

# Decision Notice



Decision 103/2009 Barr Limited and Argyll and Bute Council

Argyll and Bute Schools Project

Reference No: 200800369

Decision Date: 28 August 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

On behalf of their client, Barr Limited (Barr Ltd.), Pinsent Masons made a four-part request to Argyll and Bute Council (the Council) for information relating to the Argyll & Bute Schools project. In relation to one of the requests, the Council advised Barr Ltd. that some of the information was available on its website, while some of the information was not held. The Council advised that it would cost in excess of £600 to respond to the other three requests, and under section 12 of the Freedom of Information (Scotland) Act 2002 (FOISA) it was not obliged to comply with these requests.

Following a review, Barr Ltd. remained dissatisfied and applied to the Commissioner for a decision. Barr Ltd. queried whether excessive costs would, in fact, be incurred in complying with three of its requests.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Barr Ltd.'s request for information in accordance with Part 1 of FOISA, by failing to provide information which it held, by failing to give notice that other information was not held, and by failing to provide the applicant with appropriate advice and assistance. The Commissioner accepted that the cost of complying with one of the requests would exceed the specified cost limit of £600. He found that the Council had failed to comply with the statutory timescale in section 21(1) of FOISA when responding to the request for review.

Some information covered by one of the requests was provided during the investigation. The Commissioner did not require the Council to take any further action, but given the significant failings by the Council in this case will consider the extent to which a further assessment of the Council's general compliance with FOISA is warranted.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 12 (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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.



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)

## Background

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1. On 9 July 2007, Pinsent Masons LLP on behalf of their client, Barr Ltd., wrote to the Council requesting the following information relating to the Argyll & Bute Schools project (the "Project"):
  - 1) all contractual documentation and appointment details between the Council and Butler & Young in relation to the Project;
  - 2) details of the circumstances surrounding and process leading to the determination of Butler & Young's employment under their contract/appointment and their subsequent replacement by the Council including (without prejudice to the generality of the foregoing) copies of any memos, letters, faxes, e-mails, meeting minutes or notes;
  - 3) minutes of Council, Community Council and existing Rothesay Schools Parent/Teachers Association Meetings at which information relevant to the Project was discussed.
  - 4) all internal and external correspondence (memos, letters, faxes and e-mails) relating to the Rothesay Joint Campus Contract from September 2006 to date and in particular relating to the Service Availability, Decant and Building Warrant/Completion Certificate.
2. The Council responded on 7 August 2007. The Council advised that parts 1 and 2 of the request covered "an enormous amount of information", which could be held by a number of officers throughout the Council. Consequently, the Council had prepared a cost estimate in terms of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations), and estimated it would cost £816 to retrieve and provide the information falling within parts 1, 2 and 4 of the request. This figure did not include any charge for copying the information, which would be added. As the cost of compliance was in excess of the £600 limit specified in the Fees Regulations, the Council gave notice that the request for information in parts 1, 2 and 4 was refused on the basis of section 12 of the Freedom of Information (Scotland) Act 2002 (FOISA) (excessive cost of compliance).
3. In relation to part 3 of the request, the Council advised that minutes of Council and Area Committee meetings were available on the Council's website, and that the Council did not hold minutes of the Rothesay Community Council and the Parent/Teachers Association (in terms of section 17 of FOISA).



4. Barr Ltd. requested a review of the Council's response on 4 October 2007. They disputed that the cost of providing information under parts 1, 2 and 4 of their request would cost more than £600, and questioned the standard of records management within the Council. In relation to part 3 of the request, they asked for guidance on how it could obtain the information the Council did not hold.
5. The Council notified Barr Ltd. of the outcome of its review on 11 March 2008, some five months after the request for review was received.
6. In relation to part 3 of the request, the Council advised that Barr Ltd. should make requests directly to the relevant organisations for the information not held by the Council. The Council stated that it did not hold current contact details for either organisation.
7. In relation to parts 1, 2 and 4 of the request, the Council asserted that the records management methodology used was appropriate for such a large and complex project, and advised that the difficulty in complying with the request did not lie in either locating the information or determining whether it should be released, but in the volume of information and its dispersal throughout multiple distant locations.
8. The Council advised that the cost estimate previously provided was conservative. It stated that Barr Ltd. had been asked to refine the request to allow a response to be made within the cost threshold. The Council assumed that Barr Ltd. had refused to amend its request.
9. The Council stated that, in the normal course of events, it was likely that the exemption in section 36 would be applied to a request for this information from anyone else on the basis that at least parts of it relate to issues relating to "commercial confidentiality", primarily for Barr Ltd. It understood Barr Ltd. to have commenced legal action in relation to the termination of its contract. In reaching its decision not to release the information requested, the Council had had regard to other potential avenues by which the information might be made accessible in the course of legal proceedings, and had determined that since it was open to Barr Ltd. to petition the court for access to the information, there was no reason to override the Fees Regulations.
10. The Council therefore upheld the decision that parts 1, 2 and 4 of the request should be refused under section 12 of FOISA, and that the Council did not hold information covered by part 3 of the request, in terms of section 17.
11. On 11 March 2008, Pinsent Masons wrote to the Commissioner on behalf of their client Barr Ltd., stating that they were 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. Pinsent Masons queried the cost estimate provided by the Council, and noted that it was not clear from the terms of the review response (11 March 2008) whether the Council was seeking to apply section 36 of FOISA as an alternative to its arguments regarding excessive costs. Nor was it clear which part of section 36 the Council was seeking to rely upon.



