

# Decision Notice

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**Decision 162/2015: Mr Robert Trybis and Argyll and Bute Council**

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## **Sale of Castle Toward**

Reference No: 201501179

Decision Date: 20 October 2015



Scottish Information  
Commissioner

## Summary

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On 19 January 2015, Mr Trybis asked Argyll and Bute Council (the Council) for information concerning a proposal to sell Castle Toward for a specified figure.

The Council provided some information. In relation to one part of the request, it informed Mr Trybis that the information he was seeking was held in papers submitted to Councillors, but did not provide details to enable him to locate and access these papers. Following a review, Mr Trybis remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had been wrong to inform Mr Trybis that all of the information falling within the scope of this part of his request was otherwise accessible. She also found that the Council had failed to provide Mr Trybis with reasonable advice and assistance as to where the information which was otherwise accessible could be found. She was satisfied that these failures had been rectified by the end of the investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 15 (Duty to provide advice and assistance); 16(1)(c) (Refusal of request); 25(1) (Information otherwise accessible)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. It may be helpful to explain the context of Mr Trybis's request. This relates to a Community Right to Buy (CRTB) offer to purchase Castle Toward, a 19<sup>th</sup> Century mansion on the Cowal peninsula. The offer was unsuccessful. Mr Trybis's request relates to aspects of the sale process, including the valuation arrived at by the District Valuer.
2. On 19 January 2015, Mr Trybis made a request for information to the Council. In one part of the request (part 4), he asked whether Council Officials proposed to any Councillors that Castle Toward be offered for sale at a figure of less than £1.75m and, if so, to which Councillors was this proposal made and why was it rejected?
3. The Council responded on 17 February 2015. It informed Mr Trybis that the relevant recommendations by Officers were as set out in the papers submitted to Councillors in October and December 2014.
4. On 17 February 2015, Mr Trybis wrote to the Council requesting a review of its decision, on the basis that he had not been provided with links to where these papers were published.
5. The Council notified Mr Trybis of the outcome of its review on 13 March 2015, informing him that he had already been provided with the information requested.
6. On 19 June 2015, Mr Trybis wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Trybis stated he was dissatisfied with the outcome of the Council's review because it had failed to provide him with the information requested in part 4

of his request. The application also referred to another part of the email containing the information request, but the Commissioner agreed with the Council's view that this other part did not contain a valid request for information. During the investigation, Mr Trybis confirmed that he did not wish to proceed with that part of his application.

## **Investigation**

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7. In relation to part 4 of Mr Trybis's information request, the application was accepted as valid. The Commissioner confirmed that Mr Trybis made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 7 July 2015, the Council was notified in writing that Mr Trybis had made a valid application and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, with particular reference to its apparent reliance on section 25(1) of FOISA and how and where the information could reasonably be obtained.
10. The Council provided submissions. In addition, during the investigation, the Council wrote to Mr Trybis. It apologised to him and acknowledged that its previous responses should have confirmed that it was relying on section 25(1) of FOISA, providing him with a link to the December 2014 report. The Council provided the link.
11. The Council also explained that there had been an error in its reference to an October 2014 report. It informed Mr Trybis that it would have refused to disclose this report at the time of his initial request and requirement for review, but was now prepared to do so. It enclosed a copy.

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

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12. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both Mr Trybis and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Interpretation of request and identification of relevant information**

13. The Council submitted that it could have responded to Mr Trybis's request with a simple "no": Council Officers had not proposed to Councillors that Castle Toward be offered for sale at a figure less than £1.75m. The Council took the view that this would be demonstrated by referring Mr Trybis to the relevant Committee reports.
14. The Council explained it had taken this approach for what it believed were sound reasons: there had been considerable media speculation on the matter, including allegations it considered to be unfounded, and a large volume of related complaints. As a result, the Council's consideration of the matter had been the subject of extensive scrutiny and comment.
15. In the circumstances, the Commissioner is satisfied that it was appropriate for the Council to direct Mr Trybis to the relevant Committee reports in response to part 4 of his request.

