

Decision Notice 138/2020

Sale of council-owned assets

Applicant: The Applicant

Public authority: Aberdeenshire Council

Case Ref: 201902271



Scottish Information
Commissioner

Summary

The Council was asked for a list of all council-owned assets sold in the previous five years, including sale price, buyer and date of sale. The Council provided the addresses of assets sold in the past five years and told the Applicant that, as he could obtain details of each sale price and buyer from the Registers of Scotland, that information was otherwise available (and exempt from disclosure).

The Commissioner accepted that the information was exempt from disclosure, even although the Applicant would have to pay for the information. The Commissioner also found that the Council had provided reasonable advice and assistance to the Applicant under section 15(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 25(1) and (2) (Information otherwise accessible)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 1 November 2019, the Applicant, a freelance journalist, made requests for information to Aberdeenshire Council (the Council). His first request was for a list of all council-owned assets sold by the Council in the previous five years. The Council was asked to include the criteria included in Edinburgh City Council's (sic) Asset Register as well as the sale price, the buyer and the date of sale.
2. The Council responded on 29 November 2019. It provided the addresses of assets sold in the past five years and advised the Applicant he could obtain the sale prices and buyer details from the Registers of Scotland¹ through its Land Information Service. It therefore considered information about the prices and buyers to be exempt under section 25(1) of FOISA.
3. On 2 December 2019, the Applicant wrote to the Council requesting a review of its decision. He commented that other local authorities had supplied him with similar information, and argued that it was in the public interest for the information to be disclosed. (According to the *What Do They Know* website, through which the Applicant submitted the request, the Applicant submitted the same request to all 32 local authorities in Scotland.)
4. The Council notified the Applicant of the outcome of its review on 18 December 2019. The Council confirmed its initial decision. The Council explained to the Applicant that section 25 of FOISA was not subject to the public interest test.
5. On 18 December 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he

¹ <https://www.ros.gov.uk/>

was dissatisfied with the outcome of the Council's review because he believed the Council held the information and that there was a public interest in the information. He also commented that it would cost him more than £350 to purchase each of the 99 titles from the Register.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions relating to section 25 of FOISA.
8. The Council's submissions are considered below.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 25(1) of FOISA - Information otherwise accessible

10. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. Although the Applicant has argued that it would be in the public interest to disclose the information, the exemption is not subject to the public interest test in section 2(1)(b) of FOISA (see section 2(2)(a)).
11. Sections 25(2) and (3) set out the circumstances in which information:
 - (i) *may be* reasonably obtainable (section 25(2)(a)) and
 - (ii) *is to be taken to be* reasonably obtainable (section 25(2)(b) and (3)).
12. The relevant provision in this case is section 25(2)(a) of FOISA. This states that information *may be* reasonably obtainable even if payment is required for access to it.

Registers of Scotland

13. The Council supplied the Applicant with a list of all council-owned assets sold in the previous five years, and advised him that the other information he had requested was available from the Registers of Scotland.
14. The Council was asked what steps it had taken to confirm that the information was accessible from the Registers of Scotland. The Council advised the Commissioner that it had tested a search on the Register of Scotland's website using the postcode of one of the properties it had sold. This search had confirmed the information which could be accessed without payment and on payment of a fee.
15. The Council told the Commissioner that the information was available from Registers of Scotland by various means:

- (i) the Applicant could search the land register himself as a member of the public by entering the postcodes of the properties listed and bringing up the relevant entries. This will give him the purchase date and amount. The title sheet for the property can then be purchased for £3.00. The title sheet includes all the information sought by the Applicant.
- (ii) if the Applicant is likely to use the system frequently, he can consider signing up as a business user. The Council considered this option may be beneficial to the Applicant, given the length of the list provided by the Council (and might also assist in relation to requests made to other local authorities in Scotland). This would provide the Applicant with further search options including the address/description (which, in the Council's view, was likely to be the most efficient way to find the information) or by bulk (charges would apply).
- (iii) the Applicant could contact the Registers of Scotland direct and seek to use their services to obtain the information. Again, there would be a cost in using this service, but this would enable the Applicant to obtain the information, including copies of the dispositions, if he wished, once registered.