12. The application was validated by establishing that Barr Ltd. 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

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13. On 23 April 2008, the Council was notified in writing that an application had been received from Barr Ltd. and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was also asked to provide comments and information on specific points raised by the investigating officer. In particular, the Council was asked to provide detailed calculations estimating the cost of responding to requests 1, 2 and 4. The Council was asked to provide separate calculations for each of those requests. The Council was also asked to clarify whether it intended to rely on either of the exemptions in section 36 of FOISA. Finally, the Council was asked to comment on Barr Ltd.'s assumption that the relevant information would be held on IT systems (removing the need to travel long distances to collate it) and was likely to be held in a single identifiable file.
14. The Council failed to respond within the timescale requested by the investigating officer, and was issued with an Information Notice under section 50(1)(a) of FOISA requiring it to provide the Commissioner with the information needed to investigate the application. The Council provided its response on 23 June 2008.
15. In relation to its reference to section 36, the Council explained that the issue had been raised merely to highlight that, even if section 12 had not applied, this would not automatically guarantee disclosure of the requested information as it was likely that other exemptions would apply to some parts.
16. The Council also provided further analysis of its cost calculation, which is considered in detail later in this Decision Notice. It argued that in the absence of a formal contract for Butler & Young's services, every piece of work undertaken by Butler & Young and all the associated paperwork would fall within the scope of request 1. However, the Council also drew attention to a document from Butler & Young dated January 2005, comprising service proposals and a table of rates, which the Council had accepted. The Council indicated that it was willing to provide this document to Barr Ltd. after redacting the table of rates, and this offer was subsequently accepted by Barr Ltd.
17. The Council was then advised (7 and 14 August 2008) that the cost estimates should be calculated separately for each of requests 1, 2 and 4, and was asked to provide such calculations.
18. The Council failed to respond within the timescale requested by the investigating officer, and was again issued with an Information Notice under section 50(1)(a) of FOISA, requiring it to provide the Commissioner with the information needed for investigation of the application.



19. In its response, the Council disputed the need to provide separate cost calculations, but complied with the request to do so. It estimated the cost of complying with request 1 as £2802, the cost of complying with request 2 as £2904, and the cost of complying with request 4 as £1165. The Council pointed out that the work required to comply with requests 1 and 2 would be effectively identical. The Council also noted that the cost estimates did not include information held by Legal Services or the Chief Executive's Unit, both of which had been involved.
20. The Commissioner was not satisfied with the explanations provided in support of the cost estimate, and decided that further investigation was required.
21. After further correspondence and phone calls, some of which are discussed later in this Decision Notice, the investigating officer and the Deputy Head of Enforcement arranged to visit the Council to make further inquiries in person about the relevant information held by the Council, and to discuss with the Council its interpretation of Barr Ltd.'s requests. This visit took place on 16 July 2009.
22. As a result of this visit, the Council was asked to re-calculate the cost estimate for request 4. It was also established that the Council did not hold any information covered by request 2, and that it held, but had failed to retrieve, information covered by request 1.

#### **Investigation of response to request 1**

23. As noted above, in request 1, Barr Ltd. asked for all contractual documentation and appointment details between the Council and Butler & Young in relation to the Project. The Council initially argued that in the absence of a formal contract for Butler & Young's services, all paperwork associated with every piece of work carried out by Butler & Young would fall within the scope of request 1. However, the Council also drew attention to a document containing service proposals from Butler & Young which had been accepted by the Council in 2005. The Council did not consider this to be a contract as such, but an "offer" to which it had made an "acceptance", which then created the contract.
24. Despite acknowledging the existence of this document, the Council continued to present the Commissioner with arguments about the cost of providing all paperwork associated with all work carried out by Butler & Young.
25. In July 2008, the Council indicated that it was willing to provide Barr Ltd. with the service proposal document after redacting a table of rates. The investigating officer asked Barr Ltd. whether it would like to take up this offer, and on 4 July 2008, Barr Ltd. confirmed that it wished to receive the document which the Council was willing to provide. The Council believes that the document was then sent to Barr. Ltd.'s solicitors, but has no record of this correspondence in its files.
26. In January 2009, Barr Ltd. was asked for its views and comments in relation to some aspects of the Commissioner's investigation. In particular, it was asked to what extent the information provided in the Butler & Young service proposal of January 2005 had satisfied request 1 (in the absence of any formal contractual documents).



