



Scottish Information  
Commissioner

**Decision 071/2006 - Millar & Bryce Limited and Dundee City  
Council**

*Request for copies of extant notices served under Section 166 of the Housing  
(Scotland) Act 1987*

**Applicant: Millar & Bryce Limited**

**Authority: Dundee City Council**

**Case No: 200500844**

**Decision Date: 3 May 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 071/2006 Millar & Bryce Limited and Dundee City Council**

*Request for extant notices served under section 166 of the Housing (Scotland) Act 1987 – withheld on the basis of section 12(1) – excessive cost of compliance*

### **Facts**

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MacRoberts Solicitors (MacRoberts), acting on behalf of their clients, Millar and Bryce Limited (Millar & Bryce), requested details of notices which remain extant under or pursuant to section 166 of the Housing (Scotland) Act 1987 from Dundee City Council (the Council). The Council refused, citing section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council claimed that the cost of responding to the information request exceeded the prescribed amount set by the Scottish Ministers.

### **Outcome**

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The Commissioner found that the Council failed to act in accordance with Part I of FOISA in its refusal to respond to Millar & Bryce's information request under section 12(1) of FOISA, on the grounds that the estimated cost of complying with the request would exceed the amount prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations).

The Commissioner required the Council to provide a full and appropriate response to Millar & Bryce's information request.

### **Appeal**

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Should either the Council or Millar & Bryce 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 of receipt of this notice.



## Background

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1. On 1 January 2005, MacRoberts wrote to the Council on behalf of an unnamed client, requesting copies of “all Notices or Orders made or served prior to 31 December 2004, and which remain extant as at 1 January 2005, under or pursuant to section 166 of the Housing (Scotland) Act 1987.” MacRoberts also requested that, where the information contained personal data, which is exempt under section 38 of FOISA, the information be provided with that data redacted.
2. Notices under section 166 of the Housing (Scotland) Act 1987 (the HSA) are served by local authorities to prevent or reduce overcrowding in houses in multiple occupation.
3. The Council responded on 28 January 2005, informing MacRoberts that the information request was being refused. Section 12(1) of FOISA, which states that public authorities are not obliged to comply with a request if the authority estimates that the cost of complying would exceed the amount prescribed in the Fees Regulations, was cited as the reason for refusal. The amount prescribed in the Fees Regulations is £600.
4. MacRoberts replied to this correspondence on 28 January 2005. In their reply, MacRoberts requested a breakdown of the costs calculated by the Council, while also requesting that the Council review its decision to withhold the information.
5. The Council’s response to this request for review, dated 24 February 2005, upheld the decision to withhold the requested information on the basis of section 12(1) of FOISA. The Council stated that the requested information was held in 611 separate files, and the retrieval of the information would require each file to be examined. The Council estimated that it would take 30 minutes to examine each file and extract the information, by a member of staff employed on the GS1/3 pay scale. As the cost per hour for staff members on this pay scale is £9.60, the cost of providing the information was estimated at £2,932.80.
6. On 4 March 2005, MacRoberts submitted an application for decision to my Office. In this application MacRoberts named Millar & Bryce, a company offering property search services, as its client. This application was subsequently allocated to an investigating officer.



## The Investigation

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7. The application was validated by establishing that a valid information request had been made to a Scottish public authority, and that the application to me for decision had been made only after requesting the authority review its decision.
8. In their application, MacRoberts stated that Millar & Bryce did not accept that the methodology suggested by the Council was plausible, as it suggested that the Council maintained no centralised records of the requested information, and the only method of extraction would be to review every file on the Council's system.
9. On 7 April 2005, my Office contacted the Council to invite comment and seek further information relating to the case. This information was provided on 6 May 2005. Following receipt and consideration of this response, the investigating officer visited the Council's premises in July 2005 to interview key staff directly, and examine the systems and processes used by the Council to store and access relevant information. Additional information and comment was subsequently sought from the Council in various follow-up communications. The findings of this investigative work is summarised below.
10. The Council firstly informed my staff that the nature of the information requested by the applicant was misunderstood at the time of Millar & Bryce's initial request, and this misunderstanding was not identified during the Council's review. As a result, the Council stated that the initial calculation of fees on the basis of analysis of 611 separate files was erroneous.
11. The Council indicated that this misunderstanding arose as a result of the process used to filter information requests to relevant departments. This process led to Millar & Bryce's request being inappropriately summarised, with the result that the Council subsequently interpreted the request as being for details of all notices served under section 166 of the HSA, as opposed to only those notices which remained extant as at 1 January 2005. The Council stated that the 611 files referred to in its original response referred to those which would have to be examined to retrieve details of served section 166 notices.
12. The Council also indicated that the initial methodology it proposed was flawed, stating that it would only identify notices served since the introduction of mandatory licensing of Houses in Multiple Occupancy (HMOs) in 2000 by the Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000 (the 2000 Order). It would not, therefore, identify any records of section 166 notices served under the discretionary HMO licensing scheme which existed prior to the implementation of the 2000 Order.



