

Damian O'Regan  
31 Westfield  
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June 29 ,2011

RE :: Review of Copy Right Act 2000

TO

COPYRIGHT REVIEW  
ROOM 517

DEPARTMENT OF ENTERPRISE ,  
TRADE And INNOVATION,

KILDARE STREET, DUBLIN 2

Dear Secretary General,

I should like to make the following 2 observations as major faults in the current legislation.

1 \_\_\_\_\_

**The legislation has a completely negative effect on learning and research as regard making copies of material in libraries.**

Time and time again , even in the most simple of cases, the library employees will invoke the rule that not more than 10 percent or so of a book or article cannot be photocopied and they reference the Copyright Act.

So for example that happened to me, when I wanted to copy an article held by the library on Saint Stephen's Green, The library did not comply with that request , yes they said we can photocopy 10 percent but not the rest. So they offered to copy 100 lines of a 1400 line article.

Big deal , what good is that...is this what the Department of Enterprise and Innovation want, to give only 10 percent of information to research students, business entrepreneurs, writers etc.

So as a citizen of the State , I am been refused the opportunity to gain knowledge , rather like a Freedom of Information in reverse, they, the libraries are withholding 90 percent by refusing to Copy the article in full.

The situation is epidemic in libraries...the present Copyright Act is acting as a barrier to learning, a barrier to education, a barrier to the rights of Irish citizens to documents and books as held by the State.

2 \_\_\_\_\_

**The lack of clarification in Copyright Law as regard documents as held by County Councils.**

Please find enclosed a Review Case of a Freedom of Information request that I personally took against Dun Laoghaire Rathdown County Council. The case has copyright issues.

The case revolved around 2 documents that I requested, The Scott Wilson and Mosart Landscape Drawing reports , that were commissioned and paid for by Dun laoghaire Rathdown County Council as regard developments in Blackrock Park Co Dublin.

My main reason for going to the Freedom of information Commissioner was to obtain hard copies of those Landscape drawing reports.

The reviewing FOI officer in this case has agreed , against all principles of Freedom of information, with the Councils's assertion that the copyright law protects those documents form been copies and released to myself and thus the public.

From page 5 of the Review.....

### **Copyright**

The Council has provided this Office with evidence that the landscape drawings are protected by copyright. Section 12(2)(b)(ii) of the FOI Act, dealing with the manner of access where a request is granted, is relevant here:

*"Where a head decides to grant a request under section 7 and the request is for access in a particular form or manner to a record, such access shall be given in that form or manner unless the head concerned is satisfied ...*

*(b) that the giving of access in the form or manner requested would ...*

*(ii) involve an infringement of copyright (other than copyright owned by the State, the Government or the public body concerned),"*

The FOI Officer Mr Fintan Butler then agrees with DLRCOCO and says.....

I have examined the evidence and I am satisfied that the drawings are protected by copyright. That copyright is owned by parties other than the State, the Government or the Council. I am satisfied that the drawings are protected by copyright which would be infringed by providing copies of these records to the applicant or any other person. In these circumstances, I am satisfied that access should be granted to the applicant by way of providing a reasonable opportunity to inspect the records as envisaged by section 12 of the FOI Act. Access by inspection allows the applicant to view the records only. It does not enable the applicant to copy, transcribe, annotate or otherwise retain a hard copy of the information in the records concerned.

My appeal to obtain the documents has been refused, all that I can do is inspect the documents  
The review officer 's decision below

Decision

Having carried out a review under section 34(2) of the FOI Act, I hereby vary the decision of the Council as follows: (a) I direct that the Council provide access to the Scott Wilson and MosArt landscape drawings and that this access be provided by way of inspection and (b) I affirm the decision that the Council holds no further records encompassed by the request made on 12 December 2008.

In essence the Council is saying that since the Mosart and Scott Wilson Landscape drawing reports are copyrighted, they will not release those documents despite the fact that the Council commissioned the reports and paid 30,000 Euros for the reports. Yes I can see the documents at Council HQ ( The FOI officer direct such) but that is the only access that has been given.

I believe that County Councils or any Government Agency should not be able to lean on the Copyrights Act to withhold the release of information as requested by the citizens of the State. The Council paid for the reports and thus own the rights to copy such reports, they should not be permitted to refuse vital information on the workings of a County Council by invoking the Copyright Act.

