



Scottish Information
Commissioner
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Decision Notice 261/2024

Communications relating to named companies

Authority: City of Edinburgh Council

Case Ref: 202200666

Summary

The Applicant asked the Authority for copies of communications relating to three named companies. The Authority refused to disclose this information as it considered disclosure would prejudice substantially the effective conduct of public affairs.

The Commissioner investigated and found that while the Authority was entitled to withhold the information it had identified, it had failed to demonstrate that it had carried out adequate searches for all of the information falling within scope of the request.

The Commissioner required the Authority to carry out fresh and adequate searches for the information requested by the Applicant and to issue the Applicant with a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(c) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 25 April 2022, the Applicant made a request for information to the Authority. He asked for:
 - (i) Any written communications the Authority's housing dept. has had with the companies 4M, Edinburgh Holiday & Party Lets Limited and Edinburgh Rent Ltd.
 - (ii) Any internal communications that refer to these companies.
 - (iii) Any communications the Authority has had with people or organisations outwith the council that mentions these companies.

The Applicant specified that subject matters may include: Complaints from tenants and neighbours; Health and safety issues (including mould and pest infestations, hazardous electrical systems, fire safety risks and water leaks); Threats and intimidation from representatives of the companies in question; Council tax arrears; HMO licencing; Holiday lets; Council access to properties; Breaches of council and Scottish Government regulations; Landlord registration; and Housing tribunals.

2. The Authority responded on 10 May 2022, withholding the information under section 30(c) and section 36(1) of FOISA.
3. On 11 May 2022, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant argued that most of information could be provided in partial or redacted form, rather than withheld in its entirety.
4. The Authority notified the Applicant of the outcome of its review on 9 June 2022. The review upheld the Authority's response in full.
5. On 9 June 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated his dissatisfaction that the Authority was applying a "blanket ban" on disclosure of the information he had requested. He believed that some information could be provided in partial or redacted form which would not result in the harm claimed by the Authority.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 10 August 2022, the Commissioner gave the Authority notice in writing of the application and asked it to send the information withheld from the Applicant.
8. The Authority provided the Commissioner with the withheld information and following this, in line with section 49(3)(a) of FOISA, the Authority was invited to comment on the application.
9. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Withheld information

11. The Authority originally identified five emails with attachments (eleven documents in total) within the scope of the request.
12. During the investigation, the Authority informed the Commissioner that it did not consider document 9 to fall within the scope of the request. It also advised the Commissioner that it was no longer relying on the exemption in section 36(1) of FOISA to withhold information. The Authority confirmed that it was still relying on section 30(c) of FOISA, to withhold the remaining ten documents.
13. The Commissioner has reviewed the content of document 9. He notes that document 9 is an email which is contained within document 10, and he is satisfied that the information within document 9 does not fall within the scope of the Applicant's request.

Section 30(c) - Prejudice to the conduct of public affairs

14. The Authority is withholding ten documents under section 30(c) of FOISA.
15. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. In order for the exemption in section 30(c) to apply, the prejudice caused by disclosure must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances.

The Authority's submissions on section 30(c)

17. The Authority explained that the withheld information related to ongoing proceedings at the Housing Property Chamber. The Authority submitted that disclosure of the information may adversely impact these proceedings and would be likely to deter other tenants from providing evidence in relation to other properties, which would inhibit the Authority's ability to carry out its regulatory functions effectively.
18. In addition to the above, the Authority provided further detailed arguments in support of its decision to withhold the information under section 30(c) of FOISA. Due to the sensitivity of the information contained within these arguments, the Commissioner will not reproduce them in full in his decision.

However, the Commissioner would like to note that he has fully considered all of the arguments made by the Authority and has taken them into account.

The Commissioner's view on section 30(c)

19. The Commissioner has considered the nature and content of the withheld information and he is satisfied that it is related to proceedings at the Housing Property Chamber, that were ongoing at the time of the request.
20. The Commissioner is satisfied that the disclosure of communications relating to ongoing proceedings could inhibit the natural course of these proceedings and dissuade other tenants from providing evidence for those proceedings, or in relation to complaints about other properties. He accepts that disclosure would, or would be likely to, otherwise prejudice substantially the effective conduct of public affairs.
21. The Commissioner notes the Applicant's view that it should be possible to provide some information in partial or redacted form. However, given the limited amount of information identified by the Authority, and considering that it all relates to one particular issue, the Commissioner accepts the Authority's position that redaction would render the information meaningless and of no real value.
22. As noted above, the Commissioner has considered all of the arguments provided by the Authority in this case, which for reasons of sensitivity have not been reproduced in this decision, and he is satisfied that there are compelling reasons to uphold the application of section 30(c) of FOISA.
23. In all of the circumstances, the Commissioner accepts that the Authority was entitled to apply the exemption in section 30(c) of FOISA to this information.

