

Decision Notice



Decision 161/2008 Millar & Bryce Ltd and North Lanarkshire Council

Notices under Section 108 of the Housing (Scotland) Act 1987

Reference No: 200801483

Decision Date: 19 December 2008

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Scottish Information Commissioner

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Summary

Millar & Bryce Ltd requested from North Lanarkshire Council (the Council) copies of Notices or Orders made in respect of section 108 of the Housing (Scotland) Act 1987 (the HSA). The Council refused to provide the information requested, stating that it was exempt in terms of section 34 of FOISA. Following a review, in which the Council confirmed reliance on section 34(4) of FOISA, Millar & Bryce applied to the Commissioner for a decision.

Following an investigation, the Commissioner ordered the Council to disclose the information to Millar & Bryce as he was not satisfied that the exemption applied to the information on the basis that it had not been obtained or recorded for the purpose of civil proceedings and given that it did not relate to the obtaining of information from confidential sources.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 34(3) and (4) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(2)(c) (Law enforcement)

The Housing (Scotland) Act 1987 (HSA) sections 108(1), (3) and (4) (Power of local authority to secure repair of house in state of serious disrepair) and 109(1) and (5) (Recovery by local authority of expenses under s.108)

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 9 July 2008, Millar & Bryce wrote to the Council requesting a copy of all notices or orders made, served, discharged or released, and those which remain extant (i.e. works and/or monies still outstanding to the council) during the period 18 January 2008 to 9 July 2008, under or pursuant to section 108 of the Housing (Scotland) Act 1987. Millar & Bryce made it clear that if the notices contained personal data which was exempt under section 38 of FOISA, then the information should be provided with the personal data redacted.



2. The Council responded on 25 August 2008. It advised Millar & Bryce that the information they sought related to 24 addresses, but that the information was held for the purposes of investigation conducted by the Council, which may lead to a decision by the Council to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instigated and, as such, was exempt in terms of section 34 of FOISA. (The Council did not specify which exemption in section 34 it considered applied, although from the arguments it made it appears to have been section 34(1)(b).) The Council also stated that it had concluded that the public interest in disclosing the information was outweighed by that in maintaining the exemption.
3. On 27 August 2008, Millar & Bryce wrote to the Council requesting a review of its decision. Millar & Bryce stated that they were unaware that criminal proceedings could be instigated for non-compliance of a notice under section 108 of the HSA and also commented that the Council had, on at least three previous occasions, provided Millar & Bryce with copies of the notices, albeit with personal data redacted.
4. The Council notified Millar & Bryce of the outcome of its review on 25 September 2008. On review, the Council accepted that criminal proceedings could not be instigated and instead advised Millar & Bryce that it considered the information requested to be exempt in terms of section 34(4) of FOISA, which states that information is exempt 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 section 34(1) or (3) of FOISA.
5. On 8 October 2008, Millar & Bryce 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 Millar & Bryce had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after Millar & Bryce had asked the authority to review its response to that request.

Investigation

7. On 16 October 2008, the Council was notified in writing that an application had been received on behalf of Millar & Bryce and was asked to provide the Commissioner with copies of the 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 on 29 October 2008, 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 confirm which exemption or exemptions it was relying on to withhold the information and to provide a detailed analysis as to why the exemption or exemptions applied.



9. The Council responded on 20 November 2008, confirming that it was relying upon section 34(4) of FOISA to withhold the information, in that the information was obtained and recorded by the Council for the purposes of civil proceedings arising out of an investigation as mentioned in section 34(3).

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Millar & Bryce and the Council and is satisfied that no matter of relevance has been overlooked.
11. The Council has submitted that the withheld information is exempt under section 34(4) of FOISA since it falls within the parameters of an investigation mentioned in section 34(3) of FOISA.
12. The Council state that it is possible that a notice issued under section 108 of the HSA will not be complied with. This means that the Council would carry out the necessary works and then have to raise a court action for the recovery of the costs of carrying out those works under section 109 of the HSA. Civil proceedings would therefore occur.
13. Given that the Council has made it clear that it considers section 34(3) to be relevant here, in order to determine that section 34(4) of FOISA applies to the information, the Commissioner has to be satisfied that both of the following tests can be fulfilled:
- the information was obtained or recorded by the Council for the purposes of civil proceedings brought by or on behalf of the Council and
 - those proceedings arise out of the type of investigations mentioned in section 34(3).
14. The Commissioner will first of all consider whether the information was obtained or recorded for the purposes of civil proceedings brought by or on behalf of the Council.
15. The Commissioner considered this point in *Decision 059/2007 Mr David Ferguson and the Chief Constable of Grampian Police*. Mr Ferguson had asked Grampian Police to provide him with two investigators' reports in relation to a misconduct hearing. The Police withheld the information under a number of exemptions, including section 34(4). In that case, while the Commissioner accepted that one possible outcome of a misconduct investigation would be civil proceedings, he concluded that the information was not obtained or recorded for the purposes of such proceedings. It had been created by the investigating officer and recorded for the purposes of identifying to the Deputy Chief Constable areas in which Grampian Police might review or improve practice in the light of issues arising from the investigation. Consequently, the Commissioner did not uphold the exemption in section 34(4).