Section 25(2)(b)(ii) of FOISA

- 16. The Applicant commented that it was unreasonable for him to have to pay for the information he had requested. The Council was given an opportunity to comment on this point.
- 17. The Council referred the Commissioner to section 25(2)(b)(ii) of FOISA. This states that information is to be taken to be reasonably obtainable if the Keeper of the Records of Scotland holds it and makes it available for inspection, and (in so far as practicable) copying by, members of the public on request, whether free of charge or on payment.
- 18. The Council highlighted the fact that the reference here was to "payment" and not to "reasonable payment." It therefore took the view that, regardless of whether the fee to be paid was reasonable or otherwise, the information would be reasonably obtainable and exempt from disclosure.
- 19. This is considered in more detail below.

How is the information held?

- 20. The Council was also asked how it held the information requested (e.g., was it held in an Excel spreadsheet?).
- 21. The Council commented that, although it takes its responsibilities under FOISA very seriously, and employs considerable resources in meeting these responsibilities, its limited resources do not allow it to disclose information which is exempt under FOISA when the cost to the Council is likely to exceed those of the Applicant in obtaining the information from a publicly available source.
- 22. The Council explained that different services in the Council hold the information on the sale of properties in different ways and for different purposes. For example, some Council services record the gross sale price (as it is expected this will eventually appear in the Register), while others record the sale price after deduction of any costs the Council incurred in achieving the sale. For some services, it is sufficient to record the month of sale and the name of the purchaser as first indicated at the time contact was made. Often, by the time a sale completes, the name of the purchaser may have changed (e.g. a different company purchases the property). There is no single spreadsheet available in the Council that is

certain to have information that would mirror that held by the Registers of Scotland. The best source of information will be the Registers of Scotland. The Council stated that, while it could assemble accurate information as requested in a single spreadsheet, FOISA did not require it to do this.

The Commissioner's conclusions

23. As noted above, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. Under section 25(2)(a) of FOISA, information *may be* reasonably obtainable even if a requester has to pay for it.
24. The purpose of the exemption in section 25(1) is to protect the resources of public authorities by preventing them from having to comply with requests for information which the requester could have found elsewhere. Section 25(1) also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes and protects the statutory right of public authorities to charge for certain information which they are required by law to protect.
25. The Applicant, the Council and the Commissioner all accept that the information the Applicant has asked for is available from the Registers of Scotland. (The Commissioner notes that the Council has given the Applicant the details he needs to be able to locate the information from the Registers of Scotland.)
26. The next question the Commissioner must determine is, given that the Applicant will need to pay for the information, whether the information is *reasonably* obtainable. If it is, it is exempt from disclosure.
27. As noted above, the Council referred to section 25(2)(b)(ii) of FOISA during the investigation. Under section 25(2)(b)(ii), information *is to be taken to be* reasonably obtainable if the Keeper of the Records of Scotland holds it and makes it available for inspection and copying by members of the public, whether free of charge or on payment.
28. The Council used this to argue that, in determining whether a fee is payable, the amount of fee charged is irrelevant (i.e. regardless of how much is charged, the fee is automatically deemed to be reasonable). However, in the Commissioner's view, this argument is of limited assistance in this case:
 - (i) the Keeper of the Records of Scotland is a different entity from the Registers of Scotland, so section 25(2)(b)(ii) is not designed to deal with information held by the Registers of Scotland
 - (ii) information made available by the Keeper of the Records of Scotland under section 25(2)(b)(ii) *is to be taken to be* reasonably obtainable, whereas section 25(2)(a), which is relevant subsection in this case, makes it clear that information *may be* reasonably obtainable even if payment is required. The Commissioner considers that the different tests mean that it is appropriate for him to consider whether the amount of the fee is reasonable. (The Commissioner's guidance on section 25(2)(a) states that information may not be reasonably obtainable if the requester's means are limited or the fee payable to access the information is high².)

