

Decision Notice



Decision 149/2012 Mr Alex Morrice and City of Edinburgh Council

Statutory notice repairs

Reference No: 201200319

Decision Date: 4 September 2012

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Scottish Information Commissioner

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Summary

Mr Morrice asked City of Edinburgh Council for information about statutory repair works at a specified property. The Council refused to supply the information because they considered disclosure would undermine ongoing investigations regarding its property conservation section.

During the investigation, the Council disclosed the information to Mr Morrice, and Mr Morrice accepted that he had received all of the relevant information held by the Council. In the absence of any relevant submissions, the Commissioner could not accept that the Council had been entitled to withhold the information when dealing with Mr Morrice's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (general entitlement); 2(1) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations)

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.

Background

1. On 16 April 2011, Mr Morrice wrote to the Council requesting the following information in relation to statutory notice repair works undertaken at a specified property:
... all information ... relating to the tendering process, and in connection with all additional work identified after the initial statutory notice, including the tendering or negotiation process for any additional work.
2. Mr Morrice indicated that this should include, but not be restricted to, formal tender documents, contracts, internal memos, emails, informal hand-written notes, and agendas and minutes of relevant meetings. He also requested information in relation to snagging or additional work after the original work was completed.



3. The Council responded on 26 April 2011, indicating that, having considered his request under the Environmental Information (Scotland) Regulations 2004 (the EIRs), the Council was withholding the information on the basis that it was excepted from disclosure under regulation 10(5)(b). It maintained that this exception applied because disclosure of the information would, or would be likely to, prejudice substantially the course of justice with respect to ongoing investigations concerning allegations of misconduct within the Council's Property Conservation section.
4. Although the Commissioner is satisfied that the Council sent its response in an email on 26 April 2011, Mr Morrice apparently did not receive it. He asked the Council to review its failure to respond on 27 May 2011 and, on 20 June 2011, was advised that the response had been issued, and provided with a further copy.
5. On 11 July 2011, Mr Morrice made an application to the Commissioner, seeking a decision regarding the Council's handling of his request. However, the Commissioner was unable to accept that application, because Mr Morrice had not asked the Council to review its response to his request. He was advised to seek a further review, highlighting the reasons for his dissatisfaction with the Council's response.
6. On 23 October 2011, Mr Morrice requested a review of the Council's decision to withhold the information, maintaining that there was a strong public interest in the release of the information. This request was (for reasons which are not relevant to this decision) made outwith the timescale required for submitting a request for review in terms of the EIRs. This communication could therefore only be treated as a request for review of the Council's handling of the request insofar as it was made in terms of FOISA. The Council was not obliged to conduct a review, but had the discretion to do so under section 21(6) of FOISA.
7. Following a request from the Commissioner's staff, the Council agreed to exercise its discretion and conduct a review of the handling of Mr Morrice's request in terms of FOISA. The Council notified Mr Morrice of the outcome of that review on 15 February 2012 (again following delays for reasons that are not relevant to this decision). It withheld the information on the basis that it was exempt from disclosure under sections 34 and 30(b)(ii) of FOISA.
8. On 19 February 2012, Mr Morrice wrote to the Commissioner, stating that he was 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.
9. The application was validated by establishing that Mr Morrice 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 information withheld from Mr Morrice in this case was already in the possession of the Commissioner, and so the case was allocated to an investigating officer.



Investigation

10. On 27 February 2012, the investigating officer 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 concerning its application of exemptions in section 30(b)(ii) and 34 of FOISA.
11. The Council did not provide any submissions in response to this invitation. However, on 7 June 2012, it disclosed to Mr Morrice the information that had previously been withheld.
12. Following this disclosure, Mr Morrice was asked to confirm whether he considered that this information satisfied his request, and whether he now wished to withdraw his application for a decision by the Commissioner. He responded on 8 July 2012, confirming that he wished to continue with his application, because he was dissatisfied with the time it had taken for the information to be disclosed, and he considered that the Council had used spurious arguments to circumvent his request after it was first received.
13. Mr Morrice also noted that the information supplied to him did not include any notes or minutes of relevant meetings, or tender documents or contracts. He also asked for confirmation on certain points regarding the Council's searches.
14. The investigating officer subsequently raised Mr Morrice's concerns with the Council, and asked for further information about its searches to address each point he had raised. The Council responded to these questions on 24 July 2012 and a summary was communicated to Mr Morrice thereafter.
15. Mr Morrice confirmed on 19 August 2012 that he was satisfied the Council had disclosed all relevant information. As a result, the Commissioner's decision in this case will solely consider the Council's initial decision to withhold that information. (The Commissioner has decided that it would not be appropriate in the circumstances to consider the question of delay further. As indicated above, she is satisfied that the Council's initial response to Mr Morrice's request was sent on 26 April 2011. As also outlined above, subsequent delays can reasonably be attributed to unfortunate – but wholly explicable – circumstances.)

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Morrice and the Council and is satisfied that no matter of relevance has been overlooked.



17. In this case, the Council refused to supply the information requested by Mr Morrice on the basis that it was exempt from disclosure under sections 34 and 30(b)(ii) of FOISA. Within section 34 of FOISA, there are a number of exemptions, but the Council did not indicate which it considered to be applicable.
18. All of the relevant exemptions are reproduced in the Appendix to this decision. All are subject to the public interest test required by section 2(1)(b) of FOISA, which is also set out in the Appendix.
19. During the investigation, the Council was invited to provide submissions to confirm which of the exemptions in section 34 it considered applicable to the withheld information, and to explain why it considered these, and the exemption in section 30(b)(ii), to have applied to the withheld information at the point when it notified Mr Morrice of the outcome of its review.
20. Despite reminders from the investigating officer, the Council did not provide any submissions to the Commissioner on these points, and instead decided to disclose all of the withheld information.
21. In the absence of any submissions to justify the Council's previous decision to apply exemptions to the information withheld from Mr Morrice, the Commissioner can only conclude that these exemptions were incorrectly applied by the Council.
22. Accordingly, the Commissioner finds that the Council breached Part 1 (and in particular section 1(1)) of FOISA by withholding the information requested by Mr Morrice. Since the Council rectified this breach during the investigation, the Commissioner does not require the Council to take any further action in response to this decision.

DECISION

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Alex Morrice.

In the absence of any submissions to justify the Council's decision that the requested information was exempt from disclosure, the Commissioner finds that it was not entitled to rely upon the exemptions cited in its response to Mr Morrice's request for review. Accordingly, the Commissioner finds that the Council breached Part 1 (and in particular section 1(1)) of FOISA by refusing to disclose the requested information to Mr Morrice.

Given that the Council disclosed the withheld information during the investigation, the Commissioner does not require it to take any further action in response to this failure in response to Mr Morrice's application.

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Appeal

Should either Mr Morrice or city of Edinburgh 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.

Margaret Keyse
Head of Enforcement
4 September 2012



Appendix

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...



34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or
 - (ii) prosecuted for an offence is guilty of it;
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
 - (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- (2) Information is exempt information if-
 - (a) held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14) but not for the time being concluded; or
 - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-
 - (i) by virtue of a duty to ascertain; or
 - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
- (3) Information held by a Scottish public authority is exempt information if-
 - (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
 - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

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