27. In response, Barr Ltd. advised that it had not received the promised document containing Butler & Young's service proposal.
28. The Commissioner then asked the Council (17 February 2009) to provide Barr Ltd. with the service proposal document as quickly as possible. The Council had difficulty in locating the document, for a variety of reasons. On 23 March 2009, the Council supplied Barr Ltd. with a bundle of documents consisting mainly of emails, but including the proposal document with the rates table redacted. The Council copied these documents to the Commissioner.
29. It was noted that some of the emails in the bundle made reference to a formal letter of appointment for Butler & Young, but no such letter had been produced by the Council. When asked about the formal letter of appointment, the Council was not able to say definitely whether such a letter had ever been created, despite the references in the emails. The Council advised that it had twice carried out searches which would have retrieved the letter, if it was held.
30. On 10 July 2009, the Council obtained from Butler & Young a copy of the formal letter of appointment. The Council then established that it did, after all, hold a copy on file amongst its own records. A copy of the letter was then sent to Barr Ltd. along with a copy of the table of rates previously redacted from the service proposal document.

### **Investigation of response to request 2**

31. As noted above, Barr Ltd.'s second request was for details of the circumstances surrounding and process leading to the determination of Butler & Young's employment under their contract/appointment and their subsequent replacement by the Council.
32. The Council initially estimated that the cost of compliance with requests 1 and 2 would be £816. In its response to the information request (7 August 2007) it advised that an "enormous" amount of information was involved, which could be held in a number of offices throughout the Council. In its review response (11 March 2008) the Council reiterated the difficulties posed by the volume of information involved, the geographically disparate nature of Argyll, and the fact that the information was stored in several distant locations.
33. In its first submission to the Commissioner (23 June 2008), the Council explained that at the end of 2004 it had had several vacancies in its Building Control service, and so utilised Butler & Young's services. The Council then employed a new Building Control manager and officers. The manager had decided to deploy his own staff wherever possible, and consequently this lessened the Council's need for the services provided by Butler & Young. There was no termination of contract.
34. As with request 1, the Council considered that it would be necessary to provide all paperwork relating to Butler & Young's work on behalf of the Council to respond fully to request 2.



35. In its second submission to the Commissioner (26 September 2008), the Council stated that as there was no formal contract with Butler & Young and, similarly, no details relating to the end of the agreement, it would be legitimate to argue that request 2 represented information which the Council did not hold in terms of section 17 of FOISA. If, however, the existence of a contract was to be construed by the actions of the Council and Butler & Young, the detail of any such “contract” would involve viewing every piece of work performed by Butler & Young as part of their “contract”, since the process as a whole led to the cessation of their services being used and their replacement with permanent staff.
36. When the Commissioner’s staff visited the Council, two Council officials advised independently that there was no connection between the recruitment of Building Control staff in 2005 and any declining requirement for Butler & Young’s services. It was explained that Butler & Young’s services were procured for work on the Project, while the new staff recruited in 2005 worked on the day-to-day business of the Building Control service (the Council cited figures showing a huge increase in such business in the years 2000 to 2004). Any declining requirement for Butler & Young’s services was due to increasing completion of the work on the schools, but Butler & Young were still involved with the Project.

#### **Investigation of response to request 4**

37. The fourth part of Barr Ltd.’s request was for all internal and external correspondence (memos, letters, faxes and e-mails) relating to the Rothesay Joint Campus Contract from September 2006 to date and in particular relating to the Service Availability, Decant and Building Warrant/Completion Certificate.
38. The Council initially aggregated the costs of complying with requests 1, 2 and 4, and found that the cost threshold in the Fees Regulations would be exceeded by providing the information requested in parts 1 and 2 alone. A separate cost calculation was therefore not provided for request 4 in the Council’s response or review response, or in its first submission to the Commissioner (23 June 2008).
39. In its submission of 26 September 2008, the Council provided the Commissioner with an estimate of the cost of complying with request 4. It explained that the centrally-held Building Control file and the Dunoon area file would require to be “processed” in order to extract information covered by request 4, and the cost of processing these files was estimated to be £868. The estimate included 7 hours staff time chargeable at the maximum £15 per hour and 7 hours clerical staff time at £7 per hour to process the centrally-held Building Control file. It was estimated that processing the Dunoon area file would take 42 hours at £15 per hour.
40. The Council stated that to include all correspondence covered by request 4, it would be necessary to involve not only the building control staff but also a number of senior staff from Community Services (Education). It was estimated that it would take an hour for each manager to check their emails, and another hour for clerical staff to check the paperwork held by each manager.





