

Decision Notice



Decision 130/2011 Dawn Developments Limited and South Lanarkshire Council

Instruction of retail capacity and impact assessment

Reference No: 201100542
Decision Date: 4 July 2011

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Summary

Dawn Developments Limited requested from South Lanarkshire Council (the Council) information about the instruction of Roderick Maclean Associates Limited (RMA) in the preparation of a retail capacity and cumulative impact assessment in relation to a retail proposal at West Mains Road, East Kilbride. The Council provided some information, but withheld other information under various provisions in FOISA. Following a review, as a result of which the Council advised that certain information was not held, Dawn Developments Limited remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Dawn Developments Limited's request for information in accordance with Part 1 of FOISA. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is 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 16 December 2010, solicitors acting on behalf of Dawn Developments Limited wrote to the Council requesting the following:

“All information held by you including communications which have taken place both between members and employees of the Council and Roderick Maclean Associates Limited and internal communications within the Council relating to the instruction of Roderick Maclean Associates Limited in the preparation of a retail capacity and cumulative impact assessment in relation to the retail proposal at West Mains Road, East Kilbride. In particular all information relating to the timing of that instruction, the reasons for the instruction and the scope of the instruction; and any information ancillary to any of the above.”



2. Subsequent references to correspondence to and from Dawn Developments Limited should be read as including correspondence to and from the company's solicitors on its behalf.
3. The Council responded on 21 January 2011 and provided:
 - a. Emails of 9 November 2010 [11:59 and 13:03] and 17 January 2011 [17:14];
 - b. Report on quotations;
 - c. Request for authority to approach a single consultant where costs below £50,000; and
 - d. Letter of appointment to RMA dated 9 November 2010.
4. The Council redacted information under various provisions in FOISA. It also relied on the exemption in section 25 of FOISA for information in a committee report, which was available on its website, providing instructions as to where this might be found. Finally, the Council stated that it held no ancillary information.
5. On 16 February 2011, Dawn Developments Limited wrote to the Council requesting a review of its decision. In particular, Dawn Developments Limited noted that it had specifically requested the scope of the instruction to RMA, which it did not consider had been provided. It drew the Council's attention to the email of 9 November 2010 [11:59], which had referred to RMA's appointment "in accordance with the points below". Dawn Developments Limited understood these points to set out the scope of the relevant instruction, but they had not been provided: the Council was asked to provide them now.
6. The Council notified Dawn Developments Limited of the outcome of its review on 10 March 2011, explaining that it had examined the email of 9 November 2010 [11:59] and found that it did not in fact contain any bullet points. The Council explained that this discrepancy was a mistake and the reference to "points below" should have referred to the points agreed at the meeting (also referred to in the email) held to discuss the appointment. It stated that it had been able to locate no minutes or other recorded information relating to the scope of the instructions.
7. On 23 March 2011, Dawn Developments Limited wrote to the Commissioner, stating that it 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.
8. The application was validated by establishing that Dawn Developments Limited 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. The case was then allocated to an investigating officer.



Investigation

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. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, and in particular to explain the steps it had taken to establish what relevant information it held.
10. The submissions received from both the Council and Dawn Developments Limited, insofar as relevant, 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 the submissions made to him by both Dawn Developments Limited and the Council and is satisfied that no matter of relevance has been overlooked.

Scope of application

12. Having considered both Dawn Developments Limited's request for review and its subsequent application to the Commissioner, the Commissioner takes the view that he is being asked to make a decision on the Council's failure to provide information on the scope of RMA's instruction. None of the information withheld from Dawn Developments Limited relates to the scope of the instruction and therefore this withheld information will not be considered further by the Commissioner, except to the extent necessary to establish whether the Council held any further information on the scope of the instruction (for this purpose, the Commissioner has had the opportunity of considering full versions of all the redacted documents).
13. In responding to Dawn Developments Limited's request for review, the Council stated that it held no minutes or other recorded information relating to the scope of the instruction.

Section 17 – Notice that information is not held

14. Section 17(1) of FOISA states that, where a Scottish public authority receives a request for information which it does not hold, it must give the applicant notice in writing that it does not hold the information. In terms of section 1(4), the information an authority is required to provide in response to a request is generally that held by it at the time the request is received (see the Appendix for the full text of the subsection).



