



Scottish Information
Commissioner

**Decision 018/2006 - Miss Mary E. Mackenzie and Scottish
Borders Council**

*Requests for various information relating to the status of Victoria Park,
Peebles and the Chambers Institute, Peebles as Common Good Assets*

Applicant: Miss Mary E. Mackenzie
Authority: Scottish Borders Council
Case No: 200502014
Decision Date: 2 February 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 018/2006 Miss Mary E Mackenzie and Scottish Borders Council

Request for information relating to the Peebles Common Good Fund – Failure to respond within 20 working days - Section 25 Information Otherwise Accessible – Section 17 Information not held – Settlement proposed and rejected

Facts

Miss Mackenzie submitted various requests relating to the Peebles Common Good Fund to Scottish Borders Council (the Council). The Council failed to respond to her initial request and, in response to her request for review, stated that the requested information was either available through the Council's publication scheme or was not held.

Following receipt of Miss Mackenzie's application for Decision, the Council attempted to effect settlement with Miss Mackenzie by providing information in response to her requests. In response, however, Miss Mackenzie raised concerns regarding the accuracy and validity of the information supplied.

Outcome

The Commissioner found that the Council failed in its handling of Miss Mackenzie's information request with regard to the following sections of the Freedom of Information (Scotland) Act 2002 (FOISA):

- Section 10(1) – Failure to respond to Miss Mackenzie's requests within 20 working days
- Section 16(1) – Failure to issue a formal refusal notice in relation to Miss Mackenzie's specific information requests
- Section 17(1) – Failure to issue notice that information is not held in relation to Miss Mackenzie's specific information requests
- Section 19 – Failure to inform the applicant of the right of application to the Commissioner
- Section 15 – Failure to provide advice and assistance to the applicant



The Commissioner also found that the information subsequently supplied by the Council to effect settlement with Miss Mackenzie was an appropriate response to her information request and, with regard to the information supplied from non-recorded information, went beyond the requirements of FOISA.

Appeal

Should either Miss Mackenzie or the 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 with 42 days of receipt of this notice.

Background

1. Miss Mackenzie submitted correspondence to the Council on 9 April 2005, which explicitly identified itself as containing requests under FOISA.
2. In this correspondence Miss Mackenzie referred to letters she had previously received from the Council and stated that these letters appeared to be contradictory on the subject of Victoria Park, Peebles (the Park). Miss Mackenzie then raised various issues in relation to the Park. The issues raised were punctuated with question marks, and were clearly intended to convey that the Miss Mackenzie was seeking a response and/or clarification from the Council in relation to the issues raised. In addition, a small number of direct questions to the Council were also included in Miss Mackenzie's correspondence.
3. Miss Mackenzie's statements and questions in relation to the Park were as follows:
 - a) *Victoria Park land etc. was gifted to the Peebles Community through two title deeds, different dates? Including as recreation ground etc.?*
 - b) *The Park was part of the heritable Common Good assets since the dates of the gift?*
 - c) *The Peebles Common Good Assets list, over years, included this fact? The Park attracts Revenue?*



