



Scottish Information
Commissioner

Decision 081/2005 Mrs M Lee (Upper Myrtlefield Residents Group) and Highland Council

Date of meeting and minute reference of note of interest given to councillors

Applicant: Mrs M Lee (Upper Myrtlefield Residents Group)
Authority: Highland Council
Case No: 200502099
Decision Date: 19 December 2005

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 081/2005 Mrs M Lee (Upper Myrtlefield Residents Group) and Highland Council

Request for date of meeting and minute reference when officer of the Council gave note of interest to Councillors – section 10 time for compliance – section 15 duty to provide advice and assistance – section 17 information not held – section 19 content of certain notices – section 25 information otherwise accessible

Facts

Mrs Lee requested certain information from Highland Council (the Council), in particular the date of a meeting and also the minute reference at which the Council's then Head of Legal Services had given Councillors a note of his family's interest in certain land. No response was received to this request and Mrs Lee requested a review of the Council's refusal to provide the information. The Council responded by attempting to explain the Head of Legal Services' position, in the course of which it advised that there was no note of interest and consequently no minute reference. Mrs Lee applied to the Commissioner for a decision.

Outcome

The Commissioner found that while there was no minute specifically recording the formal declaration of an interest on the part of the Head of Legal Services, there was at least one minute reference to that officer's position with the Council in the context of an application for planning permission for the land in question. Therefore, it was not wholly accurate to say that no information was held that fell within the scope of Mrs Lee's request.

The Commissioner therefore found that the Council did not act in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing Mrs Lee's request on that basis. The Commissioner accepted that the information in question was available other than by requesting it under section 1(1) of FOISA and therefore was exempt information by virtue of section 25 of FOISA, but found that the Council should have provided Mrs Lee with advice and assistance to enable her to locate the information, in accordance with section 15 of FOISA. The Commissioner did not require the Council to take any further action in this connection.



The Commissioner also found that the Council failed to comply with the requirements of Part 1 of FOISA in not responding to Mrs Lee's request for information within the period of 20 working days stipulated by section 10(1), in not giving Mrs Lee proper notice that the information was not held as required by section 17(1), and in not advising Mrs Lee of her rights to seek a review and apply to the Commissioner as required by section 19. Mrs Lee was not prejudiced in the exercise of her rights under FOISA by these breaches of technical provisions of the legislation and the Commissioner did not require the Council to take any action as a consequence.

Appeal

Should either Mrs Lee or Highland Council wish to appeal against this decision, there is a right of 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.

Background

1. On 12 May 2005, Mrs Lee, the Secretary of the Upper Myrtlefield Residents Group, wrote to the Council, requesting the date of a meeting and also the minute reference at which the Council's then Head of Legal Services had given Councillors a note of his family's interest in certain land. She received no response to this request within the period of 20 working days stipulated by section 10(1) of FOISA and (treating this failure to respond as a refusal of the information requested) wrote to the Council again on 26 June 2005 requesting a review of that refusal.
2. The Council wrote to Mrs Lee on 8 and 11 July 2005, attempting to explain the Head of Legal Services' position in respect of the planning application submitted by him as a private individual in relation to his family's property. In the process, the Council advised that there had been no formal declaration of interest on the part of the Head of Legal Services (none had been required in the circumstances) and therefore no note of interest and no minute reference.



3. While the 11 July letter purported to respond to the request for information, it made no reference to any particular exemption under Part 1 of FOISA and was couched in terms which suggested that it was responding to a request for information rather than a requirement for review. A belated reference was made to Mrs Lee's right to seek a review and no reference was made to her right to apply to me for a decision.
4. Mrs Lee was dissatisfied with the Council's response and applied to me for a decision in terms of section 47 of FOISA. An Investigating Officer was assigned to the case.

Investigation

5. Mrs Lee's application was validated by establishing that she had made a valid request for information to a Scottish public authority and had applied to me only after asking the Council to review its response to her request. Given the Council's failure to respond to her initial request, I am satisfied that her letter of 26 June 2005 constituted a valid requirement for review for the purposes of section 20 of FOISA.
6. The Investigating Officer wrote to the Council on 8 August 2005, informing it that an application had been received and that an investigation had begun. It was asked to provide the following information for the purposes of the investigation:
 - a) Any notes or internal correspondence relating to the planning application submitted by the Head of Legal Services and his family, including any minutes of meetings at which the applications were discussed;
 - b) Any correspondence received from the Head of Legal Services regarding his planning application; and
 - c) Any other information which the Council would consider helpful in explaining its position.
7. The Council responded on 25 August 2005, admitting that Mrs Lee's request had not been dealt with in accordance with FOISA. The Council had attempted to address the issue in question but had not informed Mrs Lee of her rights under FOISA or issued appropriate notices. The issue of handling complaints in relation to FOISA had been recognised as an area where staff might fail fully to comply with the Act as a result of attempting to deal with a complaint (as had happened here) while failing to pick up on a request for information. Confusion was evidently caused by the fact that information did not exist and this was an issue that would be dealt with through the Council's awareness raising activities in relation to FOISA.