13. The Council informed my Office that, following receipt of the request for review, the case was again considered on the basis of the incorrect summary. The error was not, therefore, identified until Millar & Bryce applied to me for a decision.
14. Following its reconsideration of the information request, the Council informed my Office that the decision to withhold the information under 12(1) of FOISA (due to the excessive cost of compliance) still applied, albeit based on different calculations and a different methodology than those outlined to MacRoberts.
15. Prior to the introduction of the 2000 Order, the Council stated that its discretionary licensing scheme was the responsibility of the then Environmental Health and Consumer Protection Department. Following the introduction of the 2000 Order, the mandatory scheme became the responsibility of the Council's Private Sector Services Unit. The Council stated that it had canvassed available staff who either work, or had worked, in the relevant departments, and that the response suggested that no such notices were served under either the discretionary or mandatory HMO licensing schemes. Nevertheless, the Council stated that it remained a possibility that such notices were indeed served, and may remain extant.
16. Following its reappraisal of the information request, the Council asserted that the only reliable way in which any relevant information could be retrieved would involve an examination of all Council Committee minutes since 1987, the year the HSA was passed. The Council stated that there were a number of Committees at which approval to serve such notices may have been sought, and that the Council's full record of Committee minutes would have to be reviewed in order to identify the relevant committees and fully review its minutes for details of section 166 notices. If a section 166 notice was identified, this information could then be used to identify the responsible department and allow Council staff to interrogate departmental systems to establish whether the notice remained extant.
17. The Council stated that Committee minutes are held in the form of a single bound volume for each year since 1987, each comprising at least 800 pages. The Council asserted that all 800 pages of all 18 volumes would have to be reviewed. It also stated that that, following a sample review of pages from 4 random volumes, it estimated that it would take between 15 and 40 seconds to review each page. The Council therefore estimated that it would take no less than 60 hours to review all 18 volumes.



18. In its submission to me, the Council proposed that this work should be carried out by a staff member graded at AP3 level, whose hourly rate was stated to be £20.75. Regulation 3(2)(b) of the Fees Regulations, however, provides that in estimating projected costs the cost of staff time should not exceed £15 per hour per member of staff. The Council therefore estimated that the cost of reviewing the Committee minutes would be at least £900. The Council also indicated that, in circumstances where the serving of a notice under section 166 of the HSA could be identified from the relevant minutes, an additional charge would have to be made to cover the staff time required to interrogate departmental systems in order to confirm whether the notice remained extant.
19. Given that the Council's estimated charge exceeded the upper cost limit of £600 prescribed in the Fees Regulations, the Council therefore stated that its original refusal under section 12(1) of FOISA was appropriate.

## **The Commissioner's Analysis and Findings**

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### **The Council's review**

20. I would first like to comment on the Council's failure to recognise at review stage that its interpretation of the original request, and therefore the estimate of the work required in order to fulfil it, was erroneous.
21. The purpose of a review under FOISA is to provide a public authority with the opportunity to consider the issues which arise from a particular information request afresh, thus allowing it to ensure that it is satisfied that the request has been dealt with fully in accordance with FOISA. In conducting a review, I would generally expect an authority to assess whether it had interpreted an information request correctly. In this case, it is clear that the review process failed to identify that the request had been misinterpreted, and that subsequently both the information identified, and the cost of providing it, was erroneous.
22. The Council has, however, informed my staff that its procedures have been reviewed following its experience of responding to this request, and that, as a result of the misunderstanding in this case, requests are no longer summarised before delegation to an appropriate officer for response.

### **Accessing the information**

23. In the application to me, MacRoberts disputed the Council's assertion that it maintains no centralised records of the requested information, and that the only method of extraction would therefore be to manually review paper files.