Public interest test – section 30(c) of FOISA

24. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
25. The public interest is not defined in FOISA but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

The Applicant's comments on the public interest

26. The Applicant argued that the actions of the companies mentioned in his request have affected dozens – likely hundreds – of tenants in Edinburgh over the years, and that this had been well documented in the media. He submitted that documented evidence included broken windows, black mould, disabled smoke detectors, water leaking through a light fixture, crumbling walls, rusty appliances and a lack of heating in winter months. He also noted that a housing tribunal enforcement order required one of the companies to make window and roof repairs, gas and electric safety checks and install a carbon monoxide tester in one of its flats, in order for it to be deemed "fit for human habitation".

27. The Applicant commented that the evidence suggested that individuals had also been subjected to physical and verbal threats, and that so many tenants had been affected that they had formed an organisation, in order to support former and current tenants affected by these companies (who all have links to a named individual).
28. The Applicant submitted that individuals, a tenants' support group, elected members and the Living Rent tenants' rights group have for years urged the Authority to take action, as it is one of the authorities responsible for ensuring the rights and safety of tenants, and he noted there were allegations that the Authority had not fulfilled its duty.
29. The Applicant argued that it was in the public interest to better understand how the Authority has dealt with these issues internally and corresponded with the named companies in order to protect the rights of tenants in the city.

The Authority's comments on the public interest

30. The Authority acknowledged the substantial public interest in disclosure of such information into the public realm, as it would provide an assurance to the public that it is fulfilling its statutory role as an enforcement and regulatory body.
31. However, the Authority submitted that, on balance, the public interest was best served by not disclosing the information at this time, because it would significantly undermine the current proceedings and thereby undermine public confidence in enforcement and legal processes.
32. The Authority also submitted that disclosure would mitigate against future complaints being submitted to the Authority, if there was a likelihood that such matters would be routinely placed into the public domain; and therefore, undermine the complaint process, which would not be in the public interest.

The Commissioner's view on the public interest

33. The Commissioner agrees that there is a strong public interest in scrutinising the enforcement function of the Authority, particularly in relation to ensuring that housing provided by private landlords is fit for habitation and compliant with relevant regulatory requirements. He acknowledges the seriousness of the issues raised by the Applicant in his public interest arguments, and he understands the detrimental impact that "rogue" landlords can have on the health and welfare of tenants. The Commissioner considers the subject matter of this request to be serious and of significant interest to the public.
34. The Commissioner notes that the information that has been identified by the Authority and is being withheld, relates to proceedings at the Housing and Property Chamber that were ongoing at the time the request was made. He has already accepted the Authority's arguments that disclosure of this information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs. Given the limited subject matter of the withheld information, the Commissioner is not persuaded that disclosure would add significant value to the scrutiny of the Authority's enforcement actions over and above the information that is already in the public domain about the proceedings.
35. The Commissioner is persuaded by the Authority's arguments that disclosure of the information would, or would be likely to, significantly undermine the current proceedings and that it would also be detrimental to public confidence in the Authority's enforcement procedures and due process.

36. In all the circumstances, the Commissioner is satisfied that the public interest in disclosure is outweighed by that in maintaining the exemption and allowing the information to be withheld under section 30(c) of FOISA.

Searches

37. Given the broad nature of the Applicant's request, the Authority was asked to explain how it established what information was covered by the request.
38. The Authority explained that it considered its Private Rented Services (PRS) Enforcement Team to be the service area responsible for responding to the request, and in carrying out searches, they were asked to search the team's generic mailbox as well as their own mailboxes, shared drives and the enforcement database (Civica APP) using each company name, separately, as the search terms.
39. The Authority submitted that it wasn't necessary to ask any other team to carry out searches because the subject of the request related to the private rented sector exclusively. The Authority stated that there was no record of any referrals from other services.
40. The Authority explained that all of the companies listed in the request related to one individual, and it submitted that any correspondence held by the Authority would be with that individual directly, and not necessarily with the companies themselves.