15. The standard of proof to apply in determining whether a public authority holds the requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any other reason offered by the public authority to explain why the information is not held.
16. In this connection, the Commissioner will first of all address one point made by the Council in the course of the investigation. It was suggested to the Council that it might be considered surprising that the appointment of RMA would have been made on the basis of such limited information as appeared to be available on the scope of that appointment. On that basis, the Council was asked to conduct further searches. The Council expressed concern that this line of enquiry could be interpreted as asking why it did not hold the requested information. It noted previous decisions which made clear that it was not the Commissioner's role to determine whether the Council *should* hold the information requested by an applicant (as opposed to whether it *did* hold that information).
17. The Commissioner acknowledges that it is not generally his role to determine what information a Scottish public authority should hold. Clearly, he cannot require an authority to create information which it does not hold. He does not accept that it follows, however, that he is restricted from enquiring as to what information should be held (and, where applicable, why it is not held). This may be an entirely reasonable line of enquiry, particularly where he is presented with cogent arguments as to why particular information should be held, or where a reasonably informed person might expect an organisation in the authority's position to hold the information, or where a legal obligation or established good practice creates such an expectation. Relevant information may have been held at some time, while no longer being held at the time the request is received: on this and other aspects of good records management practice, it may be entirely appropriate to enquire (and, where necessary, comment), in line with the provisions of the Code of Practice issued by the Scottish Ministers under section 61 of FOISA. Ultimately, the Commissioner must exercise his investigatory functions diligently and must be allowed a reasonable degree of discretion in determining what is relevant in this connection.
18. During the Commissioner's investigation, the Council was asked to explain how it had established what information it held which fell within the scope of the request, to undertake further searches and to provide the Commissioner with details of those searches and their outcomes.
19. The Council explained initially that, as the requested information related to a planning application, all relevant planning application records had been searched, both hard copy and electronic. Searches had included its electronic records management and email systems. It considered that any information relating to the planning application would be held on file. It also advised as to which staff, all within its planning service, had been consulted in connection with the request and application.
20. Given that the request relates to the preparation of a retail capacity and cumulative impact assessment in relation to a specific retail proposal, the Commissioner accepts that the Council's initial searches and other enquiries were conducted in the appropriate places.



21. The Council also provided the Commissioner with details of the searches it had undertaken in the course of the investigation. It had searched both electronic and paper records but had not identified any additional information relative to the request. Specifically, it had searched the email systems of the relevant planning officer and of the Head of Planning and Building Standards. The Council explained that it had searched the *Inboxes*, *Sent Items* and archives in the relevant email systems, using the following parameters: the period June 2010 to January 2011, with the search term "Roderick".
22. The Council had also searched the Word documents within its Enterprise Resources systems, using the same search term as above. Neither this nor the email search referred to in the preceding paragraph had identified any additional information.
23. In addition, the Council had searched its paper files, but could not identify any further information. It therefore confirmed its contention that the information contained within the report was the only record of the scope of the instruction.
24. The investigating officer also made more specific enquiries in relation to certain references in the correspondence provided to the applicant, largely taking up points raised by the applicant. Regarding a meeting between the Council and RMA referred to in the Council's email to RMA dated 9 November 2010 [11:59], the Council confirmed that this meeting (at which the terms of RMA's appointment had been discussed) had taken place, but that it held no further recorded information in relation to it.
25. The Council was also asked about a memo (presumably from the Council to RMA) referred to in RMA's email to the Council dated 9 November 2010 [13:03]. It did not consider this to have been covered in Dawn Developments Limited's requirement for review, but in any event it took the view that as it was not responsible for the wording in the email it would be inappropriate for it to speculate on the meaning of the reference. However, to assist, the Council had contacted the author of the email, who had confirmed that the reference was to the email dated 9 November 2010 [11:59] from the Council.
26. Finally, the Council was asked to respond to comment on the apparent impression given in the email of 9 November 2010 [11:59] that there were bullet points in the email which might be expected to relate to the terms of the instruction. The Council maintained that there were no bullet points and provided an unredacted copy of the email to the Commissioner to evidence this. Having consulted the relevant officers, it explained that the wording had been an unfortunate mistake: this, the Council stated, was reflected in the outcome of its review.
27. Having considered all relevant submissions he has received from the Council, the Commissioner is satisfied that it took adequate steps to determine whether it held the information requested by Dawn Developments Limited and forming the subject matter of its application to the Commissioner.



28. In particular, having viewed the unredacted email of 9 November 2010 [11:59], and taken account of the Council's submissions, the Commissioner accepts that this email does not contain (and has never contained) any further information relating to the scope of the instruction, for example in the form of the bullet points to which it appears to refer. The reference to these points would appear to have been a mistake, as the Council indicated in the review outcome. Similarly, he has considered the submissions received on the reference to a memo in the email of 9 November 2010 [13:03], which he accepts as entirely credible in the circumstances: on the face of it, the email appears to respond to the Council's email sent at 11:59 on the same day and the Commissioner considers it reasonable to interpret the reference to a memo (rather than an email) as simply another mistake. Incidentally, given the scope of the requirement for review and application to the Commissioner as outlined in paragraph 12 above, it appears unduly restrictive to regard the reference to the memo as outwith the scope of that requirement.
29. In all the circumstances of this case, therefore, the Commissioner accepts that the Council holds (and held, at the time it received the applicant's request) no further recorded information falling within the scope of the request made on behalf of Dawn Developments Limited on 16 December 2010, in addition to that already supplied (subject to redaction) to the applicant or withheld under section 25 of FOISA. Consequently, having considered the information held and all relevant submissions, he is satisfied that the Council held no further information relating to RMA's instruction.

DECISION

The Commissioner finds that South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dawn Developments Limited.



Appeal

Should either Dawn Developments Limited or South Lanarkshire 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
4 July 2011



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.

...