41. In total, the Council estimated that it would cost £1165 to respond to request 4. The Council included several cautionary statements in relation to this figure: for example, explaining that no cost calculation had been included for the Legal Services or Chief Executive's Unit, both of which had been involved in the project. The Council also considered that one hour was unlikely to be sufficient time for officers to carry out the email check, and suggested that two hours might be more appropriate.
42. When staff from the Commissioner's office visited the Council on 16 July 2009, they were given the opportunity to see the Building Control area file relating to the Rothesay Joint Campus. After viewing the small collection of files, the Commissioner's staff reached agreement with the Council officials that the cost of retrieving relevant information from them would not be as high as the estimate presented by the Council.
43. However, it became clear from discussion with Council officials during the visit that, perhaps by focusing unduly on the Building Control files, the Council had failed to fully establish the extent of the information held by other officials or departments within the Council which would also be covered by the terms of request 4.
44. The Council was therefore asked to take further steps to establish which members of staff had been involved in correspondence relating to the Rothesay Joint Campus contract, and, based on these findings, to produce a revised estimate of costs. The Council was asked to ensure that its revised estimate specified the number of individuals who would have to search their own records, and to provide details of the time required to search electronic files and departmental records. The Council was asked to include details of the relevant information holdings in each department, such as how the information was organised and stored, to help confirm any estimate of the time required to locate and retrieve relevant information. The Council was also asked to make a more critical estimate of the time required in relation to the Building Control files.
45. On 31 July 2009, the Council provided its revised estimate of costs in relation to request 4. It had contacted more than 30 staff understood to have been involved in some capacity with the Rothesay Joint Campus project. During this exercise, additional staff were identified as also holding relevant information, and the Council finally provided the Commissioner with an analysis of the information held in the files of around 40 members of staff, including some former members of staff. The data included details of the type of information (e.g. email / paper files); a rough estimate of the time required to search for relevant information, and, in some cases, an indication of the volume of information held. Even though most staff indicated that 30 minutes would be sufficient time to check and retrieve information from their email accounts, the total estimate for staff costs in relation to request 4 was now calculated to be £2,136.50. This figure did not include any photocopying costs, which were predicted to be substantial, or the cost of redacting information considered to be exempt from disclosure under FOISA.



## Commissioner's analysis and findings

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46. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Barr Ltd. and the Council and is satisfied that no matter of relevance has been overlooked.
47. Before considering the way in which the Council dealt with each of Barr Ltd.'s requests, the Commissioner has made some general comments on the way in which the Council applied section 12(1).

### Section 12(1) – Excessive cost of compliance

48. Under section 12(1) of FOISA, a Scottish public authority need not comply with a request for information if the authority estimates that the cost of complying would exceed the £600 limit prescribed in the Fees Regulations. (The full provisions of section 12 of FOISA are included in the appendix to this Decision Notice.)
49. Initially, the Council did not calculate the costs of requests 1, 2, and 4 separately, believing that it was entitled to aggregate the costs into a single total. During the investigation, the Council was advised that this was not permitted under the Fees Regulations, even though (in the Council's view) there appeared to be some overlap between the information covered by each of the requests. The Council was asked to provide a breakdown of costs for each request.
50. The Council eventually provided such a breakdown (26 September 2008), but stated that it still had difficulty in accepting that the specific requests should be dealt with separately.
51. As the Commissioner's published guidance on Fees and Excessive Cost of Compliance<sup>1</sup> makes clear, section 12 of FOISA permits the Scottish Ministers to make regulations to allow costs to be aggregated where two or more requests are made to an authority by:
  - (a) one person;
  - (b) different persons acting in concert or whose requests appear to have been instigated wholly or mainly for a purpose other than obtaining the information itself; or
  - (c) different persons in circumstances where the authority considers it would be reasonable to make the information available to the public at large.

As yet, no regulations have been brought into force which cover the situations in (a) and (b), although the Ministers have stated that they will review this approach and, if it appears that these types of requests are presenting difficulties, the provisions can be included in future revised regulations.

52. The fact that the requests may overlap to some extent is not relevant when considering whether section 12(1) applies in this case.

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<sup>1</sup> Available to download at <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees/FeesOverview.asp>



53. The Commissioner will go on to consider the Council's reliance on section 12(1) in relation to each request, along with other issues raised by the way in which the Council dealt with each of Barr Ltd.'s requests.