- d) *Whether or not Victoria Park, Peebles is 'moved about' (by Tweeddale District Council or successor Scottish Borders Council) from one "Account" to another is immaterial, and does not alter the community's rights?*
 - e) *The list of Assets at one time, very unreliable, did not put a 'value' on Victoria Park because it could not be "sold"? – an odd attitude to the Council's duty of care and responsibilities?*
 - f) *By whose written authority, minuted?, and on what date, minuted?, did SBC Trustees agree to removing Victoria Park Peebles from the heritable property list? And for what specific reasons minuted? and was this duly advertised to inform the community? and by what means?*
4. In addition, Miss Mackenzie also asked a direct question in relation to the status of the Chambers Institute, Peebles. This was as follows:
- g) *Why is the Chambers Institute and contents i.e. the gifts to the people of Peebles (via the then Provost and Council) by the Chambers brothers not included in Common Good Assets? Were these gifts ever included in the Assets? If they were removed from the Assets? There must be minuted details on record?*
5. When no response was received to her letter of 9 April, Miss Mackenzie contacted the Council again on 17 May 2005. In this correspondence Miss Mackenzie requested that the Council review its handling of her letter of 9 April.
6. The Council subsequently responded on 26 May 2005. In this correspondence the Council indicated that a combination of annual leave and competing work pressures had led to its failure to respond to Miss Mackenzie's initial letter.
7. The Council also informed Miss Mackenzie that the information sought by her in her correspondence of 9 April was exempt under FOISA. In doing so, the Council informed Miss Mackenzie that all information held on the Peebles Common Good Fund, along with all public Minutes of the authority, are covered by the Council's Publication Scheme. The Council also stated that information which is not available through the Council's Publication Scheme will not exist in recorded information held by the Council, and therefore will not be accessible under FOISA.
8. On 14 June 2005 I received an application for decision from Miss Mackenzie in relation to this case, and the case was allocated to an Investigating Officer within my Office.



The Investigation

9. Ms Mackenzie's application was validated by confirming that she had made an information request to a Scottish public authority and had applied to me for a decision only after asking the authority to review its decision.
10. In her application for decision, Miss Mackenzie informed my Office that her questions of 9 April were prompted by concerns that the Park was not recognised by Scottish Borders Council as a Common Good Asset, and was not recorded as such on the Ordinance Survey Map of April 2003. In addition, Miss Mackenzie has concerns that the Chambers Institute, Peebles, and its contents, are also not currently recognised as Common Good Assets. Miss Mackenzie indicated that her purpose, in submitting requests under FOISA, was to attempt to clarify the status of these two resources.
11. On 16 June 2005, the Investigating Officer contacted the Council in order to seek comment in relation to this case. In addition to this comment, the Investigating Officer also sought:
 - Details of why the Council failed to respond to Miss Mackenzie's original request within 20 working days.
 - Confirmation of which exemption had been applied in relation to each of Miss Mackenzie's requests. In cases where a refusal was being made under section 25 of FOISA, the Investigating Officer sought an overview of how the specific information would be accessed under the scheme. The Council was also asked to provide details of whether any of Miss Mackenzie's questions were refused under section 17 of FOISA (information not held), as opposed to section 25.
 - Details of why the Council's response to Miss Mackenzie's request for review did not contain information on the right of appeal to me, as required by section 21(10) of FOISA.
12. The Council's response to my Office was received on 4 July 2005. In its response, the Council stated that Miss Mackenzie's original request was not initially identified as a request under FOISA, as it appeared to be part of a series of ongoing correspondence with Miss Mackenzie in relation to the Common Good Fund. The Council also stated that Miss Mackenzie's reference to FOISA was made at the end of the letter and that, as a result, staff reviewing the letter did not immediately recognise it as a valid information request. The correspondence was then passed to the Council staff member to whom the letter was addressed, for action on his return from annual leave. The Council also stated that steps were being taken to ensure that, in future, mail addressed to members of staff who are absent would be carefully checked in order to identify any freedom of information requests.



13. The Council then informed my Office that the Miss Mackenzie's request was refused on the grounds that all recorded information held on the Peebles Common Good Assets is available under the Council's publication scheme. The Council stated that Miss Mackenzie may previously have inspected these files and not found the answers she sought. If this was the case, the Council stated that the information would not be held.
14. Finally, the Council stated that the failure to include details of the right of application to the Commissioner in the response to Miss Mackenzie's request for review may have been an oversight. The Council went on, however, to question the relevance of the inclusion of this information, given that it had been made clear that the information is available under the Council's publication scheme. The Council requested guidance from my Office on this point.
15. The Investigating Officer responded to the Council on 15 September. In this, it was stressed that our letter of 16 June sought details of the reason for refusal in relation to each of the distinct questions asked by Miss Mackenzie in her request, and that this had not been provided by the Council in its response. Following consultation with Miss Mackenzie, the questions asked were summarised to the Council as follows:
 - a) *What were the dates of the two title deeds which gifted the Victoria Park land to the Peebles Community?*
 - b) *Did these deeds state that Victoria Park land should be used as recreation ground?*
 - c) *Has Victoria Park been part of the heritable Common Good Assets since the date of the gifted land?*
 - d) *Has the Peebles Common Good Asset list, over the years, included details of Victoria Park?*
 - e) *Does the Park attract revenue?*
 - f) *Is it true that the list of assets at one time did not put a value on Victoria Park because it could not be sold?*
 - g) *On whose authority and on what date did Council Trustees agree to remove Victoria Park from the heritable property list?*
 - h) *Why did Council Trustees agree to remove Victoria Park from the heritable property list?*
 - i) *Did the Council advertise to inform the Community of the removal of Victoria Park from the heritable property list? If so, how?*
 - j) *Why is the Chambers Institute (and its contents) not included in the Common Good Assets? Were these gifts ever included in the Assets? Were they removed from the Assets? Are there minutes which demonstrate this?*



