



Scottish Information  
Commissioner

**Decision 011/2005- Mr Barlow and Argyll and Bute Council**

*Refusal to release copies of all communications and information held with regard to Site 2 "Cnoc-an-sgillin" created within the last three years.*

**Applicant: Mr Barlow**  
**Authority: Argyll and Bute Council**  
**Case No: 200500842**  
**Decision Date: 13 July 2005**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Facts**

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Mr Barlow asked Argyll and Bute Council for copies of all of the records of communications, e-mails, letters, photographs and memos with regard to Site 2 Cnoc-an-sgillin created within the last three years. Argyll and Bute Council released the information to Mr Barlow during the course of the Commissioner's investigation, but Mr Barlow has requested that the Commissioner investigate the way in which Argyll and Bute Council responded to his request for information.

## **Outcome**

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The Commissioner found that Argyll and Bute Council ("the Council") did not deal with Mr Barlow's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council should put in place procedures to conform with the provisions of FOISA particularly in respect to sections 1, 10, 15, 16, 19 and 21, and with paragraphs 3, 6 and 63-71 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002.

## **Appeal**

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Should either the Council or Mr Barlow 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 of receipt of this notice.



## Background

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1. On 29 January 2005, Mr Barlow e-mailed the Council, requesting that it provide him with copies of all of the records of communications, emails, letters, photographs and memos with regard to Site 2 Cnoc-an-sgillin created within the last three years.
2. On 31 January 2005, the Council responded to Mr Barlow by e-mail, providing him with photographs of the area.
3. On 1 February 2005, Mr Barlow responded to the Council's email, stating that he had not been provided with any other information regarding the photographs, and that he required further information regarding the photographs from the Council.
4. On 4 February 2005, the Council responded to Mr Barlow's second email, giving more details regarding the subject of the photographs, when they were taken and the circumstances under which they were taken.
5. On 6 March 2005, Mr Barlow applied to the Scottish Information Commissioner for a decision as to whether the Council had applied FOISA correctly in responding to Mr Barlow's request for information.
6. The case was allocated to an Investigating Officer within my Office.

## The Investigation

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7. Mr Barlow applied to me for a decision on 6 March 2005. He enclosed copies of his request, the Council's response, his request for a review, and the Council's second response.



8. I considered that the application was valid in terms of section 47 of FOISA. Mr Barlow had firstly made a request to the Council for the information and then asked the Council to review its decision not to release the information requested. Mr Barlow's second email did not specify that he required the Council to review decision, nor state the matter giving rise to his dissatisfaction with the Council's response, as is set out as a requirement for a valid request for review in section 20(3)(c) of FOISA. However, Mr Barlow had not been informed of his right to appeal by the Council. Paragraph 64 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities ("the Section 60 Code") makes it clear to public authorities that where an applicant has not been made aware of his or her rights to a review but nevertheless questions, in writing, the decision of an authority, the authority should treat the query as a formal request for a review. It is concluded that Mr Barlow had fulfilled these requirements, and therefore I consider his second email to the Council to be a valid request for review.
9. On 1 April 2005, I asked the Council to provide me with copies of the information which had originally been requested by Mr Barlow on 29 January 2005. I also asked for its comments on the case, as I am obliged to do in terms of section 49(3)(a) of FOISA, specifically regarding the manner in which the Council responded to Mr Barlow's request for information.
10. The Council replied to my letter on 5 April 2005, stating that it had not recognised Mr Barlow's request as one made under FOISA, and therefore had not carried out a review of the decision. It proposed to carry out an internal review of the way in which it responded to Mr Barlow's request for information. I agreed to this procedure being carried out retrospectively, and agreed not to come to a decision until the Council had completed its review.
11. The Council completed its internal review almost 2 months later, and sent the results to both Mr Barlow and the Investigating Officer on 24 May 2005. The Council found that it had not identified Mr Barlow's request for information as a request made under FOISA, and had therefore failed to respond to the request in line with FOISA. It overturned its original response and released copies of all of the records of communications, emails, letters, photographs and memos with regard to Site 2 Cnoc-an-sgillin created within the last three years to Mr Barlow.
12. The Council released copies of all emails that Mr Barlow had requested to the Investigating Officer on 7 June 2005. It released all other copies of the information which was held in hard formats to the Investigating Officer on 9 June 2005.



13. In some cases where an authority provides disputed information during the course of an investigation to an applicant, this may be done with a view to settling the case without a need for a decision notice to be published. However, Mr Barlow confirmed that he did not wish to withdraw his application to me, as he felt that all of the information that he had requested may not have been released to him and he was unhappy with the way in which his request had been handled by the Council.

## **The Commissioner's Analysis and Findings**

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14. The main issue in this investigation is whether the Council complied with FOISA in responding to Mr Barlow. There is also a supplementary issue surrounding whether the Council released all of the information it held as a result of the internal review it carried out during my investigation.

### **Was the information request valid?**

15. The Council originally responded to Mr Barlow's request on 31 January 2005, well within the timescales set out within FOISA. However, the response did not comply with the provisions of FOISA.
16. The Council stated in its letter to the Investigating Officer sent on 24 May 2004 that it did not recognise Mr Barlow's request as a valid request made under FOISA. Section 8 of FOISA sets out the following conditions for valid requests for recorded information made under FOISA. The request must:
  - be in writing or other recordable format;
  - state the name of the applicant and an address for correspondence and
  - describe the information requested.
17. Mr Barlow's request to the Council fulfilled all of these conditions. As a result, the request was a valid information request to which the rights of FOISA applied.
18. Mr Barlow stated in his application to me that he was unhappy with the way in which the Council had responded to his request for information. I find that the Council's response to Mr Barlow's request did not comply with the requirements for responding to information requests made under FOISA for the following reasons.



