

Decision Notice

Decision 163/2016: Mr N and East Lothian Council

Lair records

Reference No: 201600397

Decision Date: 20 July 2016



Scottish Information
Commissioner

Summary

On 14 October 2015, Mr N asked East Lothian Council (the Council) for specified lair records.

The Council provided a transcript of some records and photocopies of other records. Mr N was dissatisfied, believing that he was entitled to a photocopy of all the records he had requested. He believed he had not received all information from the records, and complained that some of the information had been inaccurately transcribed.

The Commissioner concluded that Mr N was not entitled to photocopies of the information, but found that the Council had failed to provide him with all of the information he should have received. She required the Council to disclose the remaining information to Mr N.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 11(1), (2) and (3) (Means of providing information)

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

Background

1. On 14 October 2015, Mr N made a request for information to the Council. He asked for “a photocopy from the original books of entry for the surname of [specified] for Pencaitland, Ormiston, Gladsmuir and Tranent burial grounds”.
2. The Council responded on 5 November 2015. It provided a transcript of some of the records and photocopies of other records.
3. On 11 November 2015, Mr N wrote to the Council requesting a review of its decision on the basis that he required a photocopy from the original entry.
4. The Council notified Mr N of the outcome of its review on 12 February 2016. It explained that it had provided typed up records (i.e. a transcript) for three of the four cemeteries and a photocopy from the lair book for the fourth. The Council stated that it was nearly impossible to photocopy the lair books and that there was a danger that damage might be done to the books.
5. On 29 February 2016, Mr N applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council’s review, and did not consider that the Council had disclosed all relevant information. He complained about the Council’s refusal to provide photocopies, stating that this would prevent errors and omissions in the information disclosed to him. He noted that there were differences between information he had received in transcript and information already provided in photocopied form. He stated that if photocopies were not possible without damaging the books, photographs taken by digital camera would achieve the same purpose and satisfy his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr N 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. The case was then allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 24 March 2016, the investigating officer notified the Council in writing that Mr N had made a valid application. The Council was invited to comment on this application and to answer specific questions. The Council responded on 6 April 2016, providing its submissions and photographs of some of the lair book entries.
8. On 21 April 2016, the Council was asked for further comment about the photocopying of lair records. It responded on 26 April 2016.

Commissioner's analysis and findings

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

Was Mr N entitled to copies of the records?

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not relevant in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
12. Section 11(1) of FOISA provides that, where an applicant expresses a preference for receiving information by one of the means specified in section 11(2), the public authority must, so far as is reasonably practicable, provide the information in the preferred format. The means specified in section 11(2) are: a copy (section 11(2)(a)); a summary or digest (section 11(2)(b)); or a reasonable opportunity to inspect a record containing the information (section 11(2)(c)).
13. Section 11(3) states that, in determining whether it is reasonably practicable to provide information in the specified format, the authority may have regard to all the circumstances, including cost. Where it determines that it is not reasonably practicable to give effect to the preference, it must explain why.
14. The Court of Session stated in *Glasgow City Council v The Scottish Information Commissioner*¹ [2009] CSIH 73 (at paragraph 57):

"When section 11(2)(a) refers to the "form" in which a copy of the information may be provided, it appears to us to have in mind such possible forms as electronic files, paper documents, audio or video tapes, or verbal communication. That is consistent with the sense in which the word "form" is used elsewhere in the Act (e.g. in sections 8(1)(a) and 47(2)(a))."

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

15. The Council was satisfied that the information disclosed to Mr N was a complete and accurate transcript of the records.
16. The Council referred to paragraph 16 of the Commissioner's Guidance on the validity of FOI requests following Court of Session Opinion on 30 September 2009² (SIC Guidance), which states:

"You are not entitled to be given copies of specific documents under FOISA, but that does not mean that any requests you make for documents or copies of documents are automatically invalid."

The Council stated that it had adhered to this guidance to the letter. It had not declared Mr N's request invalid, but had disclosed the exact information contained within the lair book entries, which is what Mr N was entitled to, under FOISA.
17. The Council noted that in paragraph 21 of the same Guidance, it states:

"Requesters cannot insist on receiving copies of specific documents, but only on receiving information. However, unless the requester has asked for the information to be provided in a digest or summary, the information provided must be a complete and accurate version of the information contained in the specified documents."

The Council pointed out that Mr N did not receive a digest or summary, but exactly the lair book entries that he requested, in the same table format as they are entered into the lair book. The Council considered this to be "an exact reflection of the information contained within the pages of the lair books".
18. The Council noted that most of the lair books are of a size that makes photocopying extremely difficult without damaging the book. It explained that the books have already been wrapped in sturdy, thick brown paper to protect them. It provided a photograph to illustrate the fragility of one of the books, which shows repaired pages and the extent of existing damage. The Council has decided that it is not going to endanger its records any more than they already have been endangered. Digitising records is currently out of the question as the Council, unfortunately, does not have the funds.
19. In his application for a decision, Mr N noted that the Council had previously sent him a photocopy from one of the lair books, but had later provided a transcript of the same information. The Council was asked to explain why, previously, it had been possible to photocopy the record.
20. The Council explained that the first time the lair book was photocopied was an attempt which resulted in the realisation that this action was too dangerous to the book itself. Only some of the books that were in better condition were subsequently photocopied. The Council has now decided that none of the books are to be photocopied anymore, to preserve them, and only transcripts of the information will be provided, as the danger to the books from frequent photocopying is too great.
21. The Commissioner accepts that it is not "reasonably practicable" (in terms of section 11 of FOISA) for the Council to provide Mr N with the information he requires in the format he prefers, i.e. by providing a photocopy. The Commissioner accepts that the lair books are not suitable for photocopying. She is satisfied that the Council gave Mr N some explanation of

² <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>

the difficulties involved. In this regard, the Council's response complied with the requirements in section 11(3) of FOISA.