That situation is a major fault in present legislation and needs to be changed to allow the Citizens of the State access to information by way of Copies of documents been made available .

Thank you for your consideration in this matter

Yours sincerely

Damian O'Regan





Oifig an Choimisinéara Faisnéise  
Office of the Information Commissioner

Our Reference : 090106  
11 May 2011

Mr Damian O'Regan,  
31 Westfield,  
Sion Hill,  
Blackrock,  
Co. Dublin.

Dear Mr O'Regan

I refer to your application dated 12 December 2008 for a review by the Information Commissioner of the decision taken by Dún Laoghaire-Rathdown County Council (the Council) on your Freedom of Information request.

We have now completed our review under section 34(2) of the Freedom of Information Act in this case and have decided to vary the decision of the Council. I enclose a copy of the decision in this matter.

A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date on which notice of the decision was given to the person bringing the appeal.

Yours sincerely

Alison McCulloch  
Investigator



Oifig an Choimisinéara Faisnéise  
Office of the Information Commissioner

**Review Application to Information Commissioner - Case Number 090106**

**Freedom of Information Acts 1997 & 2003 (the FOI Act)**

**Applicant:** Mr Damian O'Regan, 31 Westfield, Sion Hill, Blackrock,  
Co. Dublin

**Public Body:** Dún Laoghaire-Rathdown County Council (the Council)

**Issue:** Whether the Council is justified in its decision to refuse access to records concerning Blackrock Park on the basis that the records are exempt from release under various sections of the FOI Act.

**Review:** Conducted in accordance with section 34(2) of the FOI Act by Fintan Butler, Senior Investigator, who is authorised by the Information Commissioner to conduct this review.

**Summary of Decision:** The Senior Investigator found that the Council is justified in its decision to refuse access to additional records on the basis of section 10(1)(a) of the FOI Acts. He further found that the Council is not justified in refusing access to certain landscape drawings on the basis of section 20 of the FOI Act as the public interest is better served by releasing these records than by withholding them. Access to these landscape drawings is to be by way of inspection in accordance with section 12(2)(b)(ii) of the FOI Act.

**Right of Appeal:** A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date on which notice of the decision was given to the person bringing the appeal.

## **Background**

The applicant made an FOI request to the Council on 12 December 2008 seeking access to the following records:

- 1) *"All plans, masterplans, drafts and other records, with regard to any developments in Blackrock Park, both devised by Dun Laoghaire Rathdown Co. Council, or by any other company that the council has employed to do so, in 2006, 2007, 2008.*
- 2) *The money spent or owed to other companies or consultants by Dun Laoghaire Rathdown Co. Council, with regard to the drawing up of Development Plans For Blackrock Park for 2006, 2007, 2008."*

The Council wrote to the applicant on 21 January 2009 purporting to grant his request, while at the same time refusing access to certain records under sections 20 and 27 of the FOI Act which in effect is a part refusal of records. In its internal review decision of 5 March 2009 the Council granted access to the records with the exception of one record, numbered 23, which had portions of the record redacted on the basis of section 27(1)(c) of the FOI Act. The applicant wrote to this Office on 30 April 2009 seeking a review of the Council's decision as it was his view that there were further records of plans and environmental reports, encompassed in his request, which had not been released.

I note that Ms Alison McCulloch, Investigator in this Office outlined her preliminary views to the Council on 9 October 2009 and to the applicant on 12 November 2010 and that both parties responded to those views. I consider that the review should now be brought to a close by the issue of a binding decision.

In conducting this review, I have had regard to

- the submissions from the Council,
- the submissions from the applicant,
- the correspondence between the applicant and the Council,
- additional information and clarification provided by the Council at the request of this Office,
- the provisions of the FOI Acts.

## **Scope of the Review**

During the course of this review, the Council released additional records in November 2009 and the applicant narrowed the scope of his request on 19 November 2010 to the following records:

- 1) the Scott Wilson and MosArt landscape drawings,
- 2) further records of the Car Park construction plans at the "Circus Field" Blackrock.

Therefore, this review is concerned solely with the question of whether the Council is justified in refusing access to the above records under sections 10(1)(a) and 20, respectively, of the FOI Act.

