



Scottish Information
Commissioner

Decision 015/2006 Mr David Wickham and Moray Council

Request for information held in a publication scheme

Applicant: Mr David Wickham
Authority: Moray Council
Case No: 200502376
Decision Date: 1 February 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
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Request for planning documents – information held in authority’s publication scheme – charge levied for supply of information – whether section 25(1) applied – failure to respond to request for review in accordance with section 21(1)

Facts

Mr Wickham sought copies of all information Moray Council (the Council) held on file regarding alterations carried out on a property in Market Street, Forres. The Council advised Mr Wickham that the information requested was contained in the Council’s publication scheme and explained how the scheme could be accessed. The Council also advised that the information requested by Mr Wickham was subject to a cost which was currently set at £41 per document although he could view the information at no cost by visiting the Access Point at Elgin. Mr Wickham requested a review of this response challenging the charges that were being made. The Council responded to the request for review after the expiry of twenty working days and reasserted the charges that would be made. Mr Wickham applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in its application of the charges to the information requested by Mr Wickham.

The Commissioner found that the Council partially failed to comply with Part 1 of FOISA by failing to cite section 25(1) in its response to Mr Wickham’s request in accordance with section 16(1) of FOISA.

The Council partially failed to comply with Part 1 of FOISA by failing to respond to Mr Wickham’s request for review within 20 working days in accordance with section 21(1) of FOISA.

The Commissioner does not require the Council to take any remedial steps in relation to these breaches.



Appeal

Should either the Council or Mr Wickham 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

1. On 23 May 2005 Mr David Wickham sent an email to the Council, asking for copies of all information it held on file regarding the alterations carried out on a named property in Market Street, Forres under the reference 99/-1392/ALT.
2. The Council acknowledged this request by email on the same day, advising that the request would be dealt with under the Freedom of Information (Scotland) Act 2002 (FOISA).
3. The Council responded substantively on 3 June 2005. The Council advised that the information requested was contained in the Council's publication scheme. The Council explained how the scheme could be accessed online and where the information Mr Wickham was seeking was listed.
4. The Council advised that the information requested was subject to a cost which was currently set at £41 per document. The Council advised that Mr Wickham could view the file at no cost by visiting the Access Point at Elgin.
5. Mr Wickham responded to the Council on 16 June 2005. He expressed surprise at the fee of £41 per copy. He indicated that he understood that under the fees regulations most information was provided free of charge and where the cost went over £100 the authority could charge 10% of the cost.
6. Mr Wickham indicated that if he requested a copy of the building warrant and completion certificate this would be at a cost of £82. He expressed difficulty in seeing how provision of these documents would cost the authority £820. Mr Wickham also complained that he had not been issued with a "fees notice" as required under the terms of FOISA. He asked the Council to re-examine his request and the fees it intended to charge.
7. Mr Wickham sent a reminder of this request on 23 June 2005 and a further reminder on 14 July 2005.



8. The Council responded on 15 July 2005. The Council confirmed that the charge for the supply of a copy document was set at £41. The Council advised that this charge had been established following a time recording exercise to establish the average cost of supplying a document taking account of all related tasks. These tasks included often having to carry out a detailed desk top property search using often basic information that has been provided, reproduction of the document from its archived records, production of a covering letter and postage.
9. The Council advised that in this particular case, Mr Wickham was able to provide precise details of the information he required including the building warrant reference number and, as the record was comparatively recent, the building warrant file had not been micro filmed. As such, little research was necessary and for this reason the charge of £41 had been restricted to the building warrant and completion certificate only.
10. The Council advised that copies of the application forms, approved plans and other correspondence had been included within this charge.
11. Mr Wickham was dissatisfied with this response and on 4 August 2005 he applied to me for a decision. He indicated that he was dissatisfied with the charge for copying two documents (£82) and also the Council's failure to provide a fees notice when the information was originally requested.
12. The case was allocated to an investigating officer.

The investigation

13. Mr Wickham's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its failure to provide a response to his request.
14. The Investigating Officer contacted the Council on 12 August 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. Further research was carried out into the Council's Publication Scheme as approved by my Office and on 12 September 2005 a letter was sent to the Council to invite its comments on the issues raised by Mr Wickham's case and to provide supporting documentation for the purposes of the investigation.