#### **Request 1 – Commissioner's view**

54. As previously noted, after a long process of investigation, it was established that at the time the request was made, the Council held both a service proposal document from Butler & Young and a letter from the Council accepting their terms, and that the offer and acceptance recorded in these documents formed the basis of a contractual agreement between the Council and Butler & Young.
55. In relation to request 1, the Commissioner finds that the Council was wrong to cite section 12(1) when dealing with Barr Ltd.'s request and request for review, as the cost of providing the information covered by request 1 (i.e. the service proposal and letter which were eventually supplied) was clearly not in excess of the limit in the Fees Regulations.
56. The Commissioner is critical of the Council's insistence upon a broad interpretation of the information covered by request 1, and the subsequent claim that compliance would cost more than £600. In the absence of a formal contract between Butler & Young and the Council, it would seem reasonable to accept that Butler & Young's proposal document, which sets out terms which are known to have been accepted by the Council, constituted at least part of the information covered by the request. If the remaining part of the information (the formal letter of acceptance) was believed to be no longer held by the Council (although, as it turned out, this was not the case), the Council should have given Barr Ltd. notice to this effect in terms of section 17(1) of FOISA. It is not clear to the Commissioner why the Council chose to persist with the argument that the terms of the request covered all paperwork relating to the work carried out by Butler & Young. The Commissioner takes the view that the Council's interpretation of the scope of the request was not supported by an ordinary reading of the words.
57. The Commissioner therefore finds that the Council failed to comply with section 1(1) of FOISA which states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
58. As the information covered by request 1 has now been supplied to Barr Ltd., the Commissioner does not require the Council to take further action in relation to these specific failings. However, given the significant deficiencies identified the Commissioner may find it necessary to conduct a further assessment of the Council's general compliance with FOISA, the Environmental Information (Scotland) Regulations 2004 (the EIRs), and the associated codes of practice.
59. It is evident that the searches carried out by the Council were not sufficient to locate and retrieve the copy of the letter of acceptance. The Council described some of the searches it had carried out, which in themselves appear to have been thorough, but it is clear that the relevant files were not included in the search for a document which was held electronically and should have been capable of retrieval through a keyword search.



60. The Commissioner would ask the Council to consider its general records management practices in light of the Scottish Ministers' Code of Practice on Records Management (commonly known as "the Section 61 Code"), and particularly section 8 of that document, which states:

8.1 Each business area of the authority should have in place adequate arrangements for documenting its activities. These arrangements should take into account the legislative and regulatory environments in which the authority operates.

8.2 Records of a business activity should be complete and accurate enough to allow current employees and their successors to fulfil their responsibilities to:

- facilitate an audit or examination of the business by anyone so authorised;

(...)

8.3 Records created by the authority should be arranged in a record keeping structure (or structures) that will enable it to obtain the maximum benefit from the quick and easy retrieval of information.

#### **Request 2 – Commissioner's view**

61. As previously noted, in request 2, Barr Ltd. asked for "details of the circumstances surrounding and process leading to the determination of Butler & Young's employment under their contract/appointment and their subsequent replacement by the Council...".

62. Despite the way in which request 2 is worded, after investigation, the Commissioner accepts that the decision to recruit staff to the Council's Building Control service in 2005 was not affected or influenced by any considerations relating to Butler & Young, and that no decision was taken to use Council staff to "replace" Butler & Young, who continued to work on the schools' project while the newly-recruited Council staff dealt mainly with the day-to-day business of the Building Control service.

63. The Commissioner therefore finds that there was no factual basis underpinning request 2: Butler & Young were not "replaced" by the Council and any reduction in the use of their services was a natural consequence of the progress towards completion of the schools under construction. As Butler & Young continue to be involved in the project, the Commissioner has not identified any "process leading to the determination of Butler & Young's employment under their contract/appointment".

64. Accordingly, and after investigation, the Commissioner concludes that the Council does not hold any information covered by request 2.