22. The Commissioner notes that Mr N appears willing to accept that the records are too fragile to photocopy, although he has reasonably queried why, if this is so, he was previously provided with a photocopy from these records. In his application, he has suggested other ways of providing the information, such as photographing the records.

Did Mr N receive all the information covered by his request?

23. The Council stated that, after checking, it was satisfied that the information that Mr N received was complete and accurate.
24. The Council acknowledged that there had been a typographical error in one of the records transcribed for Mr N, and said it could provide Mr N with a correction to this record. It also pointed out that when the transcripts were checked, its officer had noticed that the lair book entry gave an incorrect burial date: this error had been corrected in the transcript provided to Mr N.
25. During the investigation, the Council was asked to explain why it seemed that the transcripts contained additional information not included within the lair record. In response, the Council explained that two types of books existed: the lair books and the chronological interment book. It had provided images of the lair book entries specifically requested by Mr N, but, in the transcript provided to Mr N, it had also included additional information from the interment book, to be helpful.

Mr N's comments

26. Mr N did not accept that the Council had provided a copy of all the records he had requested. He did not accept that he had received a true transcript of the records, stating that it provided false details and omitted others. Mr N considered that a photocopy of the records would prevent such errors. He suggested if photocopying was not possible, the same purpose could be achieved by photographing the records with a digital camera and print and image would achieve the same purpose.

The Commissioner's findings

27. The Commissioner has considered the submissions provided by the Council, including the photographs of the lair records which it provided as part of the investigation
28. The Commissioner is satisfied that there is photographic evidence to show that the records are fragile, and accepts that photocopying the records would damage the books in which the records are contained. In the circumstances, she finds that it was reasonable for the Council to choose to provide the information in a different format. The Commissioner acknowledges that the Council has tried to be helpful and has spent time trying to provide the information.
29. The Commissioner accepts that, in line with the Court of Session judgment referenced previously, Mr N is entitled to the information covered by his request, which need not be provided in the form of a copy. (Usually, this will be the most convenient way of providing information, but not in this case.)
30. The question for the Commissioner is whether Mr N has received all the information to which he is entitled, regardless of the format in which it was provided. The Commissioner accepts that Mr N's request was for information from the "books of entry" (i.e. the records in the lair books) and did not include information from the interment book. Given the similar

information in each of these sources, it was helpful for the Council to provide information from the interment books as well as the lair books, but this information was not covered by the terms of Mr N's request. The Commissioner will only consider whether Mr N received all the information to which he was entitled from the lair books. (In passing, however, she notes that the only information which appears to be missing from the transcript of the interment books is the initials of the clerk who added each record.)

31. The Council submitted that the transcript of information from the lair books was a complete and accurate record, with two minor exceptions. Having compared the information provided to Mr N in the transcripts with the photographs the Council provided of most of the lair book records, the Commissioner accepts this.
32. In relation to one of the records which was transcribed (Tranent 3172), Mr N complained that the age of the person buried in the lair had been wrongly transcribed. The Council accepted this. As Mr N already has a photocopy of this entry, the Commissioner does not require the Council to provide the information to Mr N again.
33. The Council provided a transcript of the lair record Gladsmuir 232. When creating the transcript, its officer noticed that the burial date on the record did not correspond with the date entered in the chronological book of interment. The Council corrected this 80-year old mistake on the transcript, but did not inform Mr N that it had done so. The Commissioner finds that although the information in the lair record was known to be inaccurate, it was recorded information which was covered by Mr N's request, and should have been provided to him, together with the explanation that the information had been wrongly recorded and a correction. Although this matter has now been explained, for completeness, the Commissioner requires the Council to provide Mr N with the information from the original lair record Gladsmuir 232, as held at the time of Mr N's request.
34. As noted above, the Commissioner accepts that it is reasonable to refuse to provide the information in the form of a photocopy. She is not prescriptive about the format in which the information should be provided, but notes that Mr N has expressed a preference for photographs rather than transcripts.
35. As the Council did not disclose all of the requested information within the lair records in response to Mr N's request, the Commissioner finds that the Council failed to comply completely with section 1(1) of FOISA. The Commissioner commends the Council for providing Mr N with information which was relevant to, but not covered by, his request.

Decision

The Commissioner finds that East Lothian Council (the Council) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr N.

The Commissioner found that the Council correctly gave Mr N an explanation of why the information could not be provided in the format he required, as required by section 11(3) of FOISA. However, the Council failed to disclose all of the information covered by Mr N's request, as required by section 1(1) of FOISA.

The Commissioner requires the Council to provide Mr N with the information described in paragraph 33 of the decision by **Monday, 5 September 2016**.

Appeal

Should either Mr N or the 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

20 July 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.

...

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.

- (2) The means are-

- (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
- (b) such provision to the applicant of a digest or summary of the information; and
- (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.

- (3) In determining, for the purposes of subsection (1), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info