15. In particular, the Council was asked to describe the nature of the documents offered to Mr Wickham. The Council was also asked to indicate where this information appeared in the Publication Scheme and the corresponding charge.
16. According to the Council's Publication Scheme, Appendix 1 to the scheme contained a list of documents with specific charges. The Council was asked to advise whether the charge in this case appeared in Appendix 1 to the scheme and, if so, to indicate whether Appendix 1 was appended to the Publication Scheme when it was approved by my office.
17. Finally the Council was asked to provide detailed information about how the charges were calculated.

Submissions from the Council

18. The Council responded to this letter on 27 September 2005. The Council advised that the documents offered to Mr Wickham were the contents of the entire file relating to the alterations at the specified property in Market Street under the Building Warrant reference 99/01392/ALT. These included copies of the Building Warrant, Certificate of Completion, Compliance Certificate for Electrical Installation, application forms, Plans, Notification of Commencement of Building Operations and associated correspondence. The Council advised that the associated fee was for all documents leading up to and including the Building Warrant and leading up to and including the Certificate of Completion.
19. The Council advised that the information requested appeared in the *Environment - Planning and Building Control* category of the Publication Scheme. A copy of the scheme was supplied.
20. The Council advised that the charge for the information requested was contained within Appendix 1 to the Publication Scheme and that this charge was set and agreed each year at Full Council. The report and minutes from the Council meeting of 10 February 2005 that related to the setting of costs for 2005/06 was provided.
21. The Council indicated that it did not believe that the full list of documents contained within the Publication Scheme was either requested by or issued to my Office at the time that the publication scheme was approved by my Office. Instead, an overview of the classes had been provided to my Office. A copy of this information was supplied.



22. The Council advised that the charges for this information were established following a time recording exercise to establish the average cost of supplying a document, taking account of all related tasks including, desk top property search, reproduction of the document (which might be archived), production of covering letter and postage.
23. The Council advised that in the light of this investigation it had been decided to investigate costs through benchmarking with neighbouring authorities and the conducting of a new time recording exercise. The benchmarking exercise demonstrated that most local authorities charge for this activity and that the Council was cheaper than many. This material was enclosed. The time recording exercise was yet to be finalised at the time of writing.
24. In subsequent correspondence, the Council advised that the documents requested by Mr Wickham were contained within the "Copy plans/decision notices" class of the Publication Scheme.
25. The Council further clarified that the charges of £41 were being made for the Building Warrant and the Completion Certificate only. The Council advised that the other documents were to be provided free of charge because they were background information.

Commissioner's analysis and findings

26. Mr Wickham requested copies of all information the Council held on file regarding the alterations carried out on a specified property in Market Street under the reference 99/01392/ALT. The Council advised that the request was being dealt with under FOISA and that the information was contained in the Council's Publication Scheme.
27. The request was made in writing and was therefore a request in terms of section 1 of FOISA. In such cases, where information is contained in an authority's publication scheme, the authority should issue a refusal notice in accordance with section 16(1) of FOISA and cite section 25(1) as the relevant exemption, explaining that the information is contained within the authority's publication scheme and is therefore otherwise accessible.
28. A reference to the publication scheme will not normally suffice, however, and it will be good practice for authorities to explain how the publication scheme can be accessed and the information it contains obtained.



FOISA or the Environmental Information (Scotland) Regulations 2004

29. In this particular instance, the case was slightly complicated in that the information requested could potentially be environmental information. Indeed the information requested was listed in the *Environment - Planning and Building Control* category of the Council's Publication Scheme. Therefore I felt it prudent to give consideration as to whether the information requested was environmental information.
30. If the information was environmental information, then any request for access would have to be considered under the terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs) rather than FOISA.
31. Section 25(1) can be cited in respect of information held under FOISA but does not apply where the information falls under the EIRs.
32. The first category of information that regulation 2(1) 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".
33. The Investigating Officer asked the Council to supply my Office with copies of the information requested so that a determination could be made as to whether any of the information fell within the above definition.
34. The information requested by Mr Wickham in this case provides information about the proposed alterations and what these will entail. However, I am satisfied that the information in this case does not provide information as set out in regulation 2(1)(a) above. In particular, it does not provide information on the state of the land.
35. As a result, this request for information was properly considered under FOISA rather than under the EIRs.

