

# Decision Notice

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**Decision 138/2016: Mr X and East Lothian Council**

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**Tyne Esk Leader funding for Dunbar Community Bakery**

Reference No: 201502401

Decision Date: 28 June 2016



Scottish Information  
Commissioner

## Summary

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On 2 January 2015, Mr X asked East Lothian Council (the Council) for information pertaining to “Tyne Esk Leader” funding for the Dunbar Community Bakery.

The Council responded by providing some information to Mr X, notifying him that that any remaining information it held was held on behalf of the Scottish Ministers (the Ministers). Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

After an investigation (during which the information held on the Ministers’ behalf was disclosed to Mr X), the Commissioner found that the Council had partially failed to respond to Mr X’ request for information in accordance with FOISA.

While the Council was correct that information was held on the Ministers’ behalf, it failed to locate all the information it held in its own right until after her investigation had begun. The Commissioner did not require the Council to take any action in respect of this failure, given that this information was disclosed during the investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 3(2)(a)(i) (Scottish public authorities).

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

## Background

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1. On 2 January 2015, Mr X made a request to the Council for information pertaining to “Tyne Esk Leader” funding for the Dunbar Community Bakery (along with other matters, not covered by this application). The full information request is reproduced in Appendix 2.
2. After asking for and receiving clarification of his request from Mr X (a matter which is not directly relevant to Mr X’ application), the Council responded on 9 March 2015. The Council provided Mr X with information it held in its own right. However, it withheld the remainder of the information it held, on the grounds that this information was not, in terms of FOISA, held by the Council. This was because it was held on behalf of the Ministers. The Council cited section 3(2)(a)(i) of FOISA, which states that information held by an authority on behalf of another person or body is not deemed to be information held by the authority itself.
3. On 14 May 2015, Mr X wrote to the Council requesting a review of its decision. He did not believe the Council had provided all the relevant information it held pertaining to Dunbar Community Bakery funding. He did not believe the remaining information was held on behalf of the Ministers.
4. The Council notified Mr X of the outcome of its review on 15 June 2015. The Council upheld its view that section 3(2)(a)(i) of FOISA applied to the information. It provided additional explanations in relation to aspects of the request, along with supporting documentation.

5. On 16 December 2015, Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of the Council's review because he had not been provided with all of the information he was seeking and did not agree with the Council's position.

## **Investigation**

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6. Although Mr X' application to the Commissioner was made one day after expiry of the time period allowed by section 47(4)(a) of FOISA (six months from receipt of the review response), the Commissioner exercised her discretion in this case and accepted the application as valid. The Commissioner considered it appropriate to consider the late application given that it was made just after the expiry of the six months and given that the Council had failed to notify Mr X that he had six months to apply to the Commissioner.
7. The Commissioner confirmed that Mr X 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 21 January 2016, the Council was notified in writing that Mr X had made a valid application. The Council was asked to send the Commissioner the information which it stated was held on the Ministers' behalf. The Council provided the information 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 to provide evidence that the information being withheld from Mr X was actually held on behalf of the Ministers.
10. The Council provided submissions in support of its position. The investigating officer also contacted the Ministers to ascertain their views on the status of the withheld information.
11. The Ministers confirmed that the information was held on their behalf by the Council, to both the investigating officer and the Council. The Ministers also authorised the Council to disclose the remaining withheld information to Mr X, after redacting any personal data.
12. On 3 May 2016, the Council disclosed the information to Mr X on the Ministers' behalf.
13. The investigating officer subsequently went back to the Council to check that it did not hold any further information in its own right, in addition to that disclosed to Mr X in its response of 9 March 2015.
14. After carrying out further searches the Council located two other documents, which it then disclosed to Mr X.