19. Mr Barlow was sent two photographs in response to his initial requests. No mention was made of whether any other information requested by Mr Barlow was held by the Council in this response. In failing to release all of the information that Mr Barlow had requested without explaining why it had not done so, the Council effectively withheld the information from Mr Barlow.
20. On receipt of a valid request for information, a public authority has three main options: release the information to the applicant; issue a formal notice to the applicant stating that the authority does not hold the information or issue a formal refusal notice to the applicant. I consider that the Council's email of 3 February 2005 did not comply with any of the options for response to applicants set out by FOISA. Sections 16 and 19 of FOISA clearly set out the information which must be included in a refusal notice in order for that notice to be valid. The notice must:
  - disclose that the public authority holds the information;
  - specify the exemption that applies to the information;
  - state why the exemption applies (including consideration of the public interest test, where relevant);
  - provide information about the applicant's right to request that the authority conduct a review of their decision, and
  - give information about the applicant's right to apply for a decision from the Commissioner.
21. I find that the Council failed to meet its obligations under FOISA in its initial response to Mr Barlow. However, I note that in the comments submitted to my Office, the Council has accepted that the initial failure to recognise Mr Barlow's request as a valid request made under FOISA meant that subsequently the request was not handled in accordance with the provisions of FOISA.

### **Review stage**

22. When Mr Barlow requested that the Council review his request for information, the Council responded providing him with details of the photographs that it had released as a result of his initial request. I find that this is not an adequate response to a request for review made to an authority for the following reason.



23. Section 21 of FOISA requires an authority to carry out a review in response to an applicant's request to do so. Following the review, the public authority must issue a written notice to the applicant, which must include details about the requester's right of application to me for decision and about the right to appeal against any decisions by me to the Court of Session. No review appears to have been carried out and this information was not included in the response sent to Mr Barlow. Again, I note that the Council has conceded that the case was not handled under FOISA during the stages of initial request and review as it had not designated the email from Mr Barlow as a valid request when it was first received by the Council.
24. I also note that the Council subsequently carried out a full review of their initial response to Mr Barlow during the course of my investigation, and as a result of its findings released the information that Mr Barlow requested in its entirety. Although the Council did carry out a retrospective review of its initial response to Mr Barlow, it should be noted that authorities are required by FOISA to carry out a satisfactory review before the case is referred to me for decision. Therefore the Council failed to comply with section 21 of FOISA in responding to Mr Barlow's request for information.

### **Information not held**

25. When asked if he wished to pursue settlement, Mr Barlow stated in his response that he did not believe that he had been given all of the information that the Council held with regards to his request. He went on to say that he felt that the Council had withheld the identity of the person who took the photographs that he had been supplied with as a result of his initial request. He also stated that the Council had not provided him with the name of the complainant who had originally pointed out site 2 Cnoc-an-sgillin to the Council. I find that the Council did comply with the FOISA in this case for the following reasons.
26. The Council responded to Mr Barlow in its email of 4 January 2005, saying that the photographs had been taken by a council officer. After having pursued this with the Council, I am satisfied that it does not hold recorded details of the identity of the person who took the photographs sent to Mr Barlow, and therefore it provided Mr Barlow with all of the recorded information that it held. I am also satisfied that the Council does not hold any recorded information relating to the identity of the complainant.



## Duty to advise and assist

27. All public authorities have an obligation under FOISA to advise and assist applicants in making information requests. This duty is set out in section 15 of FOISA. Paragraph 3 of the Section 60 Code states that staff of public authorities should be prepared to explain the key provisions of FOISA to those who may benefit from assistance. Paragraph 6 of the Section 60 Code goes on to state that where the authority has significantly departed from the approach to the provision of advice and assistance to the applicant, it may have failed in its obligation under section 15 of FOISA. I find that in this case the Council failed to recognise a request for recorded information which it held as a request made under FOISA. As a result it did not inform Mr Barlow of his rights under FOISA, and did not fully respond to his request for information, or to his subsequent request for review. Therefore, the Council failed in its duties both under the Section 60 Code and section 15 of FOISA.
28. However, I note that the Council recognises that its approach to this case has fallen short of what is required, that it did eventually provide the information to Mr Barlow in full and that I have been assured in the comments submitted to me that the relevant department of the Council has been reappraised of when requests for information should be identified as requests made under FOISA.

## Decision

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I find that the Council has not dealt with Mr Barlow's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council should put in place procedures to conform to sections 1, 10, 15, 16, 19 and 21 of FOISA, and with paragraphs 3, 6 and 63-71 of the Scottish Ministers' Code of Practice on the Discharge of Functions of Public Authorities under the Freedom of Information (Scotland) Act 2002. These processes must, through staff training and revisions to the Council's processes:

- ensure that a request for information is recognised as a request to be dealt with under FOISA;
- ensure that refusals conform with FOISA by stating that an exemption is being claimed, specifying the exemption and stating why the exemption applies (as required by section 16 of FOISA) and
- ensure that all applicants are informed of their rights of redress (as required by section 19 of FOISA).



I find that the Council did not carry out a review in terms of section 21(1) of FOISA and that its written notice to the applicant did not comply with the requirements as set out in section 21(10) of FOISA in that the notice did not contain particulars about the rights of application to the Commissioner and, subsequently, to the Court of Session.

The Council must take steps to put in place improvements with immediate effect. It should implement the necessary staff training and improvements no later than 3 months from the date of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**13 July 2005**