24. As noted above, the Council revised its assessment of both the nature of the request, and of where the information could be correctly located, following Millar & Bryce's application to me. Despite this, however, the core argument put forward by the Council remained the same. This was that:
- the information was not centrally accessible;
  - retrieval of the information would require a manual review of relevant documentation; and
  - the cost of this manual review would exceed the prescribed amount set out in the Fees Regulations.
25. In order to assess the validity of this position, a member of my staff visited the Council's premises to inspect the systems used and to interview key staff, in order to establish whether the information could be extracted from the existing systems.
26. During this visit, the Council made it clear that it has never been asked to, nor has it had any need to maintain, a centralised record of notices served under section 166 of the HSA. It was also made clear that the existing Council databases are not designed to record details of such notices. The Council went on to state that information on extant section 166 notices is not provided in the Council's property enquiry certificates, and it is for this reason that the Council does not keep a central record of such notices.
27. The Council also stressed that it considers a manual search of Committee minutes to be the only available recourse if accurate information is to be provided to Millar & Bryce.
28. As a result of the submissions provided by the Council, and the subsequent site inspection carried out by my investigating officer, I am satisfied that the information requested by Millar & Bryce cannot be readily accessed through the Council's existing IT systems. As such, I accept the Council's view that a response would require a manual search of relevant paper files, as valid.

### **The Council's assessment of charges**

29. As noted above, Millar & Bryce's information request was refused on the basis of the excessive cost of compliance. In its submissions to this Office, the Council estimated that a response to this request would involve a manual review of Committee minutes since 1987, and advised that the cost of carrying out this work would be at least £900.00.





30. Having considered the submissions put forward by the Council, I am not, however, satisfied that the Council's assertion that the retrieval of relevant information would cost in excess of £600 is appropriate and correct in terms of FOISA. I will outline the reasons for this below.
31. Firstly, it was noted by my investigating officer that the staff required to conduct the review of the Council's Committee minutes appeared to be graded at a higher level than those staff required to respond to the Council's initial interpretation of the request (AP3 staff as opposed to GS1/3 staff). The Council was asked to provide an explanation for this discrepancy.
32. In response, the Council stated that this was a result of the initial misunderstanding over the nature of the request. The Council stated that when the misunderstanding had been resolved and the request considered again, it was decided that it would be necessary for the work to be carried out by a staff member at AP3 level. AP3 level staff were described as having the relevant skills and experience required to carry out the work, while GS1/3 level staff were described by the Council as providing clerical support. No further explanation was provided.
33. Following consideration of this issue, I do not find it acceptable that the Council chose to amend the grading of staff officer required to carry out the work, following its subsequent reconsideration of this case.
34. I do not accept the Council's apparent view that there is a marked difference in the skills required to review the original 611 files to establish whether a notice has been served, and reviewing Committee minutes for the same purpose. It is my view that the Council had adequate opportunity when considering both the initial information request and the subsequent request for review in which to consider the appropriate grade of staff to carry out work of this type. In doing so, the Council appears to have twice arrived at the conclusion that an appropriately briefed GS1/3 graded staff member would be suitable. I am not satisfied, therefore, that there is adequate justification for the Council's subsequent assertion that this work could only be carried out by staff graded at the higher AP3 level, as opposed to an appropriately briefed GS1/3 staff member.
35. The Council's response to MacRoberts' request for review stated that the cost per hour of a staff member at GS1/3 level should be charged at £9.60. It is, therefore, my view that any work required to review Committee minutes should be charged at this level.