## **Analysis and Findings**

### **Section 10(1)(a)**

The Council relied on section 10(1)(a) of the FOI Act to refuse access to further records of

the Car Park construction plans at the "Circus Field" Blackrock, at point 2 above. Section 10(1)(a) provides as follows:

*"(1) A head to whom a request under section 7 is made may refuse to grant the request if - (a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken."*

In such cases, the Commissioner's role is to review the decision of the public body and to decide whether that decision was justified. This means that the Commissioner must have regard to the evidence available to the decision maker and the reasoning used by the decision maker in arriving at his/her decision.

In implementing the terms of the FOI Act with regard to access to requested records, the Information Commissioner is concerned only with ensuring access to extant records in accordance with the provisions of the FOI Act. The FOI Act does not provide for a right of access to records which ought to exist. Neither does it provide for the creation of records to satisfy an FOI request. It should be noted that the fact that one might expect that such records should exist, and that the absence of such records might suggest inadequate record keeping practices on the part of the Council, is not an issue in this review. The Information Commissioner's understanding of her role in such cases was approved by Quirke J. in the High Court case of *Matthew Ryan and Kathleen Ryan and the Information Commissioner (2002 No. 18 M.C.A.)*

According to the Council, on 12 November 2009, it released a detailed drawing, dated 25/11/2008, of Blackrock Temporary Amenities and Car Parking Facility, record number 7, which was provided to KN Networks for the construction of the car park. It is the applicant's view that other construction plans for the car park exist. According to the Council, *"having cross checked with other departments within the Council and with reference to other FOI and AIE requests made by the applicant over the last 3 years"*, it noted that a further record was released to the applicant on 4 May 2010 pertaining to the construction of the car park. This record is, drawing no: *TT-051-01-09 Map of proposed car park, Rock Road, Booterstown*, and was released on foot of his application under the Access to Information on the Environment (AIE) Regulations. The Council contends that these two plans were used for the construction of the car park by KN Networks. The Council has told this Office that following extensive searches, across departments, of hard copy and electronic records no further records exist. Having considered the Council's submissions, this Office is satisfied with its response concerning the plans for the construction of the car park and the searches carried out, and that they are adequate to meet the requirements placed upon the Council under the FOI Act and that the Council is justified in seeking to rely on section 10(1)(a) of the FOI Act to refuse access to these records. I find accordingly.

## **Section 20**

The records at issue here, the Scott Wilson and MosArt landscape drawings, were not included in either decision by the Council and were refused only when the applicant specifically asked for the plans by name. In its letter to this Office of 10 June 2009, the Council said that it had inadvertently omitted the plans from the schedule of records and that it was withholding the records on the basis of section 20(1) of the FOI Act which provides:

*"(1) A head may refuse to grant a request under section 7 if the record concerned*

*contains matter relating to the deliberative processes of a public body (including opinions, advice, recommendations and the results of consultations, considered by the body or a member of the body or of the staff of the body for the purposes of those processes)."*

The exemption provided for at section 20(1) of the Act is not a mandatory exemption unlike, for example, the exemption provision contained at section 20(1A) of the FOI Act. In invoking a discretionary exemption, the Commissioner expects that a public body will make a clear case in support of the need to rely on that particular exemption. Section 20, in broad terms, is intended to protect a deliberative process of a public body. The Council in its letter of 10 June 2009 said that release of these records "*may prejudice the public consultation process*". The records in question are landscape drawings by Scott Wilson and MosArt for parkland near to the "Blackrock Plaza". The Council said that "*the decision for refusal is taken on the basis that the commissioned work by Scott Wilson and MosArt (Landscape Architects) were preliminary and essentially conceptual in nature, aimed at elucidating potential treatments for car parking and an event space at the Booterstown end of Blackrock Park. Proposals were submitted as outline concepts, and are a number of stages away from constituting "construction plans" referred to in (the applicant's) letter.*"

On 12 November 2009, the Council also stated "*Landscape Architectural consultants (Scott Wilson and MosArt) were procured to look at potential layouts for the "Booterstown Arena" and environmental consultants (JBA Consulting) were procured to assist on the survey and design of the parkland contiguous to the "Blackrock Plaza."*

*The survey work carried out by JBA has been made available to (the applicant). This information has informed our design process and plans are currently in circulation within the Council seeking departmental reports. It will then be presented at an Area Committee Meeting seeking approval to put it to public consultation by way of the part 8 consultation process in early 2010.*

*This is the standard procedure and policy for presenting plans to the public. It follows approval of the draft plans by the elected members, the public are then invited to inspect the draft plans and to make submissions, which then form a constituent part of a Manager's Report. This is the democratic process under which we operate and is the very cornerstone of protecting the public interest. The Council is therefore of the view that .....the public interest in withholding these records far out weighs the public interest in releasing them.*

