), the University stated that it no longer held the information which was on the laptop, and that it was owned by company X, commenting that the University had, with the agreement of company X, already provided Mr Campbell with some of the information on 30 October 2009. The University advised him that the laptop had been disposed of as obsolete in 2008, and that the information had been retained in a back-up file.
4. On 31 May 2011, Mr Campbell wrote to the University requesting a review of its decision. In respect of request (1), Mr Campbell reiterated that he wished the University to provide him with the remainder of the information from the laptop (i.e. the information which he had not been provided with on 30 October 2009). In respect of requests (2) and (3), Mr Campbell stated that the University had not made it clear whether anyone had accessed the laptop from 2003 until its disposal. In respect of requests (5) and (6), Mr Campbell stated that he did not believe that the University did not hold information which would address these requests.
5. The University notified Mr Campbell of the outcome of its review on 24 June 2011, and upheld its initial decision.
6. On 30 June 2011, Mr Campbell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University'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 Campbell had made requests 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 those requests.



Investigation

8. On 8 July 2011, the University was notified in writing that an application had been received from Mr Campbell. The University was asked to provide the Commissioner with any information it was withholding from Mr Campbell and the University responded by providing the contents of the laptop in CD format.
9. The University was subsequently given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the University was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The University was also asked to provide some clarification in respect of its responses to requests (1), (2), (3), (5) and (6).
10. During subsequent correspondence between the University and the investigating officer:
 - in respect of request (1), the University reiterated that it had previously provided some of the information on the laptop to Mr Campbell, but that the information was owned by company X. The University stated that it could not disclose any further information as it did not have permission from company X to do so
 - in respect of requests (2) and (3), the University clarified that its response of 24 May 2011 to Mr Campbell was intended to be interpreted as confirming that no-one from the University had accessed the information contained on the laptop, except for when it had been used to provide Mr Campbell with some of the information on 30 October 2009
 - in respect of requests (5) and (6), the University, after providing details of the searches it had carried out, and carrying out further searches at the behest of the investigating officer, confirmed that it held no recorded information which would address these requests
11. On examining the content of CDs provided by the University, the investigating officer was unable to access some of the information on the CDs, due to its being held in certain file types, for which the Commissioner's office did not have the appropriate software to open. Mr Campbell was advised that this was the case, and it then became apparent that Mr Campbell held a copy of the information from the laptop other than that which had been provided to him by the University on 30 October 2009. The investigating officer asked Mr Campbell to provide her with a copy of this, and he sent her the information in CD format.
12. After technical advice and assistance from the University's computing department, and on comparing the listed information from the CD provided by Mr Campbell to that provided by the University, the investigating officer concluded that the information was the same. On being advised of this, Mr Campbell stated that he had retained a copy of the content of the laptop before it was removed from his office, but emphasised that it was not actually the information itself that he was seeking, rather conclusive proof that the laptop had been confiscated. He stated that, if the information was provided to him by the University, he would be able to prove that the information was held by University and by named individuals 1 and 2.



13. In the light of the fact that Mr Campbell was requesting information which he already held, the University advised the investigating officer that it wished to cite the exemption at section 25 of FOISA in respect of Mr Campbell's request (1), as the information was otherwise accessible to him other than by his requesting it under FOISA.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Campbell and the University, and is satisfied that no matter of relevance has been overlooked.

Requests (2), (3), (4), (7), (8) and (9)

15. In respect of requests (2), (3) and (4), the University advised Mr Campbell that it had held a copy of the information from the laptop on a back-up file (explaining that the laptop itself was disposed of as obsolete in 2008), and that the back-up file held by the University had not been used or accessed by the University or by any other individuals. The University also advised Mr Campbell that no one had accessed the back-up file since a disc was supplied to him on 30 October 2009. The Commissioner accepts, however, that this part of the response was somewhat confusing, in that it did not clearly state whether the information on the laptop had been accessed between 2003 (when the laptop was taken from Mr Campbell's office) and 2008 (when the back-up file was made).
16. On being asked by the investigating officer to clarify this point, the University stated that nobody else had been given access to, or a copy of, the information on the laptop itself, nor had any use been made of, or access been given to, the information held on the University's copy of the back-up file by anyone at any time apart from on 30 October 2009 when the information had been accessed to make a CD containing some of the information for Mr Campbell. The Commissioner considers that the University could have explained this to Mr Campbell more clearly in its initial response; however, she does not require the University to take any further action on this point.
17. In respect of requests (7), (8) and (9), the Commissioner notes that the University disclosed information to Mr Campbell in relation to these requests and that Mr Campbell did not make specific review requests on the basis of the information provided. The Commissioner also notes that Mr Campbell raised new issues which he linked to the University's responses to his requests (7), (8) and (9). (Mr Campbell believes that information on the laptop has been used in some way to the detriment of his architects' practice and that he (Mr Campbell) has evidence of this. However, it is outwith the remit of the Commissioner to investigate intellectual property issues of the type raised by Mr Campbell.)



