



Scottish Information
Commissioner

**Decision 031/2005 – Millar & Bryce Limited and South
Lanarkshire Council**

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

**Applicant: Millar & Bryce Limited
Authority: South Lanarkshire Council
Case No: 200501557
Decision Date: 6 October 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 031/2005 – Millar & Bryce Ltd and South Lanarkshire 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 South Lanarkshire Council's (the Council) register of public roads. The Council refused to provide a copy of the register, stating that it was available for inspection at council offices. As this arrangement is detailed in the Council's publication scheme, the information was considered exempt from release under section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). Macroberts sought a review of this decision on behalf of their client. The Council upheld its initial decision. Macroberts subsequently applied to the Commissioner for a decision, again on behalf of its clients, for a decision as to whether the Council were correct to refuse to provide 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 is not required to provide a copy of the list of public roads to the applicant.

Appeal

Should either South Lanarkshire 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 email 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 Millar and Bryce Limited’s request in a letter dated 15 March 2005. This stated that register is listed in the Council’s publication scheme and that it is available, for inspection only, at Council offices. This letter did not state any exemption in Part 2 of FOISA in relation to the refusal to provide a copy, and did not advise Millar and Bryce Limited of their right to request a review of this decision or to apply to me for a decision.
4. The Council’s publication scheme can be viewed online here: http://www.southlanarkshire.gov.uk/pls/slcportal/docs/PAGE/SLC_PUBLICDOCUMENTS/CORPORATE_DOCUMENTS/FREEDOM%20OF%20INFORMATION.PDF. The register is listed on page 89 within the Road Building class. The scheme makes clear that access to the register is offered only by inspection.
5. Macroberts, acting on behalf of Millar and Bryce, sought a review of the Council’s decision in a letter dated 22 March 2005.
6. The Council responded to this letter on 20 April 2005. The Council noted that the refusal issued on 15 March 2005 had not contained the information that should have been incorporated within a refusal notice. The Council apologised for any inconvenience caused by this failure and advised that measures had been taken to redress the administrative shortcomings of the Service that has issued the refusal. However, the Council’s decision to refuse the request for a copy of the register was upheld. The review panel concluded that under sections 25(1) and 25(3) of FOISA, the register was reasonably obtainable through the Council’s publication scheme.



7. Macroberts wrote seeking a decision from me on whether the Council had acted in accordance with Part 1 of FOISA. The application, dated 21 April 2005, was received on 25 April 2005. It noted that the issue in this case was one of the interpretation of section 25 of FOISA and the degree to which the Council is able to restrict access to information by making it merely available at an office of its choosing at times that it may determine.
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 me only after requesting that the authority review its decision.
10. This case was investigated alongside three other similar appeals from Macroberts regarding refusals by other local authorities in Scotland to provide copies of their roads registers.

Initial consideration of whether the register is environmental information

11. The request for a copy of the register was made and dealt with under FOISA. However I felt it was prudent to give consideration as to whether the register contained environmental information. If it is environmental information, then any request for access would have to be considered under the Environmental Information (Scotland) Regulations 2004 (the EIRs) rather than FOISA.
12. The first category of information that Regulation 2 of the EIRs defines as Environmental Information is:

"any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements".



13. If a road is an aspect of “land”, does its inclusion on the register tell us something about the state of that land? For example, does it show that it will be maintained to a certain standard? The Investigating Officer wrote to both Macroberts and the Council seeking their views on whether or not the register should be considered to contain environmental information.
14. Macroberts’ response to this request indicated that they would be content for the investigation to proceed under the terms of the EIRs, and indeed that given the different provisions contained within these, this would be their preference.
15. The Council responded that it did not consider the register and its contents to be environmental information (as did the other local authorities which were consulted in relation to the parallel cases). Its response noted that the register provides only information about the legal status of the roads for the purpose of responsibility for maintenance. The Council also noted that the register is not collected or used for any environmental purposes.
16. Having considered the responses of Macroberts and the Councils involved in these cases, and having considered relevant case law, I have concluded that the register and its contents do not constitute environmental information as the register itself provides no direct information on the state of the road as ‘land’.
17. As a result, I asked the Investigating Officer to continue to investigate this and parallel cases under FOISA.

The Council’s submission

18. The Investigating Officer wrote to the Council again 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. The Council was also 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.
19. The Council’s response was received on 26 July, and further comments on 11 August 2005.



20. 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.

21. The Council expressed the view that that the information is available in accordance with its publication scheme and so is reasonably obtainable and is therefore exempt under the terms of section 25 of FOISA.

22. The Council explained that access to the register is restricted to inspection only because it is available only in paper form. The Council's register consists of 55 A5 bound reference documents, each consisting of around 100 pages. These documents are held in separate offices, each holding details of the roads in their particular area. The Council noted that it would be difficult and time consuming to copy these documents, and estimates the cost (in terms of staff time and reproduction costs) at around £630.



The Commissioner's analysis and findings

23. The main question for me to address in this case is whether the fact that the register is made available in line with the Council's publication scheme is sufficient to make the information exempt under section 25 of FOISA.

Is the register exempt information under Section 25 of FOISA?

24. Section 23 of FOISA requires each Scottish 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.
25. 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.
26. 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 of section 1(1) of FOISA. Instead, the information should be made available under the terms set out in the publication scheme.
27. I am satisfied that Macroberts' clients have been 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 under the terms of section 25 of FOISA. This means that the Council is not required to provide the information in the form the applicant requests, and its response in this case was compliant with the requirements of Part 1 of FOISA.

Availability of information by inspection only

28. My investigations into the 4 related cases concerning registers of public roads have highlighted the fact that in some cases public authorities have listed documents within their publication scheme which are made available for inspection only, where they could relatively easily be reproduced.



29. 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. This section 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.
30. In my Guide to publication schemes under the Freedom of Information (Scotland) Act, I made clear 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)
31. The information provided to me by the Council about the form and arrangement of its register leads me to conclude that it would be unreasonable to expect the Council to make it available otherwise than by inspection. Therefore, its inclusion in the Council’s publication scheme on this basis was done with good reason.



Decision

I find that the Council has dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002, as detailed above.

I find that the Council breached the provisions of Part 1 the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to provide a refusal notice as required by sections 16 and 19. However, I do not require the Council to take any remedial steps under section 49(6)(b).

Kevin Dunion
Scottish Information Commissioner
6 October 2005