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

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

## **Information claimed to be held on behalf of the Ministers**

### *Section 3(2)(a)(i) of FOISA*

16. The word "held", in relation to information requested under FOISA, has a specific meaning in section 3(2)(a)(i) of FOISA. When information is present within a Scottish public authority's premises and systems only because it is held on behalf of another person (in the legal sense, i.e. including another organisation), that information is not held by the authority for the purposes of FOISA.
17. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would if it held the information in its own right. The authority would not have power to delete or amend that information without the owner's consent, nor would it be able to apply its own policies and procedures to it. It might have restricted access to the information.
18. During the investigation, the Ministers confirmed the Council's position that the information was held on their behalf and authorised its disclosure to Mr X. The Council also provided submissions explaining that it held the information in order to allow it to administer the "Tyne Esk Leader" scheme and that it administered the scheme for and on behalf of the Scottish Ministers. As such, the information was clearly held on behalf of the Scottish Ministers.
19. The Council argued that its role was to support the scheme, as part of a Local Action Group with other local stakeholders. Under the Service Level Agreement (SLA) with the Ministers, it had a range of processing and payment functions which it carried out on the Ministers' behalf. This was reinforced by the Ministers' Technical Guidance, which confirmed that the Ministers were the managing authority for the scheme, providing the necessary conditions and administering the funds. Their approval was required for any assignation or sub-contracting of the services performed by the Council. Implementation of the scheme was subject to inspection and monitoring by the Ministers, who had the final say on the interpretation of the SLA. Penalties for breaches of the scheme, such as accepting overpayments, were established by the Ministers, who also dealt with appeals against such penalties.
20. All of this, the Council submitted, was proof that the Ministers were responsible for the overall control of the scheme.
21. Having considered these submissions, and noting that the Ministers are of the same view, the Commissioner accepts that the information disclosed to Mr X during the investigation, with the agreement of the Ministers, was information held by the Council on the Ministers' behalf. The Council was correct in applying section 3(2)(a)(i) of FOISA to this information.
22. Mr X still has the right to make an information request directly to the Ministers, to ascertain whether they hold (or have held on their behalf) any information which might be relevant to his concerns.

## **Information held by the Council in its own right**

### *Section 1(1) of FOISA*

23. The Council provided Mr X with information in response to his initial request. Mr X expected there to be more information, about (in particular):
  - the Tyne Esk Leader funding decision-making process
  - reasons for payments continuing after a particular decision

- pursuit of EU State Aid concerns, and
  - events relating to a particular complaint.
24. Two further pieces of information were subsequently disclosed to Mr X during the investigation after the Council was asked to review (and, where necessary, revisit) the searches it had carried out. It was asked to provide – and did provide – details of the searches carried out.
  25. The Council explained that searches were carried out in records maintained by its Economic Development Unit, which retained information specific to the Dunbar Community Bakery and its funding. The resources searched included the “Enterprise” email vault, electronic folders, and paper files.
  26. The Council provided the Commissioner with screen-shots of the electronic folders that had been searched, confirming the results of the searches, along with relevant internal communications and a list of the documents identified and located. This included the documents held on behalf of the Ministers as well as those held by the Council in its own right.
  27. The Commissioner has carefully considered all of the submissions provided by both Mr X and the Council, including the evidence provided by the Council of the searches carried out.
  28. The Commissioner can only reach a decision based on information actually held by an authority, not on the basis of information a requester believes the authority should hold.
  29. Having considered all relevant submissions, the Commissioner accepts that the Council has now carried out adequate, proportionate searches to ascertain whether it holds any information, in its own right, falling within the scope of Mr X’ request. She accepts that any information falling within the scope of the request would have been identified using the searches described by the Council. On the balance of probabilities, she accepts that the Council holds no further information falling within the scope of Mr X’ request.
  30. Not all the relevant information was identified, located and provided by the Council prior to the Commissioner’s investigation. In the circumstances, the Commissioner must find that the Council breached the requirements of section 1(1) of FOISA in responding to Mr X’ request, by failing to disclose all the information it held in its own right until after her investigation had begun.

## Decision

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The Commissioner finds that East Lothian 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 X.

The Commissioner finds that by correctly claiming that information was held on behalf of the Scottish Ministers, the Council complied with Part 1.

However, the Council failed to comply with Part 1, and in particular section 1(1), by not identifying and locating all the information it held in its own right.

Given that the additional information (insofar as held by the Council in its own right) has now been identified, located and provided to Mr X, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr X' application.

## Appeal

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Should either Mr X or the East Lothian 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**

**28 June 2016**

### 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.

...

#### 3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

(a) by the authority otherwise than-

- (i) on behalf of another person; or

...