The Council was asked to confirm the reason for refusal in relation to each of these questions. In doing this, it was stressed that the Council should inform my Office whether, in relation to each question, the request was refused because the Council held no recorded information which could answer the question, or because the recorded information which contained the answer was available through the Council's publication scheme. If the information was available through the scheme, the Council was asked to provide an overview of the process involved in accessing the information.

16. In response to the Council's request for guidance regarding the inclusion of the right of appeal to me in its response to information requests (discussed at paragraph 14 above), my staff informed the Council that the inclusion such information is a statutory obligation, imposed by sections 19 and 21(10) of FOISA.
17. In its response to this correspondence, dated 30 September 2005, the Council stated that, in order to respond to our correspondence of 15 February, it had been necessary to research the information sought by Miss Mackenzie. The Council then proceeded to provide responses to Miss Mackenzie's questions, "*in so far as the information is held by this Council*". These responses were subsequently forwarded by the Council to Miss Mackenzie in an attempt to settle the case.
18. Miss Mackenzie responded to this settlement attempt in two separate pieces of correspondence, received by my Office on 11 October 2005. In this correspondence, Miss Mackenzie raised various concerns relating to the information supplied.

The Commissioner's Analysis and Findings

19. From a review of this case, and the submissions made by Miss Mackenzie to this Office, it is clear that Miss Mackenzie's application stems from general concerns she holds regarding the Council's stewardship of the common good fund and, specifically, her belief that both Victoria Park and the Chambers Institute should be recorded as assets under the fund.
20. Before proceeding to discuss the substance of the case, however, it is important to note that my remit does not extend to assessing either the Council's stewardship of the common good fund or the quality of recorded information held in relation to the fund. My remit, as set down by FOISA, requires me to consider only the Council's handling of Miss Mackenzie's requests for information and to assess whether the Council acted in accordance with FOISA in dealing with these information requests.



21. In considering the Council's handling of Miss Mackenzie's request, there are a number of issues which must be discussed, relating not only to the central issue of whether the Council holds recorded information which can be supplied in response to Miss Mackenzie's questions of 9 April, but also with regard to the Council's actions following receipt of the requests.

The Council's handling of the requests

22. It has become clear during the course of this investigation that staff responsible for dealing with Miss Mackenzie's requests within the Council were, at the time of receipt of Miss Mackenzie's requests, uncertain of the specific obligations that FOISA place upon them. As a result, a number of significant failures were made by the Council in dealing with the requests.
23. The Council has stated in its submissions to this Office that Miss Mackenzie's correspondence was, at first, not recognised as an information request which should be processed under FOISA. The Council states that this was because it initially appeared to be part of ongoing correspondence between Miss Mackenzie and the Council, and that the request for information was not clearly identifiable within the correspondence. The request was, as a result, processed outwith the Council's FOISA procedures.
24. While I hold a degree of sympathy with the Council regarding this position, particularly with regard to the manner in which Miss Mackenzie's questions and requests were presented, it cannot be accepted as a valid reason for refusing to respond to Miss Mackenzie's initial correspondence under FOISA. This is particularly the case given that Miss Mackenzie's original correspondence both referred directly to FOISA, and explicitly sought a response to her questions under that legislation.
25. Since 1 January 2005, every Scottish public authority faces a statutory obligation to respond to the information requests they receive within 20 working days. In fulfilling this obligation, authorities must be mindful that any written correspondence they receive may contain a FOISA request, regardless of the context in which the correspondence is sent, or the previous communications which have passed between the parties. Authorities must therefore ensure that they have procedures in place to allow all incoming correspondence to be fully reviewed, and relevant information requests identified.
26. The Council, however, failed to identify Miss Mackenzie's requests following receipt of her initial correspondence, and, as a result, failed to meet the requirements of section 10(1) of FOISA in failing to issue a response within 20 working days.