*The purpose of commissioning concept plans is to inform the Council's decision making in relation to the possible uses and activities for the area. The Council is making its deliberations on any future plans for Booterstown Arena and since 2007, no plans have been presented to the elected members for their consideration. All of the plans in question remain conceptual in nature and their release into the public domain in advance of presentation to the elected members may:*

- 1. Be construed as being actual proposals, leading to unrealistic expectations amongst the public,*
- 2. Be used selectively for political expedience to undermine the role of the elected representatives,*
- 3. Generate excessive and unnecessary workload for public servants and elected members,*



4. *Undermine the democratic process and in particular the Planning and Development Act 2000,*
5. *Generate confusion and mistrust of the local authority and its decision making process."*

In a letter of 1 November 2010, the Council said that the records "*should not become public documents as they are not going to proceed to design stage*" and that release of the plans "*would only serve to undermine the democratic process and create an unnecessary (sic) workload for officials. On this basis it is our considered opinion the release of concept plans for the so called "Boosterstown Arena "would create a substantial and unreasonable interference with or disruption of work of Dún Laoghaire Rathdown County Council"*.

The Council argues that the public interest would not be better served by the release of information which could give rise to misleading conclusions. The argument advanced, that the information once released will be used (or abused) in some particular way or misinterpreted or will not be properly understood reflects an attitude more akin to that which prevailed in an era dominated by the Official Secrets Act rather than one governed by the FOI Act. The motives of requesters for seeking information have to be disregarded in dealing with a request [section 8 (4) of the FOI Act).

The Council has also said that were the records to be released to the applicant, it would have to simultaneously engage in a public consultation so as to counter any potential misinformation and that this would create a substantial and unreasonable interference with or disruption of the work of the Council. One can sympathise with the desire of managers to do their jobs without, as they might see it, the "distraction" of dealing with enquiries, etc. However, a commitment to greater openness carries with it the burden of dealing with the increased scrutiny that openness may invite. It follows that the possibility of such a burden arising is not a factor to suggest that the public interest is not served by release in this case.

I consider that the following public interest considerations would, on balance, favour release:

- the public interest in individuals being able to exercise their rights under the FOI Act to the fullest extent,
- the public interest in members of the public knowing how a public body performs its functions and being able to form an opinion as to whether those functions are being properly discharged,
- the public interest in individuals being able to understand the reasons for courses of action taken by a public body,
- the public interest in public bodies being accountable for use of public funds.

In terms of balancing the competing public interests at issue here, I believe that the advantages in terms of openness and accountability of releasing the landscape plans in question outweigh any possible harm to the Council and that the public interest is better served by the release of these records.

#### **Copyright**

The Council has provided this Office with evidence that the landscape drawings are protected by copyright. Section 12(2)(b)(ii) of the FOI Act, dealing with the manner of access where a request is granted, is relevant here:

*"Where a head decides to grant a request under section 7 and the request is for access in a particular form or manner to a record, such access shall be given in that form or manner unless the head concerned is satisfied ...*

*(b) that the giving of access in the form or manner requested would ...  
(ii) involve an infringement of copyright (other than copyright owned by the State, the Government or the public body concerned)."*

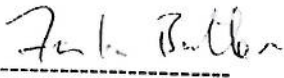
I have examined the evidence and I am satisfied that the drawings are protected by copyright. That copyright is owned by parties other than the State, the Government or the Council. I am satisfied that the drawings are protected by copyright which would be infringed by providing copies of these records to the applicant or any other person. In these circumstances, I am satisfied that access should be granted to the applicant by way of providing a reasonable opportunity to inspect the records as envisaged by section 12 of the FOI Act. Access by inspection allows the applicant to view the records only. It does not enable the applicant to copy, transcribe, annotate or otherwise retain a hard copy of the information in the records concerned.

### **Decision**

Having carried out a review under section 34(2) of the FOI Act, I hereby vary the decision of the Council as follows: (a) I direct that the Council provide access to the Scott Wilson and MosArt landscape drawings and that this access be provided by way of inspection and (b) I affirm the decision that the Council holds no further records encompassed by the request made on 12 December 2008.

### **Right of Appeal**

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**Fintan Butler**  
**Senior Investigator**

11 May 2011