



Scottish Information
Commissioner

Decision 171/2007 Mr Euan Renton and East Lothian Council

Request for documentation outlining East Lothian Council's assessment of the Musselburgh Joint Racing Committee's ability to repay a proposed £9 million loan.

Applicant: Mr Euan Renton
Authority: East Lothian Council
Case No: 200700446
Decision Date: 24 September 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 171/2007 Mr Euan Renton and East Lothian Council

Request for information relating to East Lothian Council's assessment of the Musselburgh Joint Racing Committee's ability to repay a proposed loan of £9 million – sections 15(1) (Duty to provide advice and assistance) and 17(1) – Notice that information is not held.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General information); 2(1) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held);

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Euan Renton requested information on how East Lothian Council (the Council) assessed the Musselburgh Joint Racing Committee's (the MJRC) ability to repay a proposed £9 million loan from the Council. The Council initially informed Mr Renton that it did not hold the information requested, providing background information about the loan process and noting that the terms of the proposed loan had not yet been finalised. Mr Renton was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and subsequently notified Mr Renton that it did not hold the full business information he sought but that it did hold information concerning the initial business plan of the MJRC. The Council withheld this information on the grounds that it was exempt from disclosure in terms of 33(1)(b) of FOISA. Mr Renton remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Renton's request for information in accordance with Part 1 of FOISA. In particular, he concluded that the Council did not hold any information falling within the scope of Mr Renton's information request. However, the Commissioner found that the Council had failed to comply fully with the duty to provide advice and assistance contained in section 15 of FOISA in this case. The Commissioner did not require the Council to take any action in response to his decision.



Background

1. In 2006, East Lothian Council (the Council) agreed (subject to conditions) to make a £9 million loan to the MJRC in order to fund the development of an all-weather, floodlit racetrack at Musselburgh Racecourse. The development proposals attracted considerable protest from local residents and subsequently a public inquiry into the development was held in November 2006. In August 2007, the proposed development plan was rejected by the Scottish Ministers.
2. On 6 November 2006, Mr Renton emailed the Council requesting details of the timing and extent of anticipated repayment of the proposed loan to fund the development of Musselburgh race course.
3. On 28 November 2006, the Council gave Mr Renton notice (in terms of section 17(1) of FOISA) that it did not hold the information he sought as the exact terms of any loan had still to be decided.
4. On 29 November 2006, Mr Renton contacted the Council with a revised request which sought information in the following terms:

“Has the Council made any calculation as to the ability of Musselburgh Joint Racing Committee (or its re-constituted successor) to afford the repayments on the proposed loan? If so, please can I have a copy of the documentation”
5. On 22 December 2006, the Council wrote to Mr Renton in response to his request for information. The Council informed Mr Renton that its agreement to lend the balance of funding to the MJRC was subject to certain conditions requiring the provision of documents to protect the position of the Council and evidence from the MJRC that loan payments were affordable and would be met. The Council advised Mr Renton that this remained the case, and it was awaiting the outcome of the planning inquiry regarding the development. I understand this response to be again confirming no information was held falling within the scope of Mr Renton’s revised information request.
6. On 21 February 2007, Mr Renton emailed the Council requesting a review of its decision. In this email, Mr Renton broadened the scope of his request and asserted that the Council must have information about the ability of the borrower to repay the loan and asked that he be provided with all Council records relating to the borrower’s ability to repay the loan.



7. On 22 March 2007, the Council wrote to notify Mr Renton of the outcome of its review. The Council informed Mr Renton that it had not yet received an application for a loan and that none would be submitted before the MJRC had obtained approval from the planning inquiry. The Council gave Mr Renton notice (in terms of section 17(1) of FOISA) that it therefore did not hold the full business information he sought. However, the Council informed Mr Renton that it did hold some information relating to the MJRC's initial business plan but that it considered this information exempt in terms of section 33(1)(b) of FOISA.
8. On 23 March 2007, Mr Renton wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Renton had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

10. On 12 April 2007, the Council was notified in writing that an application had been received from Mr Renton and was asked to provide my Office with the information that had been withheld from Mr Renton. The Council responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Council, asking it to provide comments on the application and to respond to specific questions on this case.
12. On 25 May 2007, the Council wrote to my Office and provided its submissions on the case, including detailed arguments with respect to its application of the exemption contained in section 33(1)(b) of FOISA, and an analysis of the public interest test.
13. In this decision I will consider whether the Council was correct to respond to Mr Renton's request in the manner it did at the time of his request.



The Commissioner's Analysis and Findings

14. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Renton and the Council and I am satisfied that no matter of relevance has been overlooked.