The fees regulations and publication scheme charges

36. In his submissions to the Council and to me, Mr Wickham challenged the failure of the Council to issue a fees notice in this case and also cited the provisions of the fees regulations that applied to information supplied under FOISA.



37. In fact, the fees regulations (the *Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004* and the *Freedom of Information (Fees for Disclosure under Section 13) (Scotland) Regulations 2004*) which have been introduced under FOISA do not apply to information contained in a publication scheme. In such cases, the information will be supplied in accordance with the charges set out in the scheme. There is also no requirement to issue a fees notice in accordance with section 9 of FOISA.

Application of section 25(1) to the information requested

38. As I said in paragraph 27 above, where a written request seeks information contained in an authority's publication scheme, the authority should cite section 25(1) in its refusal notice. I therefore need to consider whether section 25 applies to the information requested in this case.

39. Section 25 of FOISA states:

(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 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.



40. Section 23 of FOISA requires each 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.
41. 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.
42. 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 set out in Part 1 of FOISA. Instead, the information should be made available under the terms set out in the publication scheme.
43. The upshot of section 25(3) is that where information is made available in accordance with the authority's approved publication scheme and any payment required is specified in, or determined in accordance with the scheme, I have no power in respect of an application for a decision made under section 47(1) of FOISA to query whether the information is in fact reasonably accessible. I am obliged to accept the application of the exemption.
44. When approving publication schemes, my Office looks at the classes of documents being made available under the scheme but does not normally inspect the list of individual publications which come within each class of documents. My Office also requires any reproduction charges to be set out in the preamble to the scheme.
45. It is recognised that in some cases specific charges might be levied for certain documents contained within a class. Where this is the case, it should be made explicit in the preamble to the scheme.
46. I understand in this case, that while the broad classes of information were considered as part of the approval process, my Office did not have sight of Appendix 1 to the scheme which sets out the detailed categories of information which would be made available. However, paragraph 7 of the Council's approved publication scheme indicated that certain information is provided as a specialist service. It advises that "such requests are detailed within individual publication entries in Appendix 1 and any charge reflects the staff in retrieving/collating/copying this information."



47. The specific documents requested by Mr Wickham are contained within the “Copy plans/decision notices” class as set out in Appendix 1 to the scheme. The adjacent charges indicate that although inspection of the information at an Access Point is free, a paper copy will attract a charge of £41 per document.
48. In other words, I am obliged to accept that the information requested in this case is being provided in accordance with the authority’s publication scheme and that the payment required is specified in the scheme.
49. As a result, the information is exempt by virtue of section 25(1) of FOISA.
50. I indicated in paragraph 43 that when considering an application for a decision under section 47(1) I am obliged to accept the application of the exemption under section 25(1) where the information is made available in accordance with the publication scheme. However, this does not mean that I have no powers to take action where I consider charges within a publication scheme to be excessive.
51. Under section 23(5) of FOISA I have the power to revoke the approval of an authority’s publication scheme and to ensure that appropriate amendments are made.
52. In this particular case, the Council advised that a time recording exercise had been initiated to assess the charge that could be made for this information. It further advised that following this investigation a new time recording exercise had been initiated and note had been taken of the charges being levied by other local authorities for this information.
53. I am concerned by the level of charges being levied in respect of this class of documents particularly given that the charge assumes the need to carry out certain tasks to supply the information which may not, in fact, always be necessary.
54. In establishing charges for documents in publication schemes authorities may find it helpful to look at the charges made by other authorities for equivalent information. On the other hand, this process may also serve to keep the charges artificially high.
55. Therefore although I am obliged to accept the charges being made in this specific case, we will be looking at the charges being made for this class of documents when we carry out the next review of publication schemes.



Decision

I find that Moray Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in its application of the charges to the information requested by Mr Wickham.

I find that Moray Council partially failed to comply with Part 1 of FOISA by failing to cite section 25(1) in its response to Mr Wickham's request in accordance with section 16(1) of FOISA.

I find that Moray Council partially failed to comply with Part 1 of FOISA by failing to respond to Mr Wickham's request for review within 20 working days in accordance with section 21(1) of FOISA.

I do not require Moray Council to take any remedial steps in relation to these breaches of FOISA.

Kevin Dunion
Scottish Information Commissioner
1 February 2006