27. Miss Mackenzie's request was formally recognised following the submission of her request for review on 17 May 2005. The Council responded to this request for review by informing Miss Mackenzie that the information sought was exempt from release under FOISA, because it was available through the Council's publication scheme. The Council therefore indicated that it was applying the exemption contained under section 25 of FOISA, although this was not explicitly stated in the Council's response. In addition, the Council also stated that where information was not available through its publication scheme, this will be because the information is not recorded, and therefore not held by the Council.
28. This is an unacceptable response in terms of FOISA. In issuing its response, the Council placed no distinction on which of Miss Mackenzie's questions could be answered by reference to the scheme, nor did the Council identify those questions where no information was held.
29. Section 16 of FOISA requires authorities to give applicants notice in writing within 20 working of receipt of an information request, if that request is to be refused. Such a notice is required to contain the following information:
 - a) Confirmation that the requested information is held;
 - b) Confirmation that the request is being refused;
 - c) Details of the exemption being applied to the information;
 - d) Details of why, if it is not otherwise apparent, the exemption applies.
30. Section 17 of FOISA also requires authorities to notify applicants within 20 working days if it holds no information which could be provided in response to the request.
31. In the case of Miss Mackenzie's request, the Council should have provided a response in relation to each of the distinct questions raised by Miss Mackenzie. Any notice issued should, therefore, have provided details of whether any information was held by the Council which could be provided in response to each question. Where information was held which could be provided in response, the Council should have set out, in relation to each question, which specific exemption it considered applied to the information held. Where information was not held, the Council should again have made this clear in relation to each question.
32. Following consideration of the case, it would appear that the Council responded to Miss Mackenzie's request for review in the way that it did because it was unable to directly identify recorded information held which might be provided in response to her initial requests.



33. However, where there is ambiguity or uncertainty regarding the nature of an information request, or it is unclear what specific recorded information is being requested (as appears to have been the case with Miss Mackenzie's request) FOISA obliges authorities to advise and assist applicants. This obligation is contained under section 15 of FOISA, and is expanded on in the Part II of the 'Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002' (the Section 60 Code). The Section 60 Code states the following at paragraph 20:

"Where the applicant has provided insufficient information to enable the authority to identify and locate the information sought, or where the request is unclear, the authority should help the applicant to describe more clearly and particularly what information they require."

The Section 60 Code goes on to state that appropriate help might include:

- *"Providing an outline of different kinds of information which might meet the terms of the request;*
 - *Providing access to detailed catalogues and indexes, where these are available, to help the applicant to see the nature and extent of the information held by the authority;*
 - *Providing a general response to the request setting out options for further information which could be provided on request"*
34. Given the obligation which section 15 places on an authority, it would have been reasonable to assume that, where there was uncertainty around the nature of the specific information sought by Miss Mackenzie, the Council should have made contact with her in order to seek further clarification regarding the information requested. This would have enabled the Council to identify whether it held any recorded information which could be provided in response to her questions.
35. Following the formal recognition of Miss Mackenzie's request the Council did not, however, make contact in order to seek such clarification. This would, of course, be acceptable in circumstances where there was a clear understanding within the Council of the nature of the specific information sought by Miss Mackenzie, and the precise location of such information. From the Council's subsequent actions however, it is clear that this was not, in fact, the case.
36. I therefore find that the Council failed in its handling of Miss Mackenzie's request with respect to the following sections of FOISA:
- Section 10(1) – Failure to respond to Miss Mackenzie's requests within 20 working days