8. In relation to the specific information requested by Mrs Lee, the Council explained that the request was based on an erroneous assumption that a meeting had taken place and that the Head of Legal Services had attended to declare his interest. It had tried to explain that this was not in fact the case and that consequently it did not hold the information requested. The Council did, however, provide minutes of a number of Council meetings regarding the Head of Legal Services' application and the Inverness Local Plan, to demonstrate that while Councillors were made aware of the Head of Legal Services' interest on more than one occasion, he did not attend any of these meetings and declare an interest formally. It also provided copies of correspondence demonstrating that Councillors involved in the process of approving the Local Plan would have been aware of the Head of Legal Services' interest. I was assured that all of these documents (with one exception, which did not in fact make any specific reference to the Head of Legal Services) were published and available from either the Council's website or the local planning office.
9. In further communications with the Investigating Officer, the Council provided:
 - a) Details of the searches undertaken in its records to identify the minutes in question. It confirmed that all of them were in the public domain and accessible through its website.
 - b) Clarification that nothing in particular was done to draw Mrs Lee's attention to (or provide her with copies of) the minutes which did identify the applicant for planning permission as the Council's Head of Legal Services, or to provide her with advice and assistance in relation to her application more generally. The Council did, however, emphasise that the Upper Myrtlefield Residents Group was represented at the meetings where the original planning application was refused and therefore would have been aware of what had taken place there.

The Commissioner's analysis and findings

10. I should start by pointing out that it is not my function to determine whether a formal declaration of interest should have been given by the Council's then Head of Legal Services at any point in the consideration of his planning application, or to consider any other aspect of the propriety of the determination of the application. Indeed, it is not my role to consider what Councillors were aware of in the course of considering the application. The scope of the request for information was confined to the date of a meeting and the minute of that meeting. It presupposed that a meeting took place at which an interest was declared.



11. If any declaration of interest of the kind alluded to by Mrs Lee were to have been given, it would require to have been given at a formal meeting of the Council or one of its Committees – in particular, the Committee dealing with the planning application. These require to be minuted fully and (with a few exceptions, none of which are of obvious relevance here) the minutes require to be made public. The archive of minutes on the Council's website appears to be complete and I am satisfied that the Council took all reasonable steps to identify the relevant document in response to my Investigating Officer's enquiries.
12. There is no reference in any of the minutes produced by the Council to the Head of Legal Services declaring his interest in the property which was the subject of the planning application, either in person or by any other means. The minute of the meeting of the Inverness Area Planning Committee held on 29 May 2000 does however refer, in the context of the application, to the applicant's status as the Council's Head of Legal Services. This might not strictly be the declaration of interest sought by Mrs Lee, but I do consider it to be relevant to her request for information and something which should have been identified to her in response to that request.
13. I do accept that the minute in question is exempt information for the purposes of Part 1 of FOISA. It is available to the public otherwise than by making a section 1 request, being available in accordance with the Council's approved publication scheme, and therefore is exempt under section 25. That does not, however, absolve the Council of the responsibility for citing the relevant exemption and (as important, in my view) providing the applicant with reasonable advice and assistance to enable them to locate the information. In my view, it is generally unwise to presuppose that knowledge on the part of the applicant (otherwise, it seems unlikely that they would be making the request for information in the first place) and prudent in all cases where section 25 is or should be cited to advise the applicant as to where the information otherwise available is to be found.
14. It has been accepted by the Council in the course of this investigation that it did not deal with Mrs Lee's request in accordance with the procedures laid down in Part 1 of FOISA. In particular, the Council did not respond to the request within the period of 20 working days stipulated by section 10(1), give Mrs Lee proper notice that the information was not held as required by Section 17(1), or advise Mrs Lee of her rights to seek a review and apply to the Commissioner as required by section 19. I am satisfied, however, that Mrs Lee has not been prejudiced in the exercise of her rights under FOISA, and that the Council recognises where it has not complied fully with these technical requirements of FOISA and intends to remedy the situation.
15. Given the circumstances of this case, I do not require to consider the public interest.



Decision

I find that while there is no minute specifically recording the formal declaration of an interest on the part of the Head of Legal Services, the minute of the meeting of the Inverness Area Planning Committee held on 29 May 2000 does refer, in the context of an application for planning permission, to the applicant's status as the Council's Head of Legal Services. Therefore, I find that information was held that fell within the scope of Mrs Lee's request and that Highland Council did not act in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing the request on the basis that no information was held. I accept that the information in question is available other than by requesting it under section 1(1) of FOISA and therefore is exempt information by virtue of section 25 of FOISA, but I find that Highland Council should have provided Mrs Lee with advice and assistance to enable her to locate the information, in accordance with section 15 of FOISA. I do not require Highland Council to take any further action in this connection.

I find that Highland Council failed to comply with the requirements of Part 1 of FOISA in not responding to Mrs Lee's request for information within the period of 20 working days stipulated by section 10(1), in not giving Mrs Lee proper notice that the information was not held as required by Section 17(1), and in not advising Mrs Lee of her rights to seek a review and apply to the Commissioner as required by section 19. However, Mrs Lee was not prejudiced in the exercise of her rights under FOISA by these breaches of technical provisions of the legislation and I do not require the Council to take any action as a consequence.

Kevin Dunion
Scottish Information Commissioner
19 December 2005