

# Decision Notice



Decision 026/2010 Mr and Mrs R Reid and Aberdeenshire Council

Materials used in works to a property

Reference No: 200900871

Decision Date: 24 February 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr and Mrs Reid requested from Aberdeenshire Council (the Council) information relating to materials used in works carried out to a property by their neighbours. The Council responded by withholding relevant information under the exemption in section 26(a) of FOISA, citing the legislation under which it believed disclosure to be prohibited. Following a review, Mr and Mrs Reid remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with the Reid's request for information in accordance with Part 1 of FOISA, by correctly claiming that disclosure of the information was prohibited under other legislation and therefore that the information was exempt under section 26(a) of FOISA. He did not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 26(a) (Prohibitions on disclosure).

The Building Procedure (Scotland) Regulations 2004 (SSI No. 428) (the Building Regulations) regulation 58 (Inspection of records and applications).

The full text of each of the statutory provisions cited above (as they applied at the time the Council dealt with Mr and Mrs Reid's request for review) is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 7 January 2009, Mr and Mrs Reid's solicitor wrote to the Council on their behalf, requesting the following information:

*"... full details of the materials used in the remedial works undertaken at [a specified address] together with reference to the specific regulations in respect of which such work was required."*



2. The Council responded on 19 January 2009, advising that it was withholding the information requested under section 26(a) of FOISA. It considered this exemption to apply because disclosure of the requested information was prohibited by regulation 58(3) and (5) of the Building Regulations.
3. On 14 February 2009, Mr and Mrs Reid's solicitor wrote to the Council on their behalf, requesting a review of the Council's decision to withhold the information.
4. The Council notified Mr and Mrs Reid of the outcome of its review on 18 March 2009, advising that it was upholding its original decision. It took the view that Mr and Mrs Reid had not established that they were "interested parties" for the purposes of the Building Regulations. Consequently, the prohibition in regulation 58 of the Building Regulations applied and the information was exempt under section 26(a) of FOISA.
5. On 17 May 2010 Mr and Mrs Reid wrote to the Commissioner, 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.
6. The application was validated by establishing that Mr and Mrs Reid 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.

## Investigation

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7. On 3 June 2010, the Council was notified in writing that an application had been received from Mr and Mrs Reid and asked to provide the Commissioner with any information withheld from them. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered relevant to the application, with particular reference to section 26(a). The Council's submissions, insofar as relevant, will be considered more fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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9. 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 Mr and Mrs Reid and the Council and is satisfied that no matter of relevance has been overlooked.



10. Section 26(a) of FOISA provides that information is exempt if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under any enactment. The word “enactment” includes statutory instruments, such as the Building Regulations. This is an absolute exemption in that it is not subject to the public interest test in section 2(1)(b) of FOISA. The Council has argued that, read together, paragraphs (3) and (5) of regulation 58 of the Building Regulations constitute a prohibition on disclosure in this case.
11. The withheld information is held by the Council in Part II of the building standards register. Regulation 58 makes provision for Parts I and II of the building standards register to be inspected by the public but this is (or at least was at the time the Council carried out its review – see below) subject to regulation 58(3). Regulation 58(3), as it applied at that time, provided that documents were not available for inspection or copying in cases to which regulation 58(4) and (5) applied. Regulation 58(5) applied where the relevant building was a residential building (such as the property referred to in Mr and Mrs Reid’s request) unless the application was by an interested party, which meant any owner, occupier, tenant or prospective tenant.
12. Having considered the terms of regulation 58(3) and (5), the Commissioner is satisfied that they would have prohibited disclosure of the withheld information when the Council dealt with Mr and Mrs Reid’s request for information and their request for review, provided the Council was entitled to regard them as interested parties at that time. While regulation 58 has since been amended with the result that the withheld information is now available for inspection by the public at all reasonable hours (although certain restrictions still apply to copying), those amendments did not take effect until 1 May 2009, after the Council had carried out its review in this case: consequently, they can have no effect on the Commissioner’s decision here.
13. The Council submitted that as it had not been definitively established that Mr and Mrs Reid were interested parties for the purposes of regulation 58(5), it had exercised caution in concluding that the prohibition applied. Mr and Mrs Reid, on the other hand, contended (with reasons) that they were interested parties.
14. While noting Mr and Mrs Reid’s belief they had an interest in the property in question which made them interested parties, the Council advised the investigating officer of the evidence on which it had taken a contrary view. In this connection, it submitted that it was not its function as building authority to investigate ownership claims: it accepted the information on ownership submitted by applicants unless that information was challenged at the time. It did not have a definitive view on ownership in this case and, given that ownership of the land in question was clearly in dispute, did not consider it appropriate that it should have one.
15. The Commissioner should emphasise at the outset that his role in this decision is to consider whether the Council dealt with the Reids’ request for information in accordance with Part 1 of FOISA, specifically in the respects identified by Mr and Mrs Reid. It is not the Commissioner’s function to determine whether the Council discharged any obligations it may have owed to Mr and Mrs Reid (in particular) under any other legislation, although he may require to consider the application of other legislation insofar as it impinges directly on the application of any relevant provisions of FOISA.



16. The Commissioner accepts that it is not the function of the Council as building authority (or of him for the purposes of reaching a decision in this case) to arrive at a definitive conclusion in relation to the ownership of land. That can only be done by a court of law or, in certain circumstances, a tribunal with the appropriate jurisdiction. He acknowledges that it would be inappropriate for either him or the Council to purport to reach such a conclusion, particularly in respect of land the ownership of which was in dispute. He has, however, considered the Council's approach to the question of whether Mr and Mrs Reid should have been regarded as interested parties for the purposes of regulation 58(5) of the Building Regulations. In light of the Council's submissions on this point, and having taken account of those of Mr and Mrs Reid, the Commissioner accepts that the Council acted reasonably in the circumstances in deciding that they were not interested parties. In this context, he does not consider that he could be expected to require any higher test than that.
17. The Commissioner therefore finds that the prohibition in regulation 58(3) of the Building Regulations (read with regulation 58(5)) applied to the withheld information at the time the Council dealt with the information request made by Mr and Mrs Reid and their subsequent request for review. Consequently, he finds that the information was exempt from disclosure in terms of section 26(a) of FOISA at that time.

## DECISION

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

## Appeal

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Should either Mr and Mrs Reid or Aberdeenshire 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**  
**24 February 2010**



## 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.

...

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

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (b) section 26;

...

##### 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...



## **The Building Procedure (Scotland) Regulations 2004**

### **Inspection of records and applications**

**58.** - (1) Subject to paragraph (3), Parts I and II of the building standards register shall be available for inspection by the public at all reasonable hours and without prejudice to that generality Part I shall be published on a website maintained by the relevant local authority.

(2) Subject to paragraph (3), the local authority shall on payment of the appropriate fee provide copies of any of the documents contained in Part II of the building standards register.

(3) Documents shall not be available for inspection in terms of paragraph (1) or for copying in terms of paragraph (2) in the cases to which paragraphs (4) and (5) apply.

(4) This paragraph applies to cases where disclosure or copying would raise security concerns but not where the owner of the building to which the documents relate has consented, in writing, to that disclosure or copying.

(5) This paragraph applies where the relevant building is a residential building unless the application is by an interested party and for the purposes of this paragraph "interested party" means any owner, occupier, tenant or prospective tenant.