



Scottish Information  
Commissioner

<b>Decision 028/2006 Mr DH Telford on behalf of VB Contracts Ltd and East Lothian Council</b>
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<i>Request for rescue package information</i>
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**Applicant: Mr DH Telford**  
**Authority: East Lothian Council**  
**Case No: 200502018**  
**Decision Date: 20 February 2006**

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

Kinburn Castle  
Doubledykes Road  
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KY16 9DS



## Decision 028/2006 Mr DH Telford on behalf of VB Contracts Ltd and East Lothian Council

***Request for rescue package information – projected costs exceed £600 – no obligation to comply with request – section 12(1) of FOISA and the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 applied***

### Facts

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Mr Telford, on behalf of VB Contracts Ltd, requested all information in respect of the rescue package between East Lothian Council (the Council) and Innovate East Lothian Ltd following the bankruptcy of Ballast Plc. The Council did not respond to this request for information and, following the expiry of 20 working days, Mr Telford made a request for review. The Council responded to the request for review and advised that the cost of supplying the information requested would exceed £600. The Council asked Mr Telford to clarify his request or be more specific. Mr Telford declined to do so and applied to the Commissioner for a decision.

### Outcome

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The Commissioner found that the Council had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to provide information to Mr Telford on the basis that the projected costs were in excess of £600 in accordance with section 12(1) of FOISA and the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.

The Commissioner found that the Council had partially failed to comply with Part 1 of FOISA by failing to respond to Mr Telford's request for information within 20 working days as required by section 10(1) of FOISA and by failing to respond to Mr Telford's request for review within 20 working days as required by section 21(1) of FOISA.



## Appeal

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Should either the Council or Mr Telford wish to appeal against this decision, there is a right to 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 15 February 2005, Mr Telford on behalf of VB Contracts Ltd, requested the following information from the Council pertaining to the East Lothian Schools and Leisure PPP Project:
  - All information in respect of the rescue package between East Lothian Council and Innovate East Lothian Ltd following the bankruptcy of Ballast PLC.
2. This request was one of four made by Mr Telford. Only this request, however, is the subject of Mr Telford's application to me.
3. The Council did not respond to Mr Telford's request within 20 working days and on 29 April 2005 Mr Telford wrote again to the Council noting its failure to respond to his request for information and requesting a review.
4. The Council acknowledged Mr Telford's request for review on 18 May 2005. The Council noted Mr Telford's letter of 15 February 2005 and apologised for its failure to respond.
5. On 31 May 2005, the Council responded substantively to Mr Telford's request for review. The Council advised that the period of time in respect of the "rescue package" information was considerable. The Council indicated that it would be helpful if Mr Telford could clarify the specific area he required information on. The Council advised that it estimated that the time it would take to supply the information sought by Mr Telford would exceed the £600 threshold based upon staff time exceeding 40 hours. This would include liaising with third parties on material which might be confidential and exemptions from the duty to disclose under section 33 of FOISA, sorting through and compiling the information to send to Mr Telford.



6. The Council advised that it was not required to produce information under FOISA where the cost to the Council would exceed £600. The Council advised that, accordingly, unless Mr Telford restricted the scope of his request, or be more specific on the material he was looking for, the Council would not be obliged to produce “all information” on the rescue package.
7. Mr Telford was dissatisfied with this response and on 15 June 2005 applied to me for a decision. He indicated that he considered the Council's response to be a further delaying excuse as to why information was not being provided.
8. The case was then allocated to an Investigating Officer.

## Investigation

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9. Mr Telford's application was validated by confirming that he had made a request for information to a public authority and had applied to me for a decision only after making a request for review to the authority.
10. In subsequent correspondence with the Investigating Officer Mr Telford was asked whether he would consider the Council's offer and be more specific about the information he was seeking. Mr Telford advised that he believed that he would simply be wasting his time writing to the Council and wished to process his request with my Office. Mr Telford indicated that he thought the Council's statement that providing the details of the rescue package would involve more than £600 to be nonsense.
11. The Council was contacted on 8 August 2005 and advised that an application for a decision had been received from Mr Telford. The Council was invited to comment on the matters raised by Mr Telford's application in line with section 49(3)(a) of FOISA and to provide certain information. In particular, the Council was asked to provide a breakdown of the projected costs involved in supplying the information requested.
12. The Council was referred to the fees regulations, that is, the *Freedom of Information (Fees for Required Disclosure)(Scotland) Regulations 2004* and the guidance contained in Annex 3 to the *Scottish Ministers' Code of Practice on the Discharge of Functions under the Freedom of Information (Scotland) Act 2002* (the Section 60 Code). The Council was reminded that an authority cannot charge for determining whether it holds the information requested or whether the information should be supplied to the applicant; that is, whether any exemptions apply to the information requested.



