



Scottish Information
Commissioner

**Decision 037/2006 Ms Christine Divers, Secretary
of Eddlewood Tenants Association and South
Lanarkshire Council**

Information relating to a housing improvement programme

**Applicant: Ms Christine Divers, Secretary of
Eddlewood Tenants Association**

Authority: South Lanarkshire Council

Case No: 200501491

Decision Date: 08 March 2006

**Kevin Dunion
Scottish Information Commissioner**

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Decision 037/2006 Ms Christine Divers, Secretary of Eddlewood Tenants Association and South Lanarkshire Council

Information relating to a housing improvement programme – failure to provide information - section 1 of the Freedom of Information (Scotland) Act 2002 (FOSIA) – failure to provide a refusal notice - section 16 of FOSIA – failure to advise applicant of the right of review and appeal to the Commissioner – section 19 – failure to conduct a review - section 21 of FOSIA – information provided in the course of the investigation

Facts

Ms Divers, on behalf of the Eddlewood Tenants Association, wrote to South Lanarkshire Council (“the Council”) to request information on the reasons and criteria used to decide the five year “Home Happening” investment programme for the Eddlewood area, and other related matters. The Council’s response provided some explanation of the general principles behind this programme, but did not provide a full response in line with the requirements of FOISA. Ms Divers then wrote to the Council again, asking it to review the decision not to provide the information requested. The response to this letter again provided broad responses to the requests but did not supply the information requested or refer to FOISA. Ms Divers then applied to the Commissioner for a decision on this matter.

Outcome

In the course of the investigation, the Council identified the information that it held that fell under the scope of Ms Divers’ request and supplied this to her. The Commissioner is satisfied that the Council has now supplied all relevant recorded information to Ms Divers.

However, the Commissioner found that the Council failed to act in accordance with the requirements of Part 1 of FOISA, specifically sections 1(1), 16(1), 19, and 21, in the way it had initially responded to Ms Divers’ request.



Appeal

Should either the Council or Ms Divers wish to appeal against this decision, there is a right to 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.

Facts

1. Ms Divers, the Secretary of the Eddlewood Tenants Association (the ETA) wrote to the Council on 2 February 2005. This letter made a request for information on the reasons and criteria used to decide the five year “Home Happening” investment programme (the programme) for the Eddlewood area. It also requested that street names were supplied in relation to information that had already been supplied. I understand this second part of the request to relate to the names of the streets that were to be included in each stage of the investment programme.
2. Ms Divers indicated further that the ETA was interested in
 - a) gaining an understanding of why the homes in the first year of this programme were chosen in what appeared to be a contrast with the criteria provided by the Council.
 - b) why the oldest houses in the area were included in year 5 when the main criterion, as the ETA understood it, was based on oldest properties first.
 - c) the reasons for the Council not providing the option of gas central heating to tenants in a specific area.
3. Although this letter made no reference to freedom of information, it was clearly made a valid request for information, in line with section 8 of FOISA, in that it:
 - a) was made in writing,
 - b) stated the name and address of the requestor, and
 - c) described the information requested.



4. The Council responded to Ms Divers' request in a letter dated 23 February 2005, which made no reference to FOISA. This explained in broad terms that "oldest first" was the general principle informing the programme, but a number of exceptions to this principle could occur e.g. where the oldest properties had already had similar replacement works.
5. This letter also advised Ms Divers of the existing arrangements for making information available to tenants and relevant bodies; with information provided on an area-by-area basis to all Elected Members and Housing Forums, with notification up to a year in advance to individual tenants.
6. Responding to the ETA's request for reasons for the Council not providing an option of gas central heating, the Council explained that this had not been identified as a current priority for the area concerned in previous surveys. It also noted that analysis by the energy section had confirmed that heating in this area was satisfactory.
7. Ms Divers wrote again to the Council on 22 March 2005, requesting that it review the decision not to provide the information requested. She noted that although the Council had provided general criteria, her request had sought the specific criteria applied when determining the first year of the investment programme, and why the specific properties were chosen over others. Ms Divers suggested that if the Council had difficulty providing the explanation sought, it might supply the background papers that determined the grounds on which the decisions were made. Ms Divers' letter also reiterated her request for street names for the properties included in each year of the investment programme. Finally, she reiterated her request for an explanation for the inclusion of the oldest properties in the area on year five of the programme, when the main criterion for this programme was "oldest first".
8. By referring to the previous request, stating the reasons for dissatisfaction with the response provided, and asking the Council to conduct a review, this letter constitutes a valid request for review in terms of section 20(3) of FOISA.
9. The Council responded to this request for a review in a letter dated 19 April 2005. Again, no reference was made to FOISA in this letter, which was signed by the same Council official as the initial response of 23 February 2005. This letter reiterated the general principles and exceptions to these set out in the original response. However, it noted that alongside these, consideration was also given to the general condition of existing elements, and the areas were prioritised and programmed on the basis of "worst first".