The Commissioner's view on the Authority's searches

41. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances.
42. The Commissioner will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not, reasonably be expected to, hold the information.
43. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request).
44. As noted above, when asked to explain how it identified information covered by the request, the Authority stated that only the PRS Enforcement Team was asked to carry out searches and it was not necessary to ask any other colleagues or teams.
45. The Authority also explained that Civica APP was a case management system used by the PRS Enforcement Team along with other departments, to record any enforcement actions or investigations which are carried out. It stated that,
- "Every complaint has a service request generated, to which all the actions and correspondence are attached, either via indexing documents, or via text updates capturing telephone call summaries for example. Civica APP holds the information electronically, files such as emails etc, add text updates, entries recording dates, times and details of actions in relation to any investigation can be added. Civica APP allows the service to index documents or other files such as pictures, or manually input text or other notes.

Civica APP is used by multiple service areas; however, it is restricted by service area to what information can be accessed. It is also limited by service user as to appropriate levels of staff access.”

46. During the investigation the Authority was asked to carry out additional searches in relation to information held by other departments. Following this, the Authority stated that:

“The PRS enforcement team do work closely with Environmental Health (also part of Regulatory Services), in relation to the tolerable standard for example. Environmental Health and Waste both use Civica APP, which when searched did not produce any results.”
47. The Commissioner notes that screenshots from Civica APP submitted by the Authority (which related to environmental health matters) appear to show that these searches returned “service request” records within the timeframe of the request and which contained one, or more, of the search terms, i.e. the company names. The Authority did not provide the Commissioner with the “actions and correspondence” attached to these service request records, or any description or commentary on what the screenshots demonstrated. He therefore has no clarity on whether there is, or is not, correspondence or communications within the scope of the Applicant’s request attached to these service request records.
48. Furthermore, the Commissioner cannot be sure that similar searches by other teams, departments or individuals (with access to different areas of Civica APP) would yield no results within scope of the request.
49. The Commissioner has closely considered the terms of the Applicant’s request, specifically request (ii) which sought “Any internal Authority communications that refer to these companies”, and request (iii) which asked for “Any communications the Authority has had with people or organisations outwith the Authority that mentions these companies”. These are broad requests which are not related to any one department, service area or subject.
50. The Commissioner considers that the Authority’s interpretation of the Applicant’s request was too narrow.
51. Given the broad nature of the request, the Commissioner is not satisfied that the Authority has been able to demonstrate, with any certainty, that it does not hold any other information, apart from the small amount of information already identified. Specifically, the Commissioner finds that the Authority’s submissions on searches fall short in the following key respects:
 - It has provided screenshots from the Civica APP case handling system used by the Environmental Health department that show records of complaints having been recorded within the timeframe covered by request. He considers it possible that there may have been some communication falling within scope of the request related to these records. Although the Environmental Health department submitted a nil return following its searches, the Commissioner is not satisfied that the evidence presented meets the standard of proof required for him to accept that no information is held.
 - Despite the request covering a very wide range of subject matters, the Authority did not ask services areas covering the full range of subjects to carry out searches until requested to do so during the investigation. Given that the Environmental Health service clearly holds records related to some of the subjects mentioned in the request that could hold communications within scope of the request, the Commissioner is not persuaded that the original narrower searches carried out by the Authority were adequate.

52. In all the circumstances, therefore, the Commissioner cannot, based on the submissions he has received, uphold the Authority's claim that it does not hold any further information than that already identified (and withheld) in relation to the request.
53. The Commissioner therefore requires the Authority to carry out fresh searches for information relevant to the Applicant's request, giving particular attention to:
- requiring all relevant individuals to undertake adequate and proportionate searches of all mediums and locations where relevant recorded information (in any form) may be held,
 - the specific wording of the Applicant's request, which covers a range of subject matter,
 - ensuring evidence of the searches undertaken is retained in the event of a further appeal to the Commissioner.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by correctly withholding the information identified under section 30(c), the Authority complied with Part 1 of FOISA.

However, the Authority has failed to satisfy the Commissioner that it does not hold other information relevant to the Applicant's request. As a result, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to carry out new searches for information, in line with the requirements of paragraph 53, and issue a new review response to the Applicant either disclosing any information identified as a result of these new searches, or notifying the Applicant why the information cannot be provided under a provision in Part 1 or 2 of FOISA or the EIRs, by **7 January 2025**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

19 November 2024