

Decision Notice



Decision 152/2011 Loveday's and Scottish Borders Council

Clerk of Works' qualifications and information relating to an on-site assessment

Reference No: 201100335
Decision Date: 8 August 2011

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Loveday's requested from Scottish Borders Council (the Council) information relating to a Clerk of Works appointed by the Council and information concerning an on-site assessment carried out at a specified address. The Council responded by advising Loveday's that it did not hold any relevant information. Following a review, Loveday's remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Loveday's request for information in accordance with Part 1 of FOISA. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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

Background

1. On 17 August 2010, Loveday's wrote to the Council requesting the following information relating to a specified property:
 - 1) the full name and office address of the Clerk of Works referred to in the penultimate paragraph of a letter dated 16 July 2010 and details of all, if any, qualifications both theoretical (paper) and on-site experience of the aforementioned and,
 - 2) a copy of each and every item of documentation (hard copy, electronic, and/or whatever) including any and every report and any and every photograph taken relative to the on-site assessment undertaken by the Clerk of Works referred to in the final paragraph of the letter dated 16 July 2010.



2. The Council responded on 8 September 2010. In relation to request 1), the Council provided the name and address of the Clerk of Works. However, it stated that, as he was not an employee of Scottish Borders Council, it was unable to provide any details of his qualifications as this information was not held by the Council. In relation to request 2), the Council advised Loveday's that the Principal Officer (Enforcement) was not aware of any other information or photographs beyond those which had already been sent to Loveday's.
3. On 27 September 2010, Loveday's wrote to the Council requesting a review of its decision. Loveday's indicated (in relation to request 1)) it found it implausible that the Council would have no knowledge of the experience and qualifications of the Clerk of Works. Additionally, it was not satisfied with the Council's response to request 2) which appeared to be limited to the Principal Officer (Enforcement's) personal knowledge rather than encompassing any recorded information held by the Council.
4. The Council notified Loveday's of the outcome of its review on 11 November 2010. The Council confirmed that it did not hold any information regarding the Clerk of Works' qualifications and, in relation to request 2), had no further information to supply to Loveday's beyond that already provided (in response to a previous information request).
5. On 18 February 2011, Loveday's wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Loveday's had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
8. In relation to request 1), the Council was asked to clarify why it did not hold any information about the qualifications of the Clerk of Works and what searches it had carried out in order to ascertain whether it held any relevant information.



9. In relation to request 2), the investigating officer pointed out that the Council's initial response to Loveday's (i.e. that "the Principal Officer (Enforcement) is not aware of any other information or photographs beyond those which have already been sent to you") did not appear to be a notice that no relevant information was held nor that any searches had been undertaken in order to ascertain whether any relevant information was held. The Council was therefore asked whether it had been its intention to respond to request 2) by stating, in terms of section 17 of FOISA, that no such information was held by it. The Council was also asked to clarify what searches had been undertaken in order to locate and retrieve any information falling within the scope of request 2).
10. The Council subsequently responded to these requests, although, it proved necessary for the investigation officer to enter into additional correspondence with the Council in order to clarify and ascertain what information was held by it and what searches had been undertaken in order to ascertain whether all relevant information had been identified.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Loveday's and the Council and is satisfied that no matter of relevance has been overlooked.

Request 1)

12. In its response to Loveday's, the Council provided the name and address of the Clerk of Works and stated that it did not hold any information in relation to the Clerk of Work's qualifications. In its review response, the Council reiterated that it did not hold any information concerning the Clerk of Works' qualifications.
13. In order to determine whether the Council was correct to advise Loveday's that it did not hold the requested information, the Commissioner must establish whether the Council holds (or held at the time of Loveday's' request) information which would address its request.
14. The Council explained that the Clerk of Works was not a Council employee, but had been employed as an external consultant in accordance with the Council's procurement policy. The Council explained that the Clerk of Works was a former employee of the Council; as such, the Council knew that he had the specialist skills required to undertake the role. Accordingly, the Council did not consider it necessary to undertake any searches to ascertain whether it held any recorded information concerning the Clerk of Works' qualifications.



15. Following further correspondence with the investigating officer, the Council stated that the Clerk of Works' qualifications would have been vetted at the time that he commenced employment with the Council. The Council restated that it did not hold any details of his qualifications. Additionally, the Council explained that it only retains staff personnel files for a period of seven years after an employee has left the organisation. In this case, the individual had left the Council's employment more than seven years ago.
16. Having considered the Council's submissions and its explanation of why it does not hold any information concerning the Clerk of Works' qualifications, the Commissioner is satisfied that it does not hold any recorded information (and did not at the time of the request) regarding the Clerk of Works' qualifications.
17. The Commissioner is therefore satisfied that the Council has complied with the provisions of FOISA in dealing with this request.
18. In its application to the Commissioner, Loveday's indicated that it seemed inconceivable that the Council could engage a Clerk of Works without holding any details of that individual's qualifications. The Commissioner notes that his remit in carrying out this investigation extends to the consideration of whether the Council actually holds the relevant information requested by Loveday's. Consequently, in this instance, he cannot comment on whether the Council ought to hold any recorded information on the Clerk of Works' qualifications or whether it ought to have created any such information at the time of the Clerk of Works' appointment.

Request 2)

19. In its communications with Loveday's and in its submissions to the Commissioner, the Council's position was that all relevant information falling within the scope of request 2) had already been provided to Loveday's as a result of a previous information request (which had been framed more widely than the request of 17 August 2010) submitted by Loveday's in March 2010.
20. In its application to the Commissioner, Loveday's stated that it had not been provided with any information which fell within the scope of request 2).
21. As noted at paragraph 9 above, the Council's initial response did not appear to be a notice that it did not hold the information, but appeared to be simply a statement that one Council Officer was unaware of any additional information being held by the Council. The Council's review response of 11 November 2010 did, however, state that there was no further information available in relation to the building works that had taken place at the specified address. Additionally, the Council stated that "it is standard practice for the Clerk of Works to verbally agree the level of minor works with the Contractor on site, with no post meeting notes passed on to the Council".
22. In its submissions to the Commissioner, the Council confirmed that it did not hold any information falling within the scope of request 2). It stated that it had again checked the paper file relating to the property in question and had not identified any information falling within the scope of this request.



23. The investigating officer subsequently asked the Council to carry out additional searches of key staff emails in order to ascertain whether any additional information was held by the Council which had not been stored within the paper file referred to above.
24. The Council subsequently carried out electronic searches and, in doing so, identified some emails which it disclosed to Loveday's. Having considered the content of these emails, the Commissioner has concluded that, whilst being relevant to the overall conduct of the work carried out by the Council, they were outwith the scope of request 2).
25. The Council also confirmed to the investigating officer the search terms that were used in the electronic searches and the officers whose emails were searched.
26. The Commissioner is satisfied that the further searches carried out by the Council would have been sufficient to have retrieved any correspondence or other recorded information covered by the terms of request 2). Having considered the Council's submissions and its explanation of why it does not hold any recorded information concerning the on-site assessment referred to in request 2), the Commissioner is satisfied that it does not hold any recorded information (and did not at the time of the request) falling within the scope of this request.
27. The Commissioner is therefore satisfied that the Council has complied with the provisions of FOISA in dealing with request 2).
28. The Commissioner again notes that his remit in carrying out this investigation extends to the consideration of whether the Council actually holds the relevant information requested by Loveday's. Consequently, he cannot comment on whether the Council ought to hold any recorded information concerning the on-site assessment.

DECISION

The Commissioner finds that Scottish Borders Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Loveday's.



Appeal

Should either Loveday's 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 within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
8 August 2011



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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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.

...