

Decision Notice



Decision 011/2009 Mr X and Dundee City Council

Name of a lessee

Reference No: 200801184

Decision Date: 09 February 2009

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr X requested from Dundee City Council (the Council) the name of the lessee of a commercial lease from the Council. The Council withheld the information under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council upheld its original decision. Mr X remained dissatisfied and applied to the Commissioner for a decision.

Following the investigation, the Commissioner found that the Council had failed to deal with Mr X's request for information in accordance with Part 1 of FOISA. He concluded that the exemption in section 33(1)(b) had been misapplied by the Council, and also that the Council had failed to respond to Mr X's request for review within the timescale specified in section 21(5).

As the Council had released the information during the investigation, the Commissioner did not require any action to be taken.

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); 21(5) (Review by Scottish public authority) and 33(1)(b) (Commercial interests and the economy)

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. Mr X emailed the Council on 3 June 2008, asking for information relating to a specified lease agreement entered into between the Council and a named person. Mr X asked whether the agreement was in the name [with respect to the lessee] of a limited company.
2. The Council responded on 23 June 2008, and withheld the information on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA.
3. On 24 June 2008, Mr X requested a review. He argued that disclosure of the information he had requested could not in any way be likely to prejudice substantially the commercial interests of any person, and so there was no justification for withholding this information.



4. The Council did not respond to this request for review, and Mr X made an application to the Commissioner with respect to this failure. An Information Notice was served on the Council by the Commissioner on 1 August 2008, and the Council subsequently responded to Mr X's request for review on 8 August 2008. The Council's review upheld its initial decision without amendment. Mr X subsequently withdrew his application concerning the failure to respond to his request for review.
5. On 11 August 2008, Mr X 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. In his application and further correspondence he made clear that he was dissatisfied with the Council's decision to withhold the information he had requested, and that he remained dissatisfied with the Council's failure to comply with the timescales set out in FOISA.
6. The application was validated by establishing that Mr X 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

7. On 14 August 2008, the Council was notified in writing that an application had been received from Mr X and was asked to provide the Commissioner with any information withheld from the applicant.
8. As a result of an Information Notice served on the Council on 3 September 2008, the withheld information was then provided to the Commissioner on 16 September 2008. The case was then allocated to an investigating officer.
9. The investigating officer contacted the Council on 24 September 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 justify its reliance on any exemptions in FOISA which it considered applicable and about the technical aspects of the handling of Mr X's request.
10. The Council responded on 14 October 2008 confirming that it wished to continue to rely on section 33(1)(b) of FOISA. The Council also referred to the Commissioner's Briefing on this exemption in providing brief submissions relating to the public interest test, as well as in relation to the exemption itself.
11. The investigating officer spoke to Mr X on 22 October 2008 inviting him to provide his submissions on the public interest associated with section 33(1)(b) of FOISA. Mr X responded with his submissions.



12. The investigating officer wrote to the Council on 7 November 2008, requesting that it re-consider its decision to withhold the requested information. This request was prompted by the observation that Mr X's request had only sought information relating to the lessee's identity, whereas the information identified by the Council as having been withheld went considerably beyond this to include further information relating to the lease.
13. The Council responded on 28 November 2008, stating that it had re-considered its position and had now decided to release the information. Mr X confirmed that he had received this information from the Council on 17 December 2008.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has consider the withheld information and the submissions made to him by both the Council and Mr X, and is satisfied that no matter of relevance has been overlooked.
15. This decision is unusual, in that the information under consideration in what follows had been disclosed to Mr X by the time of its writing. Following this disclosure, Mr X confirmed that he remained dissatisfied with the way in which the Council handled his request, and that he wanted this decision to consider the Council's compliance with timescales set out in FOISA, but also whether it was entitled to withhold the information he had requested when it responded to his request and conducted its review.
16. Before continuing, the Commissioner would note that he has considered (as he is required to do) the application of exemptions to the information under consideration and (where this test is relevant) the balance of public interest in the circumstances that existed at the time when the Council notified Mr X of the outcome of its review, and disregarding any developments since that time (including the disclosure of the information to Mr X).