18. The Commissioner is satisfied, on balance of probabilities, that the University provided Mr Campbell with all the recorded information it holds in relation to requests (2), (3), (4), (7), (8) and (9). She has been presented with no evidence to contradict the University's declaration that the information on the laptop was not accessed or used by anyone else before the rights to the information were assigned from the University to company X on 12 November 2008, or that nobody accessed the University's copy of the back-up file except for when a CD was made for Mr Campbell on 30 October 2009. She accepts the University's assertion that it has no information regarding what use may have been made of the information after the rights to the information were assigned to company X on 12 November 2008.
19. The Commissioner therefore finds that the University provided Mr Campbell with all of the information it held within the scope of requests (2), (3), (4), (7), (8) and (9), and that it does not (and did not at the time it received the requests) hold any further information falling within the scope of those requests.

Request (1) – section 25 of FOISA

20. During the investigation, the University submitted that the information it held in relation to request (1) was exempt under section 25(1) of FOISA.
21. Under section 25(1), information which an applicant (in this case, Mr Campbell) can reasonably obtain other than by requesting under section 1(1) of FOISA is exempt from disclosure. The exemption is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
22. The Commissioner notes that Mr Campbell provided the investigating officer with a CD containing the same information as that provided by the University. She also notes Mr Campbell's comment that he retained a copy of the contents of the laptop before it was removed from his office. As such, the Commissioner is satisfied that Mr Campbell was in possession of the information he requested from the University at the time the request was made.
23. Consequently, the Commissioner is satisfied that the information in request (1) is exempt under section 25(1) of FOISA on the basis that it could reasonably be obtained by Mr Campbell other than by requesting it under section 1(1) of FOISA.
24. The Commissioner notes Mr Campbell's reasons for making the request (as outlined in paragraph 12 above), but is unable to take these into account in coming to a determination as to whether section 25(1) applies.

Requests (5) and (6) – section 17 of FOISA

25. 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.



26. In response to requests (5) and (6), the University notified Mr Campbell that it was not aware how the information in the SMART Application was used, nor was it aware of any of the information in the Application being used by anyone or to what use the information was now being put. The Commissioner has interpreted this as the University's stating that it does not hold any recorded information on what use was or is being made of the information in the SMART Application.
27. In order to determine whether the University dealt with these requests correctly, the Commissioner must be satisfied as to whether, at the time it received the requests, the Council held any recorded information which would fall within the scope of the requests.
28. Mr Campbell disputed that the University did not know what information was held by named individuals 1 and 2 or provided by them to company X. Mr Campbell stated that named individual 2 was, at the time of his request, still employed by the University in addition to having a role in company X.
29. The University was asked to carry out further searches to ascertain whether it held any recorded information falling within the scope of requests (5) and (6) and to provide a detailed breakdown of all the searches it carried out of both electronic and hard copy documents.
30. The University asserted that only named individual 2, as an employee of the University and on behalf of company X, had accessed the information in putting together the SMART Application.
31. The University also provided the Commissioner with a timeline document which detailed events surrounding the submission of the SMART Application and other events relevant to the potential use of the information within the SMART Application. The University stated that various academics had researched all their e-copy files and hard copy files for the timeline to be put together. In respect of request (6), the University advised the Commissioner that the searches did not locate any recorded information indicating that any information from the SMART Application had been sent from the University to company X.
32. In respect of request (5), the University advised the Commissioner that, to the best of its knowledge, information from the SMART Application had only been used by the University in order to (i) progress the Application itself, (ii) finalise a patent filing (iii) reach a License agreement with company X, (iv) assign the Licence to company X, (v) defend a patent action and (vi) pursue a case in the Sheriff Court.
33. However, FOISA only gives applicants the right to receive *recorded* information, which does not include recollections made by individuals as to what particular information may have been used for. In the light of this, the investigating officer asked the University whether it held any recorded information which would list what use was made of the information in the SMART Application and, if so, to provide such information to her.
34. The University advised that it does not (and did not at the time of the requests), hold any recorded information outlining how the content of the SMART application was used, or which members of staff accessed the content of the SMART Application.

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35. In reaching a decision as to whether the University holds information in respect of requests (5) and (6), the Commissioner has taken into account the extent of the searches carried out by the University and the amount of work and thoroughness which went in to its putting together the timeline document provided to her. The Commissioner also acknowledges the University's attempts to assist matters by providing the Commissioner with what it deems its best recollections of what use the information in the SMART Application may have been put to.
36. The Commissioner accepts that Mr Campbell may be looking for the University to provide him with answers to the points he raised in requests (5) and (6) on the basis of what he (Mr Campbell) feels that University staff should know or should be able to recollect. However, FOISA only requires public authorities to disclose the recorded information which they hold; authorities are not required to create new information from the recollection of public authority staff.
37. The Commissioner finds, on balance, that the University does not hold, and did not hold at the time of Mr Campbell's requests, recorded information falling within the scope of requests (5) and (6).
38. The Commissioner therefore finds that the University was entitled to give Mr Campbell a notice under section 17(1) of FOISA, to the effect that it held no recorded information which fell within the scope of requests (5) and (6).

DECISION

The Commissioner finds that the University of Aberdeen complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Mr Campbell.

Appeal

Should either Mr Campbell or the University of Aberdeen 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
Acting Scottish Information Commissioner
13 April 2012



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.
...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
...



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.

...

25 Information otherwise accessible

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

...