65. The Commissioner finds that the submissions put forward by the Council were misleading, in appearing to support the notion that services provided by Butler & Young were required less frequently as a consequence of staff being recruited to the Building Control service. The Commissioner is disappointed that this misunderstanding was not identified and corrected until his staff visited the Council.
66. As with request 1, the Commissioner is again critical of the Council's adherence to the broadest possible interpretation of the scope of request 2. Even if it had been correctly understood that the recruitment of staff had led to a declining need for Butler & Young's services, a reasonable reading of request 2 would indicate that Barr Ltd. were seeking information which would show "cause and effect" for the declining use of Butler & Young's services, or would otherwise clearly relate to the chain of events by which Butler & Young were "replaced" by Council staff. In other words, on a reasonable reading, the scope of request 2 would be restricted to information showing that the Council's motivation for recruiting the additional Building Control staff was to some degree affected by its previous decision to sub-contract certain work to Butler & Young.
67. Given that the Council appeared to accept this premise in its submission to the Commissioner (26 September 2008), the Commissioner cannot understand why the Council then insisted that a broader interpretation of the scope of the request was required, and that every piece of information relating to the work carried out by Butler & Young should be considered in responding to request 2.
68. The Commissioner considers that instead of adopting this approach, it would have been appropriate for the Council to investigate whether or not it held any information showing that it had decided to, or wished to, dispense with Butler & Young's services for any reason. It is likely that in making such enquiries the Council would have established from its own officials that there was no factual basis underpinning request 2, and would then have been able to advise Barr Ltd. that, consequently, it held no information on this matter. The failure to make such enquiries has been disadvantageous to Barr Ltd., in leading to a long investigation which has ultimately discovered that the Council does not hold any information covered by request 2; a fact which could have been established as soon as the request was received.
69. The Commissioner finds that the Council failed to comply with section 17(1) of FOISA, by failing to provide Barr Ltd. with notice in writing that it did not hold the information requested.
70. The Commissioner has not required the Council to take any steps as a consequence of this failure, but again has noted that there has been a failure to comply with certain duties and procedural requirements in FOISA. This may lead the Commissioner to consider further assessment of the Council's general compliance with FOISA, the EIRs, and the associated codes of practice.



#### Request 4 – Commissioner’s view

71. The Commissioner notes that request 4 is a broadly-worded request (“all internal and external correspondence (memos, letters, faxes and e-mails) relating to the Rothesay Joint Campus Contract from September 2006 to date and in particular relating to the Service Availability, Decant and Building Warrant/Completion Certificate”). Although Barr Ltd. made special mention of information relating to the Service Availability, Decant and Building Warrant/Completion Certificate, the wording of the request encompasses all correspondence relating to the Rothesay Joint Campus Contract between September 2006 and 9 July 2007, when the request was made.
72. The Council has claimed that section 12(1) of FOISA applies, and that the Council is not obliged to comply with request 4 because the cost would exceed the £600 limit specified in the Fees Regulations.
73. As noted in paragraph 45 above, the Council has recently (31 July 2009) provided the Commissioner with a revised, detailed estimate of the work required in order to locate and retrieve the information covered by request 4.
74. On the basis of this estimate, the Commissioner accepts that the cost of complying with request 4 would exceed the £600 limit in the Fees Regulations, and, accordingly, the Council is not obliged to comply with the request.
75. Having established that the Council was correct to rely upon section 12(1) in FOISA to justify its refusal to comply with request 4, the Commissioner must go on to consider whether the Council complied with its duty to advise and assist the requestor as required by section 15 of FOISA, read in conjunction with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 Code").
76. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Section 60 Code in providing advice and assistance in any particular case, it is taken to have complied with this duty.
77. Paragraph 14 of Annex 3 of the Section 60 Code recommends that, although a public authority is under no obligation to comply with a request for information which would exceed £600, it should consider what information could be released free of charge or below the prescribed amount.



78. The Council submits that it asked Barr Ltd. whether its request could be refined. The letter sent to Pinsent Masons in response to the request for review made on behalf of Barr Ltd. (11 March 2008) states:
- “It is normal practice within this council that when a request is found to be substantially in excess of the cost threshold of £600, that the requestor be asked to refine the request to allow a response to be made within the cost threshold. To enable this to be done, your firm was contacted by the FOI section and agreed to put this suggestion to your client, I can only assume that your client has unfortunately refused to amend their request.”
79. The Council was, however, unable to supply any further written record of the correspondence or conversation to which this statement referred. Pinsent Masons was asked whether it could provide a copy of any correspondence sent or received on this matter, but replied that it did not believe any such correspondence existed.
80. The Commissioner finds that there is no evidence that the Council considered what information could be released free of charge or below the £600 cost threshold. The Commissioner notes that at the time the Council is said to have asked Barr Ltd. to refine its request, the Council still believed that the costs of complying with requests 1, 2 and 4 could be aggregated, and therefore any advice or assistance offered by the Council on reducing the costs of compliance would have reflected this mistaken assumption. As there is no evidence that the Council provided Barr Ltd. with advice and assistance on reducing the costs relating to request 4, the Commissioner must find that in this respect the Council failed to comply with section 15 of FOISA.
81. The Council’s failure to keep proper records on this occasion makes it difficult to establish whether or not any advice or assistance was offered to Barr Ltd. A similar difficulty arose during the investigation when, in February 2009, the Council claimed that it sent Barr Ltd. a redacted copy of the service proposal from Butler & Young when first asked to do so in July 2008, but could not provide any records to support this statement when Barr Ltd. advised the investigating officer that the document had never been received.
82. The Commissioner would remind the Council of the need to maintain proper records in relation to requests made under FOISA and the EIRs, in order to demonstrate compliance with the legislation and to provide an evidential basis for any decision by the Commissioner.
83. While accepting that the Council has now provided evidence that section 12(1) should be upheld in relation to request 4, the Commissioner wishes to make it clear that his decision on this matter is based on the most recent submission provided by the Council. The Commissioner has identified several failures on the Council’s part in relation to the way section 12(1) was previously applied in relation to request 4. While the Commissioner believes that the Council has learnt from these mistakes, in this Decision Notice he must consider whether the Council complied with FOISA when dealing with Barr Ltd.’s request for review.
84. As discussed previously, the Commissioner has found that the Council was wrong to aggregate the costs of complying with requests 1, 2 and 4, as this is not currently permitted under the Fees Regulations.