Scope of the information request

17. As noted above, Mr X's information request related to a specified lease agreement entered into between the Council and a named person. Mr X asked only whether the agreement was in the name [with respect to the lessee] of a limited company.
18. The Commissioner considers that a reasonable interpretation of this request was that Mr X wished to know the name and/or legal status of the lessee as set out in relevant documents. Mr X has indicated during the investigation that this was his intention; and that his request was not intended to include the documents within which such information was held.
19. The Commissioner notes that the Council provided him with a significant volume of documents when it was required to submit the withheld information. These included a draft lease, and legal correspondence between the Council's solicitors and the lessee's solicitors.



20. It was in this context that the investigating officer invited the Council to reconsider its position with respect to the application of the exemption in section 33(1)(b), since the Council appeared to misinterpret Mr X's request to include additional documentation that fell outwith its scope. The Council subsequently released the name of the lessee, and it is this information alone that is considered in what follows.

Consideration of section 33(1)(b) – commercial interests and economy

21. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). A public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely to, be substantially prejudiced by disclosure of the information. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.
22. The Council argued that making public what it described as the terms of its negotiations about this lease would compromise the commercial interests of both parties (the Council and the lessee). The withheld details of the lease document and related correspondence included the rent, which was anticipated by the Council to be substantial, and this would, in the Council's view, be at risk if the withheld information were made public and the deal fell through.
23. Mr X argued that there was no conceivable reason for keeping the information secret as he was seeking only a very small amount. Moreover, the identity of the lessee was already known in general terms because of the planning permission which had preceded the leasing agreement. Mr X argued that no prejudice to commercial interests could occur, far less of a substantial degree.
24. There is no definition of "substantial prejudice" in FOISA. However, the Commissioner's view is that amongst the factors required to claim this exemption, the damage caused (or likely to be caused) by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.
25. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied. If a public authority is applying this exemption, the Commissioner would expect it to be able to show what kind of harm would result and why this would be the expected outcome if the information in question were released.
26. The Commissioner has noted in this case that the information requested by Mr X reveals only the name of the lessee concerned. It does not reveal the terms of the lease or any further information about commercial activities by either the Council or the lessee.



27. In all the circumstances, the Commissioner is not persuaded by the Council's arguments that substantial prejudice to the commercial interests of any person would, or would be likely to, accrue on disclosure of the very small amount of information, that is actually relevant to Mr X's request at the time of the Council's review response. Even if, in the extremely unlikely event that any commercial prejudice did arise, it would at most be marginal in degree and insubstantial. Other than the Council's assertions, no evidence of any substance was provided of any prejudice either arising or likely to arise, or how such prejudice would follow from the disclosure of the information requested by Mr X.
28. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, he is not required to go on to consider the public interest contained in section 2(1) of FOISA.
29. The Commissioner therefore finds that the Council was not justified in relying on section 33(1)(b) FOISA to withhold the information. Since the information has already been disclosed to Mr X, the Commissioner requires no further action to be taken by the Council in respect of this breach of FOISA.

Failure to respond within timescales laid down in FOISA

30. As noted above, the Council initially failed to respond to Mr X's request for review.
31. The Council explained on 8 August 2008 that it had completed an internal review on 24 July 2008, but due to an administrative error the response was not sent to Mr X. The Council then responded to Mr X and apologised for the oversight.
32. Section 21(5) requires a public authority to give an applicant notice in writing of what it has done in response to a request for review within 20 working days after receipt of the request for review. Although the Council may have carried out the review within the 20 working days in question, it failed to notify Mr X of the outcome of the review. Therefore, the Commissioner has found that the Council breached section 21(5) of FOISA in its handling of Mr X's request.

DECISION

The Commissioner finds that Dundee City 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 X. By withholding the information under consideration on the grounds that it was exempt in terms of sections 33(1)(b) of FOISA, the Commissioner finds that the Council did not comply with section 1(1) of FOISA. The Council also failed to comply with section 21(5) of FOISA by notifying Mr X's of the outcome of its review outwith the requisite timescale.

For the reasons set out above, the Commissioner does not require the Council to take any action in relation to these failures in response to this decision.



Appeal

Should either Mr X or Dundee City 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.

Margaret Keyse
Head of Enforcement
09 February 2009



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.

(...)

21 Review by Scottish public authority

(5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for doing so.

33 Commercial interests and the economy

(1) Information is exempt information if-

(...)

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).