

Decision Notice

Decision 150/2017: Ms X and Fife Council

House in Multiple Occupation

Reference No: 201700561

Decision Date: 11 September 2017



Scottish Information
Commissioner

Summary

The Council was asked for correspondence relating to a House in Multiple Occupation. The Council withheld the information under a number of exemptions in FOISA.

The Commissioner accepted that the Council was entitled to withhold the information under the exemption concerning investigations carried out by Scottish public authorities.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) Time for compliance; 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 30 January 2017, Ms X made a request for information to Fife Council (the Council). The request concerned a licence application for a House in Multiple Occupation (HMO) at a specified address. The information requested was as follows:
 - (i) Copies of all recorded (written/email) correspondence about any aspect of this HMO application for [*specified address*], between [*named individual*] or their representatives (other family member, [*specified letting agent*], legal representative etc.) and Fife Council staff. Fife Council staff includes all the staff present at the meeting on [*specified date*], and any other staff who may have an involvement.
 - (ii) Details of notes made of all telephone correspondence about this HMO application between the aforementioned persons or representatives.
 - (iii) All recorded correspondence (written/email, notes of meetings/conversations) between Fife Council staff about [*specified individual*] and any/all aspect(s) of their HMO application for [*specified address*].
 - (iv) All recorded correspondence (written/email/notes of meetings/conversations) between Fife Council staff about the objections/objectors to this HMO application for [*specified address*].
2. The Council did not respond to the request. On 1 March 2017, Ms X wrote to the Council asking it to review its failure to respond.
3. The Council notified Ms X of the outcome of its review on 9 March 2017. It apologised for its failure to respond earlier. The Council withheld the information under the exemptions in

sections 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations), 36(2) (Confidentiality) and 38(1)(b) (Personal information) of FOISA.

4. On 22 March 2017, Ms X wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms X stated she was dissatisfied with the outcome of the Council's review as she disagreed that the information was exempt from disclosure. She also noted the lateness of the Council's response.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Ms X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
6. On 10 April 2017, the Council was notified in writing that Ms X had made a valid application. The Council was asked to send the Commissioner the information withheld from Ms X. The Council provided the information and the case was allocated to an investigating officer.
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 answer specific questions, focusing on the requirements of the various exemptions applied by the Council.
8. The Council responded with submissions.
9. During the investigation, Ms X provided additional background information to the investigating officer.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Ms X and the Council. She is satisfied that no matter of relevance has been overlooked.
11. The Commissioner notes the Council's failure to respond to Ms X's request within the timescale required by section 10(1) of FOISA, and indeed until Ms X had requested a review in respect of that failure. While the Council recognised and apologised for that failure in its review outcome, the Commissioner has noted the failure, which may inform future action taken in relation to the Council's practice in handling information requests.

Section 34(1) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations

12. In its submissions to the Commissioner, the Council stated that it wished to apply the exemption in section 34(1)(b) of FOISA to the withheld information, rather than the exemption in section 34(1)(a)(i) (which had been applied in its review response of 9 March 2017).
13. Section 34(1)(b) provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.