## Appendix 2: Information request

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"I wish to exercise my rights under the Freedom of Information (Scotland) Act 2002 ("the Act") and the Environmental Information (Scotland) Regulations 2004 (EIRs) to request information held by East Lothian Council (which term shall include any relevant East Lothian Council departments and/or agencies) relating to:

- The company or business, located in Dunbar, named the Baker's Dozen ("the Baker's Dozen")
- Dunbar Community Bakery (which term shall include any other name or project name relating to Sustaining Dunbar's bakery project in Dunbar) and
- Sustaining Dunbar

I request the following documents and records in relation to the above entities:

- any notes, correspondence, emails and memoranda
- minutes of meetings or reports, whether held electronically or otherwise
- papers, whether handwritten or otherwise.

I wish to be provided with these documents and records, whether held by East Lothian Council ("ELC") or any relevant ELC departments and/or agencies directly, or on their behalf by a third party.

I do not wish to be provided with a summary or rephrasing of the information requested, but a full, comprehensive, verbatim and entirely accurate account.

Should any of the following documents contain confidential information, I would expect that the relevant information should be disclosed, but with the relevant confidential information redacted.

In the period from 1 January 2008 to the date of this letter, I request documents and records which contain:

- 1. FUNDING APPLICATIONS, MONITORING, OBJECTIVES AND ELC CORRESPONDENCE WITH SUSTAINING DUNBAR, DUNBAR COMMUNITY BAKERY AND SCOTTISH GOVERNMENT**
  - 1.1 All information regarding applications by Sustaining Dunbar and Dunbar Community Bakery to ELC, or any other funding source such as Big Lottery and Tyne Esk Leader, for funding these projects, including copies of such applications and all correspondence relating to such funding between ELC (and any other funding source such as Big Lottery and Tyne Esk Leader) and Sustaining Dunbar and/or Dunbar Community Bakery.
  - 1.2 All information concerning the terms on which grant funding or ELC support (whether financial or non-financial) has been made to Sustaining Dunbar and/or Dunbar Community Bakery by ELC or a related body.
  - 1.3 All information which results from the monitoring of spending by Sustaining Dunbar and Dunbar Community Bakery of funding granted by ELC, or by any other funding source such as Big Lottery or Tyne Esk Leader, which account for such spending.
  - 1.4 All correspondence between Sustaining Dunbar and/or Dunbar Community Bakery and ELC (including its departments and agencies), regarding any other matter not already included in 1.1, 1.2 or 1.3 above.



- 1.5 All information concerning potential and actual displacement of private business as a result of ELC funding, or funding sourced elsewhere, of Sustaining Dunbar projects, including how such displacement was considered by ELC prior to making funding for projects available and/or giving non-monetary support.
- 1.6 All correspondence between the Scottish Government (including any of its departments and agencies) and ELC (including its departments and agencies), regarding the proposed and actual activities of Sustaining Dunbar and/or Dunbar Community Bakery.
- 1.7 All correspondence between the Scottish Government (including any of its departments and agencies) and ELC (including its departments and agencies), regarding the funding of Sustaining Dunbar and/or Dunbar Community Bakery.
- 1.8 All correspondence between the Scottish Government (including any of its departments and agencies) and ELC (including its departments and agencies), regarding any other matter not already included in 1.6 or 1.7 above, concerning Sustaining Dunbar and/or Dunbar Community Bakery.

## **2. PERFORMANCE OF SUSTAINING DUNBAR AND/OR DUNBAR COMMUNITY BAKERY**

- 2.1 All information regarding communication between:
  - Officers, Councillors and/or Personnel of ELC and
  - Sustaining Dunbar and/or Dunbar Community Bakeryrelating to the performance of Sustaining Dunbar and/or Dunbar Community Bakery, and their activities and proposed activities which are within ELC's scope.

## **3. COMPLAINTS AGAINST SUSTAINING DUNBAR**

- 3.1 All information regarding complaints made by third parties (to include complaints made by the Baker's Dozen) about the proposed and actual activities of Sustaining Dunbar and/or Dunbar Community Bakery, and the responses to those complaints of ELC, its departments and agencies, Big Lottery and Tyne Esk Leader.
- 3.2 All correspondence between the Scottish Government (including any of its departments and agencies) and ELC (including its departments and agencies) regarding complaints made by third parties (to include complaints made by the Baker's Dozen) regarding the proposed and actual activities of Sustaining Dunbar.

**Scottish Information Commissioner**

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