10. In response to the request for specific street names, the Council noted that the format and layout of information for the provision of information to tenants groups was as per the agreement made with tenants' representatives on the Business Plan Implementation Group. The letter explained that this ensures that information is provided in a consistent manner to various interested parties. It advised Ms Divers that "It is not our intention currently to deviate from this agreed method of providing information".
11. Ms Divers then made an application for a decision by me on this matter. Her application noted that although the Council had responded to her requests, the level of detailed information requested had not been supplied. She also questioned whether the response to her request for review was in compliance with the relevant guidelines, i.e. 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), given that the same official appeared to have considered both her initial request and subsequent request for review.

Investigation

12. Ms Divers' application, dated 28 April 2005, was received by my office on 3 May 2005 and allocated to an investigating officer. The appeal was validated by establishing that she had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Council to review the response to her request.
13. The investigating officer wrote to the Council on 10 May 2005 to advise it that a valid application for decision had been received and that a full investigation would now commence. The Council was invited to comment on the case in terms of section 49(3) of FOISA.
14. This letter also requested
 - a) details of the handling of Ms Divers' request and subsequent request for review
 - b) confirmation of whether this request had been considered under the terms of FOISA, and if so, the grounds on which any decision to withhold information had been taken.
 - c) background on the housing investment programme and associated decision making processes.
 - d) copies of any documents which



- set out principles and criteria by which the programme was devised,
 - contained minutes of meetings, briefings, notes or correspondence relating to decisions about the programme and the homes targeted each year, and
 - detailed the streets to be targeted in each year of the programme.
15. The Council responded to these requests in a letter dated 1 June 2005, which confirmed that Ms Divers' request for information and subsequent request for review had not been considered under the terms of FOISA. Instead, they had been responded to as part of the day-to-day business of the works programme.
16. The Council also provided background information on the improvement programme, and the existing arrangements for communicating with tenants groups about this programme. Copies of 4 documents relating to the programme were also supplied:
- a) a presentation to members of the Business Plan Implementation Group
 - b) minutes of the meeting where the presentation in a was delivered
 - c) an Executive Committee report on the programme
 - d) a letter and attached report setting out the programme.
17. The Council then wrote to Ms Divers (copying to my Office) on 13 June 2005, providing her with copies of the four documents supplied to my Office, as well as a street by street listing of the Eddlewood properties to be treated in each year of the programme. This letter apologised for the inconvenience caused by the Council's previous handling of her request as day-to-day business.
18. Ms Divers then responded to the Council (again copied to my Office) on 4 July 2005, expressing dissatisfaction with the information provided in the most recent letter.
19. The investigating officer then wrote again to the Council on 14 July 2005 to seek further information and comments in relation to this case. She asked in particular whether:
- a) the Council held any further information relating to the principles and criteria used in determining the programme, and the development and adoption of these criteria.
 - b) whether any information identified in response to (a) was considered exempt from release under part 2 of FOISA.
20. The Council responded to this further request on 28 July 2005. This enclosed a further eight documents that had been identified as relevant to this case:
- a) stock condition survey, brief for surveyors



- b) individual property survey reports
- c) summary property survey reports
- d) previous investment details for the Eddlewood area
- e) Larkhall Area Housing Office Investment Strategy
- f) presentation to the Business Plan Implementation Group
- g) housing stock options- progress report from October 2002
- h) housing stock options action plan – November 2002

The Council's response also provided further background information about the development of the programme and an explanation of the information listed in a) – h) above.

- 21. The Council confirmed that none of the information supplied to my Office was considered exempt from release under FOISA, and this was all subsequently supplied to Ms Divers in the course of the investigation.
- 22. The investigating officer then wrote to Ms Divers in December 2005 seeking confirmation that this information had been received, and to ask whether the ETA was now satisfied that its request for information had received a full response.
- 23. Ms Divers' response to this letter, dated 6 February 2006 confirmed that the documents had all been supplied, but the ETA was still dissatisfied with this response. She expressed dissatisfaction that the documents supplied did not explain why certain decisions were taken over which homes would be programmed for work before others. She went on to note that the Council had not answered the original question about which of the published criteria were used to determine the programme for the Eddlewood area, and what factors influenced their final decision.

The Commissioner's analysis and findings

- 24. Ms Divers' letter to the Council of 2 February 2005 was clearly a valid request for information under the terms of FOISA. The Council failed to recognise and respond to this request within this framework, and as a result failed to act in accordance with a number of its obligations.