² <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>

29. For sake of completeness, the Commissioner has also considered section 25(2)(b)(i) of FOISA. This states that information *is to be taken to be* reasonably obtainable if the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to members of the public, whether free or charge or on payment.
30. The Registers of Scotland is a Scottish public authority which keeps public registers of land, property, and other legal documents in Scotland. As stated on its website³, a land register is a publicly accessible register of property rights.
31. The Commissioner considered, in *Decision 243/2014*,⁴ whether the Registers of Scotland was obliged, by law, to communicate the type of information the Applicant has requested to members of the public on request. The Commissioner was satisfied, following discussions with the Registers of Scotland, that, while it provided a commercial service through which the information could be provided for a fee, there was no specific enactment requiring it to do so. Therefore, any fee charged by the Registers of Scotland will not automatically be deemed to be reasonable under section 25(2)(b)(i).
32. However, given that the fees are set by statutory instrument (the Registers of Scotland (Fees) Order 2014⁵) and that, in determining the fees, the Scottish Ministers consulted with the Registers of Scotland about (among other things) the expenses incurred by the Registers of Scotland and the desirability of encouraging registering, recording and entering in any register under the management and control of the Registers of Scotland, the Commissioner is satisfied that this goes a long way to evidencing that the fees are reasonable. As noted above, one of the aims of section 25(1) is to protect the statutory right of public authorities to charge for certain information which they are required by law to protect.
33. Separately, the Court of Session has made it clear⁶ that the nature and characteristics of the requester may be relevant when determining whether section 25 of FOISA applies. The Commissioner notes that the Applicant is a freelance journalist and that he has made the same information request to every local authority in Scotland. This suggests that his interest is more than simply personal. The Commissioner therefore considers it relevant, in this case, to take account of the Applicant's characteristics in determining reasonableness.
34. The Applicant advised the Council that other local authorities had disclosed the information to him. However, the Commissioner is aware, from other applications made to him by the Applicant, that other local authorities have also refused to disclose the information on the basis that it is exempt from disclosure under section 25(1). In any event, the fact that one or more local authority has disclosed information does not mean that the exemption in section 25(1) cannot apply in relation to other local authorities. Public authorities will hold information in different ways. While it may be simple and quick for one public authority to provide the information, that will not necessarily be the case for other authorities. As noted above, the purpose of section 25(1) is to protect the resources of public authorities – and the Commissioner notes that it would not be simple or quick for the Council to provide the information to the Applicant.

³ <https://www.ros.gov.uk/about/what-we-do>

⁴ <https://www.itspublicknowledge.info/uploadedFiles/Decision243-2014.pdf>

⁵ <https://www.legislation.gov.uk/ssi/2014/188/article/4/made>

⁶ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=cc8f86a6-8980-69d2-b500-ff0000d74aa7>

35. Finally, the Commissioner notes that there are various options open to the Applicant for accessing information from the Registers of Scotland, which he may be able to use for “bulk” searches and that, given that the Council has provided the Applicant with a list of the properties it has sold, this will allow the Applicant to focus his searches, should he wish to do so, on sales which are of particular interest to him, thereby reducing the costs of obtaining the information from the Registers of Scotland.
36. Having considered all of the submissions from the Council and the Applicant, the Commissioner is satisfied that the information requested by the Applicant in the first part of his request is reasonably obtainable by him, even although payment is required for access to it, other than by requesting it under section 1(1) of FOISA.
37. This in is also in line with a previous decision of the Commissioner (*Decision 114/2013*⁷) that information held by Registers of Scotland is capable of being exempt from disclosure under section 25 even where a fee had to be paid.
38. As a result, the Commissioner finds that the information is exempt from disclosure under section 25(1) of FOISA.

Section 15(1) of FOISA

39. The Commissioner will now go on to consider the level of advice and assistance provided to the Applicant and whether the Council complied with its duty to advise and assist, as required by section 15(1) of FOISA.
40. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Commissioner would expect an authority to provide sufficient advice and assistance to an applicant to ensure that the information is actually reasonably accessible to them. Failure to do so can lead to a breach of the duty under section 15(1).
41. The Commissioner notes that the Council advised the Applicant that the information could be obtained from Registers of Scotland. The Council provided the Applicant with a list of the sold assets to assist the Applicant in obtaining the information and took steps to explain to the Applicant how to obtain the information (although it is clear from the correspondence that the Applicant was already aware of those options). Taking these factors into account, the Commissioner is satisfied that the Council complied with section 15(1) of FOISA in responding to the request.

Decision

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

⁷ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201202667.aspx>

Appeal

Should either the Applicant or the Council 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.

Margaret Keyse
Head of Enforcement

2 November 2020

Appendix 1: 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

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

- (2) For the purposes of subsection (1), information-

- (a) may be reasonably obtainable even if payment is required for access to it;

- (b) is to be taken to be reasonably obtainable if-

- (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

- (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment...

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