14. The exemptions in sections 34 are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
15. In its submissions to the Commissioner, the Council referred to statutory guidance¹ from the Scottish Government which states that Councils should compile evidence in relation to suspected unlicensed HMOs or other HMO offences, to support any prosecution that may be initiated by the Crown Office and Procurator Fiscal Service (COPFS).
16. In the Council's view, the information was held for the purposes of an investigation which might have led to it making a report to the Procurator Fiscal.
17. The Council also referred to Part 5 of the Housing (Scotland) Act 2006 (the 2006 Act), in particular section 163 which requires local authorities to have regard to any guidance issued by the Scottish Ministers (see above). The Council stated that, in terms of section 124(1) of the 2006 Act, every HMO must be licensed. In terms of section 154(1) of the 2006 Act, the owner of an HMO commits an offence if it is not so licensed.
18. The Council noted there is an expectation in the Scottish Government guidance that Councils will investigate complaints and take enforcement action where necessary. The Council stated that it had powers under sections 144 to 146 of the 2006 Act to make an order suspending the payment of rent, require work to rectify a breach of a license and require the owners of HMOs to carry out work. The Council referred also to section 5.2.2 of the Scottish Government guidance, which states that authorities should compile evidence in relation to suspected unlicensed HMOs or other HMO offences to support any prosecution that may be initiated by COPFS.
19. The Council stated that this request was received on 30 January 2017. The Council stated that its investigative process involved considering the information to hand, discussing and forming opinions and making judgements. The Council submitted that this could be a changing brief, depending on the day-to-day circumstances. In its view, until an investigation had concluded, there was always the possibility that a case might lead to prosecution and the case file was the basis for all the information in this regard.
20. The Council explained that the investigative process in this case had already started when it received Ms X's information request. It described the further investigative and other regulatory activity ongoing while it was processing the request. As a result, the Council submitted, during its consideration of the request an investigation was ongoing as to whether the Council should compile evidence to support any prosecution that might be initiated by COPFS.
21. The Council stated that the HMO licence had now been granted and a statement of reasons issued to the objectors.
22. In this case, having considered the submissions from the Council and the nature and content of the withheld information, the Commissioner is satisfied that the exemption is engaged. The information clearly falls within the ambit of the exemption, having been held for the

¹ <http://www.gov.scot/Resource/0038/00387514.pdf>

purposes of an investigation conducted by the Council which might have led to a decision to make a report to the procurator fiscal.

The public interest test

23. The exemptions in section 34 are subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the relevant exemption. The Commissioner must then carry out a balancing exercise. Unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order the information to be disclosed (unless she considers that the information can be withheld under one or more other exemptions in FOISA).
24. The public interest is not defined in FOISA, but has been described 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 interest of the public".
25. While acknowledging a general public interest in allowing oversight of the HMO process, the Council argued that there was a public interest in protecting the process of investigation and the right of an individual to a fair trial, in circumstances where criminal proceedings might be the eventual outcome of the process.
26. In the Council's view, it was essential for it to be able to compile the necessary evidence, in order to comply with the statutory guidance, without fear that information would be placed in the public domain (particularly when an investigation had only recently commenced or was ongoing).
27. The Council considered it was contrary to the public interest for an investigation of this type to be prejudiced as a result of the disclosure of information and evidence, prior to the conclusion of the investigation and any subsequent prosecution. It considered there to be strong public interest in withholding information relating to an investigative or enforcement process which was still ongoing.

The Commissioner's view on the public interest

28. In this case, taking into account the wider interest in the general subject matter of HMOs, the Commissioner recognises that there is a public interest in providing insight into the Council's actions and methods, so that its actions can be scrutinised. This would contribute to transparency and accountability.
29. The Commissioner recognises that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of investigations of this nature. The Commissioner accepts that there are strong arguments supporting the view that it is generally in the public interest to preserve the integrity of information relating to the investigation of a matter of this nature.
30. The Commissioner considers that, in general, it will not be in the public interest to disclose information if this would undermine the reliability of an investigation, or the public's confidence in such investigations. Furthermore, she considers it would be contrary to the public interest to impede the ability of local authorities to gather comprehensive information for such investigations. She has borne in mind the timing of the request and requirement for review in relation to the investigative processes under consideration.

31. Having considered the particular circumstances of this case carefully, the Commissioner has concluded that the public interest in disclosure of the information in question does not outweigh that in withholding the information. The Commissioner therefore concludes that the Council was correct in its application of section 34(1)(b) of FOISA to withhold the requested information
32. Given that the Commissioner has accepted that the information is properly withheld in terms of section 34(1)(b) of FOISA, she is not required to go on to consider the other exemptions applied by the Council in this case.

Decision

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

Appeal

Should either Ms X or Fife 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
Acting Scottish Information Commissioner

11 September 2017

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 –

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

10 Time for compliance

(1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

(b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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

(1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-

...

(b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

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