85. The Commissioner notes that the Council's initial calculations included the time taken to determine whether any exemptions applied to the information. In terms of regulation 3 of the Fees Regulations, the projected costs that the public authority can take into account in relation to the request for information are the total costs, whether direct or indirect, which the public authority reasonably estimates it will incur in locating, retrieving and providing the information requested. The public authority may not charge for the cost of ascertaining whether it actually holds the information or whether or not it should provide the information.
86. Finally, paragraph 6 of Annex 3 of the Section 60 Code makes it clear that "projected costs" must be a reasonable estimate of the costs likely to be incurred, based only on the estimated actual costs to the public authority. This will include direct outlays like postage and the cost of paper. If the cost to the authority for photocopying is 10 pence per A4 sheet, it would be unacceptable to include a greater charge for this element in estimating the fee. The Commissioner notes that in the Council's initial response to Barr Ltd.'s request, it stated that photocopying would be charged at 28p per double sided sheet. In its submission of 23 June 2008, the cost of photocopying was stated to be 5p per sheet. In the end, the Commissioner did not need to take the cost of photocopying into account in deciding that section 12(1) applied to request 4; however, he would ask the Council to make sure that future cost calculations are based on the estimated actual costs to the Council.

### **Request 3 – Commissioner's view**

87. In its application to the Commissioner, Barr Ltd. did not raise any specific complaint about the way in which the Council had dealt with request 3. However, in later correspondence (letter dated 19 March 2009), Barr Ltd. made it known that it wished the Commissioner to consider whether the Council did in fact hold the information requested, and whether it should have been more helpful in providing assistance.
88. Request 3 was for "minutes of Council, Community Council and existing Rothesay Schools Parent/Teachers Association Meetings at which information relevant to the Project was discussed."
89. The Council's initial response to Barr Ltd. stated that it did not hold the minutes either of the Rothesay Community Council or the PTA, and that consequently this information was not held in terms of section 17 of FOISA. It advised that minutes of Council and Area Committee meetings were available on the Council website.
90. In its request for review (4 October 2007), Barr Ltd. did not query the Council's statement that it did not hold certain information covered by request 3, but instead asked for guidance on how to obtain the information. The Council replied (11 March 2008) that it did not have contact details for the community council or the Parent Teacher Association.





91. The Commissioner can only consider matters that were raised in the applicant's request for review, and is therefore unable to consider fully the issue of whether the information in request 3 was held by the Council. However, he wishes to make two points in relation to the Council's response:
- a) the Council's response referred to Rothesay Community Council – in fact, there is no such organisation and the relevant Community Council for Rothesay is Bute Community Council. Minutes of Bute Community Council meetings were available from the Council's library service, as well as being available online on the Community Council's own website. The Commissioner does not accept that the Council did not hold contact details for Bute Community Council, and finds that the Council's response on this point was misleading and unhelpful.
  - b) Similarly, the Commissioner does not accept that the Council did not hold contact details for the Parent Council at Rothesay. Council minutes show that the Council had been in regular consultation with this group over the joint campus proposals. Again, the Commissioner finds the Council's response to be misleading and unhelpful.
92. As noted previously, under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Commissioner believes that in this respect it would have been reasonable for the Council to provide Barr Ltd. with the details of two organisations with whom the Council was in regular contact, and to have checked further whether it held copies of the Community Council minutes, as might have been expected.

### **Compliance with statutory timescales**

93. The Commissioner notes that Barr Ltd. made its request for a review on 4 October 2007, but did not receive a response until 11 March 2008. Clearly, this represents a failure to comply with the statutory timescale of 20 working days laid down in section 21(1) of FOISA. As previously discussed, the Council has submitted that during this period it had asked Barr Ltd. to consider refining its request; however, no records of this contact or correspondence can now be produced.
94. If a Scottish public authority dealing with a request find that it requires further information to identify and locate the requested information, and tells the applicant so, the calculation of the statutory timescale for responding to the request is suspended until the applicant has provided the additional details (section 1(3)). However, there is no equivalent provision relating to the request for review. The Council was therefore obliged to issue a response to the request for review within 20 working days and, in failing to do so, failed to comply with section 21(1) of FOISA.