36. The Council estimated that the time required to review Committee minutes since 1987 would be at least 60 hours. This assessment was based on the consideration that every page from an estimated 14,400 pages of Committee minutes since 1987 would have to be reviewed in order to establish whether a section 166 notice had been served, and that it would take a minimum of 15 seconds to review each page.
37. I also hold concerns with regard to this assessment. This estimate is based on the assertion that each page of every minute from all Council committees since 1987 would have to be reviewed in order to ensure that all potential section 166 notices could be identified. I am not, however, convinced that that this would be the case. Indeed, it appears to me that there will be a substantial proportion of each annual volume of minutes which could immediately be discounted from review, with the result that the time required could be significantly reduced from that estimated by the Council. For example, I can see no reason why there would be a need to review the minutes from those committees relating to such areas as education, leisure and arts, liquor licensing, personnel, or social work, as it would seem to be extremely unlikely that such minutes would contain the principal reference to a section 166 notice being issued or, indeed, any details of section 166 notices. Conversely those minutes relating to the Council's housing, environment, or planning functions may well contain details of such notices. Indeed, I consider that providing the nominated staff member with details of the specific committees likely to hold the relevant information would substantially reduce the time estimated to review these minutes. Any minutes which related to committees falling outwith the identified areas could then be discounted from review immediately, and would therefore not require the 15-40 second review time estimated by the Council.
38. In its submission the Council estimated that at least 60 hours would be required to review all Committee minutes since 1987. Were 60 hours of work to be carried out by a staff member on the GS1/3 payscale, the lowest estimated charge would fall within the £600 upper limit provided by the Fees Regulations. Given that I am of this view that the time required to undertake this work could be substantially and significantly reduced by the review of only those minutes likely to hold relevant information, it is my view that this work could comfortably be undertaken within the £600 FOISA upper fee limit.
39. The Council has, however, also stated in its submissions to me that, once the served notices have been identified, additional work would be required in order to contact the department responsible to determine whether the notice remained extant. The Council did not provide any estimate for this work in its submission to me. This appears to have been due to its assessment that having the work carried out by an AP3 staff member exceeded the prescribed amount, and that there was therefore no requirement to provide an estimate for this additional work.



40. I accept that additional work may be required following the review of the Committee minutes in order to establish whether any notices remain extant. I am also of the view that, were such work required, it may be appropriate for it to be carried out by a staff member at the AP3 level, in that it may require careful interrogation of relevant departmental systems. However, given the fact that the Council has stated that a survey of all relevant Council staff revealed that there is no departmental knowledge of any notices being served under section 166 of the HSA, I consider that any work required to determine whether such a notice remained extant would be minimal, and would not have a significant impact on the total cost to the Council.
41. It is my view, therefore, that the Council has inappropriately applied the exemption under section 12 (1) of FOISA to the information requested by Millar & Bryce. Indeed, as set out above, I am of the opinion that Millar & Bryce's request could be responded to within the £600 upper limit prescribed in the Fees Regulations.
42. In reaching this conclusion, I have also taken regulation 3(2)(a)(i) of the Fees Regulations into consideration. Regulation 3(2)(a)(i) states that, when estimating the projected cost of responding to a request, no account should be taken of the costs incurred in determining whether the authority holds the information specified in the request.
43. The Council has made clear in its submissions to me that it cannot confirm whether it holds information which could be provided in response to Millar & Bryce's request, and the only way in which this could be confirmed would be through the methodology it proposes. As such, it is clear that a proportion of the work undertaken by the Council would be undertaken for the purpose of determining whether the Council held the information specified. Indeed, should the end result of this work be the conclusion that no section 166 notices had been served, it can be considered that all of the work undertaken would be for this purpose. It is my opinion that these factors would further ensure that the total cost to the Council of responding to the request would fall within the upper cost limit of £600 prescribed by the Fees Regulations.
44. I therefore find that the Council failed to act in accordance with Part 1 of FOISA in refusing to respond to Millar & Bryce's request on the grounds of section 12(1).



## Decision

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I find that Dundee City Council (the Council) failed to act in accordance with Part I of the Freedom of Information (Scotland) Act 2002 (FOISA) in its refusal to respond to Millar and Bryce Limited's (Millar & Bryce) information request under section 12(1) of FOISA, on the grounds that the estimated cost of complying with the request would exceed the amount prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.

I therefore require the Council to provide a full and appropriate response to Millar & Bryce's request, supplying copies of all notices or orders made or served prior to 31 March 2004, and which remain extant as at 1 January 2005, under or pursuant to section 166 of the Housing (Scotland) Act 1987. If, following the undertaking of the appropriate work, it is discovered that no such notices or orders are held, I require the Council to inform Millar & Bryce of this fact.

In providing a response, the Council should note that section 9(1) of FOISA, read in conjunction with section 10 of FOISA, sets out that notice of a fee to be paid in relation to a request under FOISA must be issued within 20 working days of receipt of the request. As such, the Council is not entitled by FOISA to issue such a notice in relation to this request. The Council must, therefore, bear the full burden of the cost in responding to this request.

I am obliged to give the Council at least 42 days in which to undertake this action. In this case, I require that the Council respond to MacRoberts within two months of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**3 May 2006**