Information not held – section 17(1)

15. In his information request of 29 November 2006 (the request I am investigating in this case), Mr Renton first asked whether the Council had made any calculation as to the ability of MJRC to afford the repayments on the proposed loan; he then requested any associated documentation.
16. Given the nature of this request, relevant information could only be held if the Council had made any relevant calculation. The Council's correspondence with both Mr Renton and my Office has made clear that no such calculation had been made at the time of the request, because this would be undertaken when a formal loan application was received. At that time, not formal loan application had been received.
17. I note that in responding to Mr Renton's request of 29 November 2006, the Council did not clearly specify that it did not hold (in terms of section 17(1) of FOISA) the information sought by Mr Renton. I understand that this response was given in the context of previous correspondence exchanged with Mr Renton, and that the Council had already advised Mr Renton that it did not hold detailed information relating to the repayment of the proposed loan. However, for the purposes of clarity the Council should have clearly stated its position in response to Mr Renton's request.
18. Following its review of his request, the Council advised Mr Renton that as it had not yet received a formal loan application from the MJRC it did not hold all of the business information he sought. The Council explained that it will only receive the relevant information to enable it to make an evaluation of the MJRC's ability to repay the loan when a loan application was submitted. The Council also informed Mr Renton that the only information it held in relation to the loan was the initial business plan submitted by the MJRC which it considered exempt in terms of section 33(1)(b).
19. The Council provided my office with a copy of a spreadsheet detailing the initial business plan of the MJRC, which can be used to judge its ability to repay a loan. The Council asserted that the spreadsheet was submitted on its own as the MJRC's initial business plan and that no further documentation had been supplied.



20. From my investigations, I am satisfied that the Council had not undertaken a calculation of the MJRC's ability to repay the proposed loan, and so it held no recorded information relating to such calculation that could be provided in response to Mr Renton's request. Therefore, the Council was correct to notify Mr Renton (in terms of section 17(1) of FOISA) that it did not hold the information he had requested in his email of 29 November 2006.
21. I note that the only information that the Council holds which it has identified as being relevant to Mr Renton's request is a single spreadsheet, which was submitted to the Council by the MJRC as evidence of its business plan. It is this information that the Council has withheld under the terms of section 33(1)(b) of FOISA.
22. I have examined this spreadsheet and I have concluded that the document does not, in fact, fall under the scope of Mr Renton's request, as set out in paragraph 15 above. The Council identified this document only when responding to Mr Renton's request for review of 29 November 2006, which specified the information he sought in the wider terms below.

"The Council must have information about the ability of the borrower to repay the loan. In accordance with my rights under the FOI Act, and following my initial request in November 2006, I want to see all the Councils records concerning the borrowers' ability to repay the loan. In this I would expect to see likely repayment sums, options for the repayment period, possible variations in interest rates, how the borrower would likely generate the income required for the repayments, contingencies if the borrowers ability to make repayments were to be compromised, what the consequences for local tax payers would be if repayments were not to be made, and an assessment of the likelihood of failure, partial or complete financial success of the venture."

23. The terms of the above request for review are clearly much broader than those specified in Mr Renton's request of 29 November, to the extent that the issues raised in Mr Renton's request for review constitute a new request for information.
24. Accordingly, although the Council identified a single spreadsheet in response to the additional parameters set out in Mr Renton's request for review, I find that this document does not fall within the scope of Mr Renton's original request of 29 November, and that therefore I cannot consider this document, nor whether the Council was correct to withhold it in terms of section 33(1)(b) of FOISA in this decision.



25. I understand that by answering the questions raised by Mr Renton in his request for review, the Council were trying to be helpful to the applicant and to respond within the spirit of the legislation. However, my investigation can only consider an authority's response to an information request as it is first made (or following its clarification prior to a response being provided) and where the authority has had an opportunity to conduct an internal review. Given that the wider request has not been the subject of both an initial response and also a review by the public authority, I am not able to consider it within my decision.
26. It is good practice for public authorities to be alert to any new questions raised at the review stage, and to advise applicants of the fact that some any new requests will be treated as such separately from any review. This approach would be in line with the duty to provide advice and assistance to applicants contained in section 15(1) of FOISA and I would advise the Council to follow this practice in future.
27. In these circumstances, I will not go onto consider whether the Council's decision to withhold information that was identified following Mr Renton's request for review was correct in this instance.

Conclusion

28. I therefore conclude that the Council does not hold, in terms of section 17(1) of FOISA, the information sought by Mr Renton in his request of 29 November 2006.
29. However, by failing to provide appropriate advice to Mr Renton when his request for review effectively made a new request for information, I have concluded that the Council failed to comply fully with the duty to provide advice and assistance Mr Renton contained in section 15(1) of FOISA.

Decision

I find that East Lothian Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Renton by providing notice in terms of 17(1) that it did not hold the information he sought.

However, I find that the Council failed to act in accordance with the requirements of Part 1 of FOISA by failing to comply fully with the requirements of section 15(1) of FOISA in

I do not require the Council to take any action in response to this Decision Notice.



Appeal

Should either Mr Renton or East Lothian 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 within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
24 September 2007



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but



(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.