25. A request for information under FOISA could be made to any public authority employee, and so it is important that all are able to recognise them and ensure that they receive an appropriate response. Steps that should have been taken in response to Ms Diver's request include:
- a) consideration under the Council's procedures for responding to requests under FOISA,
 - b) a search to establish what relevant recorded information was held,
 - c) an appropriate response that satisfied the Council's statutory obligations and made Ms Divers aware of her rights to request a review, and of appeal to my Office.
26. The Council's responses instead provided very general answers to Ms Divers' requests, failed to identify and supply recorded information that would fulfil her request, and failed to advise her of her rights of review and appeal.
27. When FOISA came into force, it introduced the right for an individual to request any recorded information held by Scottish public authorities. A response that refused to consider supplying information that went beyond that previously made available was in clear contravention of this right.
28. I have therefore found that the responses provided by the Council to Ms Divers failed to comply with a number of specific provisions within FOISA. These are set out in turn below.

Section 1(1)

29. This section states that a person who requests information from a public authority is entitled to receive it. Information should only be withheld where an exemption listed in Part 2 of FOISA applies. By failing to supply the information Ms Divers had requested, the Council failed in its obligations under section 1(1) of FOISA.

Section 16(1)

30. This section states that where information is to be withheld in response to a request, a refusal notice should be issued, confirming that the requested information is held by the public authority, and specifying which exemption has been judged to apply. While the Council did not provide the information requested by Ms Divers, no formal notice was issued confirming why the decision had been taken not to provide it. Therefore, the Council failed to comply with its duties under section 16(1) of FOISA.



Section 19

31. The section requires that a refusal notice should advise the requestor of their right to request a review under section 20(1) of FOISA, and to apply to the Scottish Information Commissioner under section 47(1) of FOSIA. As the Council's response to Ms Divers did not advise her of these rights, it also breached the requirements of section 19 of FOISA.

Section 21

32. Ms Divers' second letter to the Council requested that it review its decision not to supply the information she requested. In doing so, it fulfilled all the requirements set out in section 20(3) of FOISA of a request for review. Section 21 of FOISA states that on receipt of a requirement for review, a public authority should conduct a review of its initial decision, and advise the applicant of the outcome of this review.
33. The Section 60 Code sets out further guidance on the handling of reviews under FOISA. Paragraphs 65 states that

"The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate."

Paragraph 66 states that:

"Where the requirement for review concerns a request for information under the general right of access, the review should generally be handled by staff who were not involved in the original decision. While this may not always be possible, it is important that the review procedure enables the matter to be considered afresh."

34. As Ms Divers' correspondence was never handled under procedures designed for FOISA, no proper review was conducted that would fulfil these guidelines. I have found that the steps followed in response to her request for review were not in compliance with the requirements of section 21 of FOISA.

The provision of information to Ms Divers

35. The failure to recognise Ms Divers' letter of 2 February 2005 as a request for information under FOISA has therefore led to a failure to comply with a number of its requirements.



36. However, in the course of my investigation, the Council has taken steps to identify the recorded information that it holds that falls under the scope of Ms Divers' request and provide it to her. The information provided has included Council reports on the improvement programme, internal briefings, stock condition reports on individual properties, and the details of the streets to be covered in each year of the programme. These documents provide a significant amount of detail showing the basis on which the programme was based.
37. However, Ms Divers has expressed her continued dissatisfaction that this information does not provide answers to the particular questions she had asked.
38. Although this information does not document the decision making process in the way that would fully answer Ms Divers' questions, I am satisfied that no further relevant recorded information could be supplied on this matter.
39. FOISA creates a right of access to recorded information that is held by a public authority. It does not create the right to access information that is not recorded, or held, and it does not require public authorities to create information to address the particular concerns of a requestor if these are not addressed in existing records.
40. While I sympathise with Ms Divers' frustration with the lack of documentation that would answer her questions more fully, I have concluded that the Council has now supplied all relevant recorded information that it holds to Ms Divers.

Decision

I have found that South Lanarkshire Council failed to act in accordance with its obligations under Part 1 of the Freedom of Information (Scotland) Act 2002 in its response to Ms Divers' request for information.

The Council failed to comply with the following sections as set out in paragraphs 29 to 34 above:

Section 1(1)

Section 16(1)

Section 19

Section 21



I find that during the course of my investigation, the Council took steps to supply all relevant information that it held to Ms Divers. I do not require any further remedial steps to be taken in response to this decision.

Kevin Dunion
Scottish Information Commissioner
08 March 2006