### Compliance with FOISA – further comments

95. The Commissioner is highly disappointed with the way in which the Council dealt with the information request from Barr Ltd. Failure to comply with the timescale for review, failure to provide reasonable advice and assistance, failure to identify which information the Council did or did not hold, and failure to properly assess the cost of compliance with each part of the request meant that the applicant, Barr Ltd., was not provided with the response to which they were entitled under FOISA.
96. The Commissioner finds that Barr Ltd. was further disadvantaged by the Council's conduct during the investigation of their application for a decision. The investigation was hampered by difficulties in obtaining submissions from the Council, which led to two Information Notices being issued under section 50(1)(a) of FOISA in order to obtain the information the Commissioner needed in order to reach a decision. Certain facts about the information held or not held by the Council were only discovered during a visit from his staff, but could clearly have been established at any time following receipt of Barr Ltd.'s request, had the Council carried out adequate searches or made the relevant enquiries. Poor record keeping by the Council made it difficult to establish whether the Council had, as claimed, discussed narrowing the scope of the request (or otherwise offering advice and assistance) before responding to Barr Ltd.'s request for review, and, similarly, whether the Council had provided the promised service proposal document to Barr Ltd. following its offer to do so in July 2008.
97. The Commissioner finds the issues raised by this case give cause for significant concern in relation to the Council's general compliance with FOISA, and will consider the extent to which further assessment is warranted under his Enforcement Strategy<sup>2</sup>.

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<sup>2</sup> Available to download at <http://www.itspublicknowledge.info/ScottishPublicAuthorities/ComplianceEnforcement.asp>



## DECISION

The Commissioner finds that Argyll and Bute 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 Barr Ltd.

The Commissioner finds that by citing section 12(1) in respect of request 4, the Council complied with Part 1.

However, as detailed above, the Council has failed to comply with Part 1 of FOISA by variously failing to comply with the provisions of sections 1(1), 15, 17(1) and 21(1) of FOISA.

Given that the information relating to request 1 has now been provided, and information covered by request 2 was found not to exist, the Commissioner does not require the Council to take any action in respect of these two requests. However, he does require the Council to contact Barr Ltd. within 45 days of receipt of this Decision Notice, with a view to discussing what, if any, information can be provided within the cost ceiling in relation to request 4, in order to comply with its duty under section 15 of FOISA.

## Appeal

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Should either Barr Ltd. or Argyll and Bute 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**28 August 2009**



## Appendix

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### 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.

(...)

- (3) If the authority –

- (a) requires further information in order to identify and locate the requested information; and
- (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

(...)

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

- (2) The regulations may provide that, in such circumstances as they may specify, where two or more requests for information are made to the authority-

- (a) by one person;
- (b) by different persons who appear to it to be acting in concert or whose requests appear to have been instigated wholly or mainly for a purpose other than the obtaining of the information itself; or



- (c) by different persons in circumstances where the authority considers it would be reasonable to make the information available to the public at large and elects to do so,

then if the authority estimates that the total cost of complying with both (or all) of the requests exceeds the amount prescribed, in relation to complying with either (or any) of those requests, under subsection (1), section 1(1) does not oblige the authority to comply with either (or any) of those requests.

- (3) The regulations may, in respect of an election made as mentioned in subsection (2)(c), make provision as to the means by which and the time within which the information is to be made available to the public at large.
- (4) The regulations may make provision as to-
  - (a) the costs to be estimated; and
  - (b) the manner in which those costs are to be estimated.
- (5) Before making the regulations, the Scottish Ministers are to consult the Commissioner.
- (6) References in this section to the cost of complying with a request are not to be construed as including any reference to costs incurred in fulfilling any such duty under or by virtue of the Disability Discrimination Act 1995 (c.50) as is mentioned in section 11(5).

## 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

## 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.

(...)

## 21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

(...)

## Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

### 2 Interpretation

In these Regulations –

"the Act" means the Freedom of Information (Scotland) Act 2002;

"prescribed amount" means the amount prescribed in regulation 5; and

"projected costs" has the meaning set out in regulation 3.

### 3 Projected costs

(1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.

(2) In estimating projected costs-

(a) no account shall be taken of costs incurred in determining-

(i) whether the authority holds the information specified in the request; or



- (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
- (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

...

## **5 Excessive cost - prescribed amount**

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.