16. Whilst the situation here is somewhat different to the Ferguson case, there are similarities. The Commissioner accepts that if a person fails to take action in response to a notice served under section 108 of the HSA, the Council may well repair the property itself and then seek to recover the costs of the repairs through civil proceedings under section 109 of the HSA. However, the Commissioner does not accept that the information in question (i.e. the information contained in the notices) was obtained or recorded by the Council for the purposes of these civil proceedings. He considers instead that the information was obtained or recorded for the purposes of instructing those persons having control of houses in serious disrepair to carry out specified works to put right certain defects and to bring the houses up to a reasonable standard of repair. If these works are carried out within the timescale given, no civil proceedings will follow. Only if the works are carried out by the Council and only if a subsequent demand for payment is not paid are civil proceedings likely to follow.
17. The Commissioner also notes from section 109(5) of the HSA that instead of raising proceedings, the Council also has the power to make a charging order in respect of any expenses incurred by them under section 108(3).
18. It is also possible that the person or persons on whom such a notice is served will appeal against the notice to the sheriff court and civil proceedings would follow as a result. However, again, the Commissioner is unable to find that the information was obtained or recorded for the purposes of such civil proceedings.
19. As a result, the Commissioner considers that the first test set out in section 34(4) cannot be fulfilled and that section 34(4) of FOISA therefore does not apply to the information in question.
20. However, for completeness, the Commissioner will also consider the second test, and whether, if he had found that the information had been obtained or recorded for the purposes of civil proceedings, it could be shown that the proceedings arose out of an investigation mentioned in section 34(3).
21. Section 34(3) states that information held by a Scottish public authority is exempt information if (a) it was obtained or recorded by an authority for the purposes of investigations (other than such investigations as are mentioned in section 34(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) if the information relates to the obtaining of information from confidential sources.
22. In this case, the Council has argued that the investigation was carried out by virtue of powers conferred on it under the HSA for the purpose set out in section 35(2)(c) of FOISA, i.e. to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. However, as mentioned above, the Commissioner is not satisfied that the information was obtained or recorded to ascertain whether circumstances which would justify regulatory action in pursuance of the HSA exists or may arise as outlined in section 35(2)(c) of FOISA.



23. Even if the Commissioner accepted this viewpoint, there is nothing to suggest that the information relates to the obtaining of information from confidential sources, which is a requirement of section 34(3). As a result, even if the Commissioner had found that the first of the tests in section 34(4) applied to the information, he would not have found that the civil proceedings arose out of an investigation mentioned in section 34(3).
24. Since the Commissioner is not satisfied that the information falls within the scope of the exemption in section 34(4) of FOISA, he is not required to go on to consider the application of the public interest test.

DECISION

The Commissioner finds that North Lanarkshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request by Millar & Bryce. He finds that the information is not exempt under section 34(4) of FOISA and that, in failing to disclose the information to Millar & Bryce, the Council failed to comply with section 1(1).

He therefore requires the Council to provide Millar & Bryce with a copy of all notices or orders made, served, discharged or released (and those which remain extant) during the period 18 January 2008 to 9 July 2008, under or pursuant to Section 108 of the Housing (Scotland) Act 1987. In line with the information request by Millar & Bryce, personal data which is exempt under section 38 of FOISA should be redacted from the notices. This information must be provided to Millar & Bryce by 2 February 2009.

Appeal

Should either Millar & Bryce or the 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
19 December 2008



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 –

- (a) the provision does not confer absolute exemption; and
(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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

...

- (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).

35 Law enforcement

- (1) ...
- (2) The purposes are-
 - ...
 - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
 - ...

Housing (Scotland) Act 1987

108 Power of local authority to secure repair of house in state of serious disrepair

- (1) Where a local authority are satisfied that any house in their district is in a state of serious disrepair, they may serve upon the person having control of the house a repair notice.
 -
- (3) Subject to subsection (5), if a notice under subsection (1) is not complied with, the local authority—
 - (a) may themselves execute the works necessary to rectify the defects specified in the notice or in the notice as varied by the sheriff, as the case may be, and
 - (b) may in addition execute any further works which are found to be necessary for the purpose of bringing the house up to the standard of repair referred to in subsection (2)(b), but which could not reasonably have been ascertained to be required prior to the service of the notice.
 - (4) Any question as to whether further works are necessary or could not have been reasonably ascertained under subsection (3)(b) shall be determined by the sheriff, whose decision shall be final.
 -



109 Recovery by local authority of expenses under s.108

- (1) Subject to the provisions of this section, any expenses incurred by a local authority under section 108(3), together with interest from the date when a demand for the expenses is served until payment, may be recovered by the authority from—
 - (a) the person having control of the house, or
 - (b) if he receives the rent of the house as trustee, tutor, curator, factor or agent for or of some other person, from him or from that other person, or in part from him and in part from that other person.
- ...
- (5) The provisions of Schedule 9 shall have effect for the purpose of enabling a local authority to make a charging order in respect of any expenses incurred by them under section 108(3) in relation to a house or building.