### **Section 25(1) of FOISA – Information otherwise accessible**

16. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA. The Council confirmed that it was applying section 25(1) to some of the information caught by part 4 of the request, as explained below.
17. In its initial response, the Council informed Mr Trybis that the information was available in papers submitted to Councillors in October and December 2014. In its review outcome, the Council told Mr Trybis that he had already been provided with the information requested.
18. In his application to the Commissioner, and in his requirement for review, Mr Trybis made it clear that he did not believe the Council had provided him with adequate details to allow him to locate the information covered by part 4 of the request.
19. In its submissions to the Commissioner, the Council confirmed that it was maintaining its reliance on section 25(1) with regard to the report submitted to its Policy and Resources Committee in December 2014. The Council provided the Commissioner with a link<sup>1</sup> to this report.
20. The Council also acknowledged, as it did to Mr Trybis at the same time (see above), that its reference to papers in October 2014 was incorrect: it should have referred to a report in August 2014. It went on to explain that this report was not in the public domain at the time of Mr Trybis's request and requirement for review, and so would not have been provided to Mr Trybis then. The Council confirmed it was now prepared to disclose this report, which it did.
21. Having considered all of the relevant submissions, the Commissioner is satisfied that some of the information sought by Mr Trybis (i.e. the December 2014 report) was reasonably obtainable by him, other than by making a request for it under section 1(1) of FOISA.
22. However, the Commissioner does not consider the August 2014 report was so obtainable, at the time of Mr Trybis's request or requirement for review, with the result that the Council was not entitled to apply section 25(1) to this information. This follows by necessary implication from the Council's acknowledgement that the report would have been refused at that time, whatever it may be prepared to do with it now.
23. The Commissioner must also note that while section 25(1) applied to some of the withheld information, and the Council's reasons for withholding the information related to that exemption, it failed to refer to the exemption in its responses to Mr Trybis. In this respect, the Council failed to comply with section 16(1)(c) of FOISA.

### **Section 15 of FOISA – Duty to provide advice and assistance**

24. It is essential to any requester pursuing a right to information that (where the public authority is not simply providing the information, but rather is directing the requester to a place where it may be obtained), the requester knows enough about where to look for it to be able to pursue that right effectively. To this end, the authority's duty to provide advice and assistance can be vital.

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<sup>1</sup> <http://www.argyll-bute.gov.uk/moderngov/ieListDocuments.aspx?CId=544&MId=6443&Ver=4>

25. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code<sup>2</sup>).
26. At section 9.4 in Part 2, the Section 60 Code states:
- When information is otherwise accessible*  
*Where a public authority refuses a request on the grounds that the information is otherwise accessible, it must send the applicant a refusal notice which acknowledges that it holds the information and explains why the exemption at section 25(1) of FOISA (or exception at regulation 6(1)(b) of the EIRs) applies.*
- The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases the authority should bear in mind its general duty to provide advice and assistance to applicants.*
27. The Council acknowledged that it could have provided more advice and assistance to Mr Trybis, although it considered it easy to find the information on its website. In the Commissioner's view, it should have been apparent from Mr Trybis's requirement for review that he still required guidance as to where this information might be found. Also, even if the August 2014 report had been accessible on the Council's website at that time, it would hardly have been easy to locate it with directions to a report from October of the same year.
28. In all the circumstances of this case, therefore, the Commissioner cannot accept that the Council gave Mr Trybis reasonable advice and assistance to enable him to locate the information it held and which was covered by part 4 of his request. In other words, it failed to comply with section 15 of FOISA in this regard.
29. Taking all of the above into account, the Commissioner is satisfied that the Council had, by the end of her investigation, taken adequate and proportionate steps to provide Mr Trybis with either the information covered by part 4 of his request or the means to access that information. Consequently, she does not require the Council to take any steps in response to the failures she has identified.

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<sup>2</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

## Decision

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The Commissioner finds that Argyll and Bute Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Trybis.

The Commissioner finds that the Council was entitled to apply section 25(1) of FOISA to some of the information sought by Mr Trybis (i.e. the December 2014 report). In failing to identify the exemption in its responses to Mr Trybis, it failed to comply with section 16(1)(c) of FOISA.

The Commissioner finds that the Council was not entitled to apply section 25(1) to other information falling within the scope of Mr Trybis's request (i.e. the August 2014 report, wrongly described as dating from October 2014).

The Commissioner also finds that the Council failed to provide Mr Trybis with reasonable advice and assistance as to where he might find the information it considered otherwise accessible, and therefore failed to comply with section 15(1) of FOISA.

Given the information provided to Mr Trybis during this investigation, the Commissioner does not require the Council to take any action in respect of these failures.

## Appeal

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Should either Mr Trybis or Argyll and Bute Council wish to appeal against this decision, they have the right to 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.

**Margaret Keyse**  
**Head of Enforcement**

**20 October 2015**

### 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 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

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

#### 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.

- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

#### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which—

...

- (c) specifies the exemption in question; and

...

**25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

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