



Scottish Information
Commissioner

**Decision 016/2007 - Sir Tom Farmer and the City
of Edinburgh Council**

Information relating to sale of land

**Applicant: Sir Tom Farmer
Authority: The City of Edinburgh Council
Case No: 200501226
Decision Date: 25 January 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 016/2007 – Sir Tom Farmer and the City of Edinburgh Council

Request for all information relating to the sale of land at Lochend Butterfly, Edinburgh

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: sections 1 (General entitlement); 12(1) (Excessive cost of compliance); 16(1) and (2) (Refusal of request); 19 (Content of certain notices); 21(10) (Review by Scottish public authority).

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

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Anderson Strathern, on behalf of their client, Sir Tom Farmer, asked the City of Edinburgh Council (the Council) to supply all information relating to the sale of land at Lochend Butterfly.

The Council withheld most of the information covered by the request, on the grounds that to release it would cause substantial prejudice to its commercial interests or would breach confidentiality.

The Council later submitted that the cost of providing the majority of the information would have been over the £600 prescribed limit and therefore it was under no obligation to meet the applicant's request.

After an investigation the Commissioner found that the Council was justified in withholding the information on grounds of excessive cost in that the cost of providing the information would exceed the £600 prescribed limit.



The Commissioner also identified certain breaches of technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in the Council's handling of Sir Tom Farmer's request.

Background

1. On 6 January 2005 Anderson Strathern notified the Council that they had been instructed by their client, Sir Tom Farmer, to ask for all information relating to Lochend Butterfly from the time the Council had decided to put the land up for sale. Anderson Strathern listed some of the types of document with which they wished to be provided.
2. On 28 January 2005 the Council first replied, advising Anderson Strathern that it required further information in order to identify and locate the requested information. However, in this letter the Council did not specify what further information was required from Anderson Strathern.
3. On 4 February 2005 the Council wrote to Anderson Strathern enclosing a copy file of all the information it was prepared to release, and informing them that the rest of the information covered by their request was exempt under sections 33 and 36 of the FOISA. The Council also informed Anderson Strathern that it was now engaged in litigation regarding the Lochend Butterfly transaction.
4. On 14 February 2005 Anderson Strathern asked the Council to review its decision to withhold relevant information, and listed some of the documents that they hoped to obtain. Anderson Strathern also made a new information request, for records giving the background to the litigation over the transaction.
5. Anderson Strathern received an initial response to their request for a review from an official in the Economic Development department of the Council, who confirmed that the letter dated 14 February 2005 had been accepted as a valid request for a review, and who informed them that the documents listed in that letter were either held to be exempt from disclosure under sections 33 or 36 of FOISA, or were available through the Council's publication scheme.



6. The Council then wrote again to Anderson Strathern on 16 March 2005, advising them that it did not consider it appropriate to progress simultaneously a request for a review and one for further information, as presented in Anderson Strathern's letter of 14 February. The Council seems to have assumed that the request for 10 specific documents in that letter superseded the request made on 6 January 2005, and asked Anderson Strathern to consider whether the information already made available to them satisfied this request. The Council advised Anderson Strathern that they had the right to ask for a review if they were not satisfied with the response.
7. Anderson Strathern took the view that their letter of 14 February 2005 had clearly requested a review of the Council's response, and on 24 March 2005 they applied to me, on behalf of their client, for a decision on the case.
8. The case was allocated to an investigating officer and subsequently validated by establishing that the request had been to a Scottish public authority, and had been appealed to me only after requesting the authority to review its response to the request.

The Investigation

9. In my view, the documents requested by Anderson Strathern in their letter of 14 February 2005 and referred to in the Council's letter of 16 March 2005 comprise information which was covered by the original information request of 6 January 2005.
10. On 14 February 2005 Anderson Strathern requested information about the litigation in which the Council had become involved, and this amounted to a new information request. However, this should not have diverted the Council from reviewing its response to Anderson Strathern's request of 6 January.
11. On 19 April 2005 the Council was asked to comment on the application in terms of section 49(3)(a) of FOISA:
 - a) to provide copies of the information provided to and withheld from Anderson Strathern
 - b) to explain which exemption it had applied to each document withheld, and to provide its reasons for believing that the exemption applied
 - c) where the public interest test applied to the exemption cited, to indicate its reasons for believing the public interest to lie in withholding the information
 - d) to provide copies of guidance available to staff dealing with requests under FOISA



12. On 5 May 2005 the Council responded. It provided copies of information amounting to almost 3500 photocopied sheets. The Council did not indicate which exemptions applied to individual documents or provide a schedule of documents as requested by the investigating officer.
13. On 20 May 2005 the investigating officer wrote to the Council, asking it to clarify whether the documents supplied included copies of the information already provided to the applicant. The Council was also asked to confirm whether it had applied the exemptions in sections 33 and 36 of FOISA to all documents withheld from the applicant, and, if this was not the case, to provide a list showing which exemptions applied to each document.
14. On 23 June the Council replied, with arguments in relation to its application of the exemptions.
15. However, in that letter the Council also submitted that, in retrospect, it should have refused the application on the grounds of excessive cost on the basis that it would cost significantly in excess of £600 to copy and review the relevant documents and provide them to the applicant.
16. On 16 March 2006, following clarification of the legal position in relation to the application of section 12 of FOISA (Excessive cost of compliance), my investigating officer wrote to the Council to confirm the view that it considered the cost of complying with the request to be in excess of the £600.
17. On 3 April 2006 the Council responded confirming that in its view, even disregarding the information already supplied to Anderson Strathern, the cost of supplying the information would exceed the £600 threshold.
18. On the 31 July 2006 my investigating officer requested that the Council provide a detailed breakdown of its calculation of cost and how this would exceed the £600 threshold.
19. On 7 August 2006 the Council responded with details of how it had calculated the cost of supplying the information and how this exceeded the £600 threshold. However, the standard of evidence required to justify the claim to excessive cost was only finally provided on 10 January 2007.