- Section 16(1) – Failure to issue a formal refusal notice in relation to Miss Mackenzie's specific information requests
 - Section 17(1) – Failure to issue notice that information is not held in relation to Miss Mackenzie's specific information requests
 - Section 19 – Failure to inform the applicant of the right of application to me
 - Section 15 – Failure to provide advice and assistance to the applicant
37. I note, however, that the Council has since informed my Office that steps have been taken to improve the procedures which led to these failures.

The information provided by the Council

38. The key issue to be considered when assessing the information provided by the Council is whether the Council does in fact hold relevant recorded information which responds to Miss Mackenzie's requests.
39. As discussed above in paragraphs 17 and 18, the Council attempted to provide information in response to each of Miss Mackenzie's questions on 30 September 2005. Following receipt of this information, Miss Mackenzie disputed the reliability of the information provided.
40. The information provided by the Council was reviewed by my Office. During this review it became clear that much of the information supplied to Miss Mackenzie appeared to be drawn from general anecdotal information rather than specific recorded information held by the authority. The Council was therefore asked to indicate which specific responses were prepared from recorded information, and which were prepared from other sources.
41. In its response, the Council indicated that the responses to three of the requests were gathered from recorded information held by the authority, while the remaining seven questions were responded to on the basis of non-recorded information gathered from internal departmental knowledge and the anecdotal experience of relevant staff.
42. The information provided by the Council can, as a result, be divided in to two distinct groups for consideration. These groups will be discussed separately below.



Responses from recorded information

43. The three requests where information was provided from recorded information were those clarified at paragraph 15(a), 15(b) and 15(e) above. The Council stated that responses to the requests described under paragraph 15(a) and 15(b) were available from the two title deeds held in relation to the Park. In relation to the request described under 15(e), the Council stated that its response was extracted from information available in the Council's financial records.
44. Miss Mackenzie has, in her submission to this office, stated that she was dissatisfied with the response provided to these three questions.
45. In relation to the question referred to in paragraph 15(e) above ('Does the Park attract revenue?'), the Council's response confirmed that the park does indeed attract a small amount of revenue annually, and provided details of the revenue attracted in 2004/05. In her submission to this Office, however, Miss Mackenzie stated that this response was unsatisfactory. Miss Mackenzie stated that this was because she sought details of the annual revenue over a number of years, as opposed to just the revenue for 2004/2005.
46. From a review of Miss Mackenzie's request, however, it is clear that the request did not explicitly seek details of any actual revenue attracted by Victoria Park, let alone revenue attracted over a number of years. Miss Mackenzie's initial request, and confirmed in the clarified version summarised under paragraph 15(e) above, appeared merely to seek confirmation of whether or not the park attracts revenue. This information was subsequently provided by the Council. Indeed, the Council's response appears to have provided information beyond that apparently sought by Miss Mackenzie in supplying details of the revenue attracted in 2004/2005.
47. I therefore conclude that the Council's interpretation of this request, and the response provided, can be considered to be both reasonable and appropriate in the circumstances. If it was indeed Miss Mackenzie's intention to seek details of the annual revenue attracted by the Park over a number of years, her request to the Council should have made this clear, explicitly requesting copies of recorded information which detailed park revenue, and stating the years over which she was interested in receiving these figures.



48. In response to the questions clarified under paragraph's 15(a) and 15(b), the Council confirmed the dates of the deeds, while also confirming that the deeds state that Victoria Park should be used as recreational ground. In addition, the Council also offered to either send Miss Mackenzie copies of the deeds or, given that they are complex legal documents, make a member of Council staff available to review and explain the deeds with Miss Mackenzie on Council premises. In her submission to this Office, Miss Mackenzie stated that the Council's response was again unsatisfactory, in that she expected to receive not only the information supplied by the Council, but also "full apposite quotations".
49. If additional information was sought by Miss Mackenzie then this should again have been made explicitly clear in her request to the authority. Such a request was not, however, expressed in Miss Mackenzie's initial requests, nor when the requests were clarified by this Office.
50. As a result, I conclude that the Council's interpretation of these requests, and the responses provided, should again be considered to be both reasonable and appropriate in the circumstances of this case.