## Council's submissions

13. The Council responded to this request on 23 August 2005. It provided detailed information about the information it considered to be relevant to Mr Telford's request and the cost of supplying it to him.
14. In order to put the Council's submissions into context it should be explained that Mr Telford's request relates to the East Lothian Council – Schools and Community Services PPP. This project involved the development of Dunbar Grammar, Knox Academy, Musselburgh Grammar, North Berwick High, Preston Lodge High and Ross High, as well as a community learning centre in Musselburgh and a swimming pool in Prestonpans. One of the members of the Innovate Consortium (which formed the company Innovate East Lothian Ltd) carrying out this project, Ballast PLC, subsequently went into administration.
15. The Council advised that the period of time to which Mr Telford's request related was from around June 2003 to April 2004. The Council advised that during this period the developments in the project were as follows:
  - June 2003 – Ballast PLC's construction work started to tail off because they were not paying their subcontractors the monies due to them, some contractors were refusing to work and additional subcontractors were being employed to continue with the works
  - August 2003 – Ballast PLC's work was almost at a stand still, most subcontractors were refusing to do any work until they were paid and it became impossible for Ballast PLC to employ other subcontractors.
  - October 2003 – Ballast PLC and their sister facilities management company Wiltshier FM went into administration and Deloitte & Touche LLP were appointed as administrators
  - November 2003 – Whilst Deloitte & Touche LLP, Innovate East Lothian Ltd and the project funders Lloyds TSB were seeking replacement contractors in consultation with the Council, emergency Health and Safety works were taking place at the eight facilities
  - December 2003 – Balfour Beatty Construction Ltd were offered the opportunity of an eight week period to put together a bid to build out the project
  - December 2003 to February 2004 – commercial, financial and legal negotiations took place between all parties to the project including Deloitte & Touche LLP to reach an agreement regarding replacement construction and facilities management contractors
  - March 2004 – Balfour Beatty Construction Ltd and FES FM Ltd were appointed as the construction and facilities management contractors respectively



- April 2004 – Balfour Beatty Construction Ltd restarted the works on all eight sites
16. The Council advised that during this period the paperwork relating to the development of the project included file notes, minutes of meetings, documentation, diligence reports and general correspondence. The Council advised that the parties to the project and to the paperwork included the Council, the Scottish Executive's Private Finance Unit, Partnerships UK, Lloyds TSB and Deloitte & Touche LLP, the Noble Group, FES Ltd, Balfour Beatty Construction Ltd and separate legal, financial and technical advisers to each of the above.
  17. In addition to the above information, the Council advised that the "bible of documentation" which formed the legal agreement among all parties comprised 84 documents that together extended to over 3000 pages of text. The Council enclosed a copy of the "bible index" which was marked up to show the work required to exclude areas that were likely to be considered to be commercially sensitive. The index listed each document, indicating the number of pages, the parties to the document and the time taken to redact information. The Council advised that out of the 84 bible documents, 54 of these documents of around 2,300 pages in total, would require to have information deleted from them.
  18. The Council indicated that the time to amend documents to evaluate commercially sensitive information was 74.5 hours. The Council advised that the time taken to amend the earlier paperwork referred to in paragraphs 13-14 above would be in the region of 20 hours.
  19. The Council confirmed that the combined time to provide the information requested by Mr Telford would be 94.5 hours. At an hourly cost of £20 per hour the Council advised that the projected costs would be £1890. At this stage, the Council had not included postage costs.
  20. The Investigating Officer sought further information on a number of aspects of the Council's projected costs.

#### Redaction of information

21. It was not clear from the Council's submissions if it was charging for the time taken to go through the documents and evaluate whether information was commercially sensitive and therefore should be excluded. The Council confirmed that it was charging for the actual deletion of sensitive information rather than for the evaluation of material.



### Assessment of projected time

22. In subsequent correspondence, the Council advised that the estimated time was for deleting, collating and copying the information requested.

### Staff cost per hour

23. The Council was advised that the cost of £20 per hour for staff time exceeded the permitted limit of £15 per hour set out in the fees regulations. The Council was reminded that the guidance to the fees regulations makes it clear that £15 is an upper limit and that the charge per hour should reflect the actual cost of undertaking the work.
24. The Council indicated that an error had been made and that the cost per hour should have read £12. The Council advised that this work would be carried out by Council staff at grades AP3 to AP5 who were paid at a rate of £10 per hour to £14.21 per hour. The Council advised that the assumed cost of £12 per hour was the middle range of the AP3 to AP5 grades.
25. The Investigating Officer queried the necessity of using an AP5 grade for carrying out the tasks of deleting, collating and photocopying this information. The Council accepted this and submitted that a more acceptable grade for carrying out this work would be a GS3 to AP1 grade with a rate ranging from £7.95 per hour to £8.85 per hour with an average of £8.40 per hour.
26. As a result of this correspondence the Council confirmed that the revised projected costs to supply the information requested by Mr Telford was calculated at £794.

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

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27. The Council has argued that the cost of supplying the information requested by Mr Telford would exceed the £600 threshold set out in the fees regulations.

### Projected costs

28. The Council has provided me with detailed information to justify its projected costs in this case. Ultimately, the projected costs in any given case are an estimate. I am satisfied with the steps the Council has taken in its assessment of the information relevant to this request and the time taken to delete, collate and copy the information.



29. In particular, the provision of the information contained in the bible would alone exceed £600. Although the Council has been unable to list the specific documents falling outwith the bible information, the Council has set out the kind of information that exists relevant to Mr Telford's request with an indication of the volume.
30. Where the projected costs exceed £600 the authority is under no obligation to comply with the request for information. Mr Telford still has the option of restricting his request or clarifying the exact information he is seeking.

#### Technical breaches

31. The Council failed to respond to Mr Telford's initial request for information and responded to his request for review outwith the 20 working days. Although the Council provided all information requested during the investigation there have also been substantial delays in the provision of some of this information.

#### **Decision**

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I find that East Lothian Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that the projected costs were in excess of £600 in accordance with section 12(1) of FOISA and the Freedom of Information (Fees for Required Disclosure)(Scotland) Regulations 2004.

I find that East Lothian Council failed to comply with Part 1 of FOISA in failing to respond to Mr Telford's request for information within 20 working days as required by section 10(1) of FOISA and in failing to respond to Mr Telford's request for review with 20 working days as required by section 21(1) of FOISA. I do not require the Council to take any remedial action in relation to these breaches.

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