The Commissioner's Analysis and Findings

20. The principal issue to be considered in relation to this case is whether the Council was in fact correct in its assertion that the cost of responding to the request would exceed the prescribed limit of £600.



21. If it can be concluded that the cost of complying with the request would indeed exceed this prescribed limit, it will not then fall to me to consider the exemptions applied by an authority, for the reason that the Council could legitimately and appropriately have refused to respond to the request on the basis of section 12(1) of FOISA.

Section 12 – Excessive cost

22. Section 12(1) of FOISA frees a Scottish public authority of its obligation under section 1(1) of FOISA if the authority estimates that the cost of complying with the request would exceed the amount prescribed in regulations made by Scottish Ministers.
23. The Scottish Ministers have, under regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations), set this prescribed amount at £600.
24. Section 12(1) of FOISA, read in conjunction with regulation 5 of the Fees Regulations, therefore provides that public authorities are under no obligation to comply with requests for information where the estimated cost of doing so would exceed this figure of £600. The estimate must be a reasonable one. Consequently, as Commissioner, I have no power to require the release of information should I find that the authority's reasonable assessment of the cost of responding to any single request for information exceeds this amount.
25. In its submissions in relation to this case, the Council has stated that 3475 documents are held which fall within the scope of the request. These documents comprise various missives, communications between the Council and third parties, emails between Council staff, press cuttings, minutes of meetings and other documentation.
26. The Council provided a detailed estimate of the minimum cost of providing the information falling within the scope of the request. This calculation included an estimate for the time that would have been spent by professional and clerical staff (detailing separately the work each group would require to do, with the relative times and costs) locating, retrieving, extracting the required information and an estimate of the time that would be spent in redacting documents where the Council considered an exemption to apply (for example some 2000 sheets considered exempt under section 36(1) of FOISA and some 360 sheets the Council considered to be exempt under section 33(1)(b) of FOISA). In summary, the Council estimated that the cost of providing copies of each document held in relation to the case, would be at least £1580 including estimates of associated costs such as photocopying but not delivery.



27. The Council further stated that it had invited Anderson Strathern to refine the request at the outset but that they had declined. Therefore, the Council had proceeded on the basis of calculating the cost of providing everything it held on the Lochend Butterfly.
28. The applicant's wish to proceed on the basis of obtaining all of the information held was confirmed in correspondence with my investigating officer.
29. Having considered in detail the submissions made by the Council in favour of the application of section 12(1) to the requested information, I am satisfied that the cost of complying with Andersen Strathern's request would indeed exceed the upper limit of £600 prescribed by the Fees Regulations.
30. As such, I am satisfied the Council had no obligation to respond to the applicant's information request, on the grounds that to do so would have exceeded the upper limit of £600 prescribed within the Fees Regulations.
31. Sir Tom Farmer is, of course free to make a fresh request, more closely defined, so as to attempt to reduce the estimated cost of compliance.

Technical breaches of FOISA

Section 16 – Refusal of request

32. In claiming exemptions under sections 33(1)(b) and 36(1) and (2) (as it appears to have intended to do) the Council was required by section 16(1) and (2) of FOISA to specify which exemption applied to the information withheld; the reason why the exemption applied and, for the exemptions claimed under sections 33(1)(b) and 36(1), how the public interest in maintaining the exemption had been arrived at. It did not do any of these things adequately in its refusal notice or in responding to Anderson Strathern's request for review and therefore breached section (1) and (2) in these respects.

Section 19 – Content of certain notices

33. In its refusal notice, the Council failed to give details of the applicant's rights to seek a review if dissatisfied with its initial decision and to apply to me if remaining dissatisfied. Therefore, the Council breached section 19 of FOISA.
34. In responding to Anderson Strathern's request for review, the Council failed to give details of the applicant's right to apply to me if dissatisfied with that response and thereafter to appeal to the Court of Session on a point of law. Therefore, the Council breached section 21(10) of FOISA.



Decision

I find that the City of Edinburgh Council (the Council) would have incurred costs in excess of the £600 limit set by regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 in complying with Sir Tom Farmer's request for information. Accordingly, I find that the Council was entitled to refuse to comply with Sir Tom Farmer's request for information under section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) and therefore that its reliance on section 12(1) was an appropriate response to the request in accordance with Part 1 of FOISA..

I find that the Council failed to comply with section 16(1) and (2) of FOISA in the terms of its decision notice and so failed to comply with Part 1 of FOISA in these respects. I do not require the Council to take any action in respect of these breaches.

I also find that the Council failed to comply with section 19 of FOISA in the terms of its refusal notice and with section 21(10) of FOISA in the terms of its response to Sir Tom Farmer's for review and so failed to comply with Part 1 of FOISA in these respects. I do not require the Council to take any action in respect of these breaches.

Appeal

Should either Sir Tom Farmer or the City of Edinburgh Council wish to appeal against my 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
26 January 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.
- (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...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).



21 Review by Scottish public authority

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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

Projected costs

3. - (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-

- (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.

Excessive cost - prescribed amount

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