Responses from non-recorded information

51. FOISA provides a right of access to information recorded in any form and held by a Scottish public authority. This will include information stored either electronically or on paper files. It is important to note, however, that FOISA does not govern access to non-recorded information, such as the non-recorded knowledge or experience of authority employees.
52. The Council has informed my Office that the information provided to Miss Mackenzie in response to the remaining seven questions (those clarified in paragraph 15(c)-(d) and 15(f)-(j)) was gathered from such non-recorded sources, and is not contained in any recorded information held by the Council.
53. In providing this information, it should be acknowledged that the Council was attempting to directly address each of Miss Mackenzie's concerns in an effort to fully resolve the case, and that Council therefore went beyond the requirements of FOISA in supplying Miss Mackenzie with this information.
54. In her submissions to this Office, Miss Mackenzie has disputed the accuracy and validity of the information supplied in response to these questions. However, as FOISA does not govern access to non-recorded information, it does not fall to me to assess the accuracy or otherwise of these responses.



55. Miss Mackenzie has, however, also expressed her belief that recorded information may be held which could be provided in response to her requests, but which has not been supplied. This aspect of Miss Mackenzie's complaint does fall within my remit.
56. In order to investigate this issue, my Office requested that the Council provide details of the work which was undertaken in order to establish that no additional recorded information was held.
57. The Council stated that all relevant minutes held, including those originating from the former Borders Regional Council and Tweeddale District Council, were checked, and no relevant information was identified. The Council also stated that a consultation process took place involving a number of officers who had recently researched the relevant historical files, minutes and titles in some detail in order to prepare an Asset Register in relation to the Peebles Common Good Fund. This consultation process, along with a review of the aforementioned Asset Register, confirmed the Council's view that no additional information was held. The Council stated that it had to assume that this information and practices were correct and appropriate since no strong evidence existed to the contrary.
58. Having considered the work undertaken, I am satisfied that the Council has taken reasonable steps to assess whether additional information is held. The Council has undertaken an appropriate review of the information sources which would be expected to hold the requested information, while also drawing on all available departmental information and intelligence in order to assess the likelihood of it being held elsewhere. As a result of this work, the Council has reached the considered conclusion that there is no other likely source of the information in its records. It would be unreasonable in my view to expect the Council to carry out an extensive search all the records it holds when, according to all available information and departmental intelligence, additional information does not exist.
59. As such, I find that the Council's conclusion that no recorded information is held which could be provided in response to the requests summarised under paragraph 15(c)-(d) and 15(f)-(j) to be appropriate in the circumstances of this case. The Council should, however, have set out what information had been gathered from a recorded source and what information had been collected from other sources when providing its response to Miss Mackenzie.



Decision

I find that Scottish Borders Council (the Council) failed in its handling of Miss Mackenzie's information request with regard to the following sections of the Freedom of Information (Scotland) Act 2002 (FOISA):

- Section 10(1) – Failure to respond to Miss Mackenzie's requests within 20 working days
- Section 16(1) – Failure to issue a formal refusal notice in relation to Miss Mackenzie's specific information requests
- Section 17(1) – Failure to issue notice that information is not held in relation to Miss Mackenzie's specific information requests
- Section 19 – Failure to inform the applicant of the right of application to me
- Section 15 – Failure to provide advice and assistance to the applicant

I do not, however, require the Council to take remedial action in relation to this failure.

I also find that the information subsequently supplied by the Council to effect settlement with Miss Mackenzie was an appropriate response to her information request and, with regard to the information supplied from non-recorded information, went beyond the requirements of FOISA.

Kevin Dunion
Scottish Information Commissioner
2 February 2006