

Decision Notice



Decision 169/2011 Goss Interactive Ltd and Scottish Borders Council

Ownership of intellectual property rights

Reference No: 201101037

Decision Date: 16 August 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Goss Interactive Ltd (Goss) requested from Scottish Borders Council (the Council) confirmation that the Council owned all of the intellectual property rights in the Jadu Content Management System. The Council responded by advising Goss that it could not confirm that it owned all of the IPR as it had not reached that stage within the Jadu implementation. Following a review, Goss remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Council did not hold any recorded information that would meet the terms of Goss's information request. While he found that the Council had failed to deal with Goss's request for information in accordance with Part 1 of FOISA by failing to notify Goss in line with section 17 of FOISA that it did not hold the requested information, 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. By way of background, the information requested in this case relates to an Invitation to Tender issued by the Council as part of its procurement process SBC/CPS/322 (Website and Content Management System). The tender was won by a company called Jadu.
2. On 18 March 2011, Goss emailed the Council noting that clause DES9 of the Invitation to Tender stated that the successful supplier would



“assign to the Council all and any rights, title and interest associated with the website (including all intellectual property rights whatsoever, which terms shall include without limitation all copyrights, patent, trademark and design rights and waiver of all associated moral rights to the full extent permitted by law). The intention is that the website will be owned solely by the Council and as such, the Council will be free to modify it as it sees fit. Its ongoing use should not be dependant on support and maintenance from the Supplier”.

In relation to this clause, Goss made the following request to the Council:

“Can the Council confirm as a fact that the Council now owns all of the IPR [intellectual property rights] in the Jadu Content Management System as required by DES9 cited above.”

3. The Council responded on 24 March 2011, stating that it could not confirm that it now owned all of the IPR in the Jadu Content Management System as it (the Council) had not reached that stage within the Jadu implementation.
4. On 28 March 2011, Goss emailed the Council requesting a review of its decision. Goss argued that the Council’s response indicated that the Council failed to recognise that the granting of IPR over the Jadu Content Management System was not an issue of project implementation, but a condition of the Council’s terms and conditions of the contract. Goss argued that the Council’s response confused the exercise of ownership of the IPR with the fact of that ownership.
5. The Council notified Goss of the outcome of its review on 21 April 2011. The Council upheld its previous response to the request, but also stated that it believed Goss had misinterpreted clause DES9. By way of clarification, the Council pointed out that it was the intention of the Council to own all rights, title and interest associated with the website alone and that it was never the Council’s intention to own the IPR of the Jadu Website and Content Management System.
6. On 31 May 2011, Goss wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Goss 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

8. 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. In particular, the Council was whether it actually held any recorded information that fell within the scope of Goss's request and to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded on 12 July 2011, stating that it now considered that it should have responded to Goss in terms of section 17 of FOISA on the basis that it did not hold any recorded information which would meet the terms of the request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Goss and the Council and is satisfied that no matter of relevance has been overlooked.
11. 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 Goss. Consequently, in this instance, he cannot comment on whether he considers the Council's, or Goss's, interpretation of clause DES9 is correct. Nor can he arbitrate on the difference of opinion between the two parties on the correct interpretation of the clause.
12. The Commissioner's role is limited to the handling of Goss's information request, which asked for confirmation as to whether the Council owns the IPR in the Jadu Content Management System (as, it believes, was required by the relevant clause in the Council's invitation to tender).
13. The Council's response to Goss indicated that it could not provide such confirmation. In correspondence with the Commissioner's office, the Council indicated that it had provided this response in an effort to provide a helpful answer to the question asked. During the investigation, it submitted that it should have indicated to Goss, in terms of section 17 of FOISA, that it did not hold any recorded information that would meet the terms of the request.
14. Section 1(1) of FOISA creates a general right of access to recorded information held by a public authority, except where (as provided by section 1(6)) that right is disapplied by the application of one of the exemptions in Part 2 of FOISA, or another provision in Part 1 of FOISA.



15. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is that held at the time the request is received. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.
16. In order to determine whether the Council should have advised Goss that it did not hold the requested information, the Commissioner must establish whether the Council holds (or held at the time of Goss's request) information which would address its request. The relevant information would, if held, be in recorded form, and would confirm that the Council owned the IPR in the relevant system.
17. Having considered the submissions provided by the Council, and the nature of the information requested by Goss, the Commissioner is satisfied that the Council does not hold any recorded information that would fulfil the terms of the request. The Commissioner's view is that this case essentially involves a dispute over the interpretation of a contract clause. As noted above, the Commissioner's remit does not extend to arbitrating on matters such as this.
18. Having concluded that the Council did not hold any recorded information falling within the scope of the request, the Commissioner finds that the Council failed to give proper notice in terms of section 17(1) of FOISA that it did not hold the information. In so doing, it breached Part 1 of FOISA.
19. However, this decision makes the position on this matter clear, and so no purpose would be served by now requiring the Council to notify Goss that the information is not held and to rectify this breach. For this reason, the Commissioner does not require the Council to take any action in respect of this breach in response to this decision.

DECISION

The Commissioner finds Scottish Borders Council (the Council) does not hold recorded information that would meet the terms of the request made by Goss Interactive Ltd (Goss), and that it did not hold such information at the time when it received Goss's request.

The Commissioner finds that, by failing to give notice that it did not hold the requested information, the Council failed to comply with the requirements of section 17(1) and consequently breached Part 1 of FOISA. For the reasons set out above, the Commissioner does not require the Council to take any action in response to this failure.



Appeal

Should either Goss 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
16 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.

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