

Decision Notice

Decision 169/2017: Mr Robert M Patterson and the Keeper of the Registers of Scotland

Changes to a property title

Reference No: 201700994

Decision Date: 16 October 2017



Summary

The Keeper was asked for information concerning changes to a property title.

In response, the Keeper provided some information, but withheld some other information which she considered to be publicly available on payment of a fee.

During the investigation, the Keeper identified and disclosed some further information.

By the end of the investigation, the Commissioner was satisfied that the Keeper had identified and disclosed all relevant information, and that she had correctly withheld the information deemed to be publicly available on payment of a fee.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 25(1) and (2)(a) (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 24 September 2016, Mr Patterson made a request for information to the Keeper of the Registers of Scotland (the Keeper). The information requested was:
 - (i) Information leading to the changes to the original title granted to James Dykes from East Kilbride Development Corporation and the somewhat increased area that is depicted on the latest Ordnance Survey plan. On the latest plan it appears that the service verge that was in the ownership of East Kilbride Development Corporation at the time of the original title has been relocated to the north of the boundary depicted on the attached diagram and marked in green (the boundary has effectively moved south). There also appears to be a reduction to the original title at the north east corner that again is circled in green.
 - (ii) All information and correspondence between, but not exclusively, RoS [i.e. the Keeper], Ordnance Survey, South Lanarkshire Council, East Kilbride Development Corporation, to include any internal communications.
 - (iii) If any titles have been legally changed to the current position and this information is available outside of this request, I am requesting under FOISA information that shall positively identify all this information to allow me to purchase or obtain it.
2. The Keeper wrote to Mr Patterson on 21 October 2016 asking for further information to allow her to proceed with the request, specifically the address of the Land Register title number.
3. On 24 October 2016, Mr Patterson informed the Keeper of the postcode in which the land was located, and the corresponding Ordnance Survey grid reference. He explained the land was bounded to the south by various titles, and provided three of those title numbers.

4. The Keeper responded on 27 October 2016. She provided copies of archived correspondence (with personal information redacted under section 38 (Personal information) of FOISA). The Keeper informed Mr Patterson that she also held copies of deeds and forms submitted with the application for registration. As copies of these documents were available from public registers on payment of the statutory fee, the Keeper considered such information to be exempt from disclosure under section 25 of FOISA. The Keeper provided details of how, and from where, Mr Patterson could obtain this information.
5. On 6 November 2016, Mr Patterson wrote to the Keeper, requesting a review of her decision on the basis that the Keeper had not provided the information requested. Referring to the anomalies between the existing and current plans, Mr Patterson believed there would be an audit trail for the transfer of information from the Keeper to Ordnance Survey, yet the Keeper had not confirmed whether any such information was held. Neither had the Keeper provided any information on ownership of the service strip. For the information withheld under section 25 of FOISA, Mr Patterson was further dissatisfied that the Keeper had provided no details of what the information comprised, the quantity of information withheld, and any reference numbers to allow him to obtain it.
6. Having received no response to his request for review within 20 working days, on 16 December 2016, Mr Patterson wrote to the Commissioner applying for a decision.
7. During that investigation, on 3 February 2017, the Keeper notified Mr Patterson of the outcome of her review, apologising for the delay in responding and modifying her original position. Dealing with each part of Mr Patterson's request in turn:
 - (i) The Keeper provided Mr Patterson with some information and plans pertaining to the area in question, including the corresponding title numbers and registration dates for the various properties within the area. She informed Mr Patterson that copies of registration forms, deeds, title sheets and plans could be obtained from her Customer Service Centres, or online, on payment of the relevant fee. With regard to the service verge, the Keeper explained the registered properties adjoin each other on the fixed boundary.
 - (ii) The Keeper confirmed she held no correspondence with Ordnance Survey, South Lanarkshire Council or East Kilbride Development Corporation in relation to the area in question.
 - (iii) The Keeper provided a plan showing, in her view, the entirety of the segments making up the area disposed to Mr Dykes in 1987. The plan showed what the Keeper understood to be the only subsequent change from the original breakaway deeds.
8. The Commissioner subsequently issued *Decision 032/2017 Mr Robert M Patterson and the Keeper of the Registers of Scotland*¹, finding that the Keeper had failed to respond to Mr Patterson's requirement for review within the timescales laid down by section 21(1) of FOISA.
9. On 31 May 2017, following correspondence in relation to an application of reduced scope (which was withdrawn), Mr Patterson wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Patterson submitted that the area of ground, as indicated on the current Ordnance Survey map relied on for registration purposes, was significantly larger than that in the Dykes' title recorded in 1987, so changes must have been

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602308.aspx>

made. Mr Patterson stated he was dissatisfied with the outcome of the Keeper's review because he did not accept that the Keeper held no records of such changes, or communications or other documents pertaining to any changes.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr Patterson 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.
11. On 21 June 2017, the Keeper was notified in writing that Mr Patterson had made a valid application and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Keeper was invited to comment on this application and answer specific questions. These focused on the searches carried out to identify and locate any information held by the Keeper and falling within the scope of Mr Patterson's request.

Commissioner's analysis and findings

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

Whether the Keeper held any further information

14. In her submissions to the Commissioner, the Keeper explained she had been corresponding with Mr Patterson for over 25 years on issues surrounding the boundaries of both his property and those of his neighbours. She submitted that Mr Patterson claims the land he is currently occupying is much less than he is entitled to from the sale in 1987. The Keeper disputes this and has, over the years, undertaken a number of investigations of Mr Patterson's and neighbouring properties, plus reviews of the Ordnance Survey map, to identify any potential errors in Mr Patterson's title. The Keeper has identified no inaccuracy in the Register, submitting that this was supported by a Lands Tribunal for Scotland judgement in 1993.
15. The Keeper stated she is a public authority which acts as an impartial registration office. She explained that the Land Register archive contains, for each property and/or area, registration forms, application forms, deeds for registration and supporting evidence, internal notes and correspondence relating to each application. The Keeper submitted that forms and deeds are covered by her information service charging order, so she can apply the exemption in section 25 of FOISA to this information, where copies are available for purchase via the Keeper's Customer Service Centres or online portal.
16. The Keeper confirmed that, at review stage, further information was identified as falling within the scope of Mr Patterson's request and this was disclosed to him on 3 February 2017.
17. The Keeper also explained that she had previously offered Mr Patterson an appointment with a search specialist, to assist him in retrieving the information he is looking for. She confirmed that this offer was still open to Mr Patterson, should he wish to avail himself of it.

Searches for information

18. In her submissions, the Keeper informed the Commissioner that she maintains two main registers in relation to land and property in Scotland, namely the General Register of Sasines and the Land Register of Scotland (LRS). She explained that the Sasine register (a deed-based register established in 1617) was being replaced by the map-based Land Register (being rolled out across Scotland from 1981 with a target completion date of 2024).
19. The Keeper confirmed she had conducted searches of both registers and supporting systems. Clarifying that she did not document searches carried out on her live systems in relation to requests for information under FOISA, the Keeper provided explanation and (where available) supporting evidence of the searches undertaken at both initial response and review stages.

General Register of Sasines

20. The Keeper submitted that she had undertaken a search of the General Register of Sasines to find and determine the scope of James Dykes' original title. This identified two deeds, details of which were provided to Mr Patterson in the Keeper's review outcome. The Keeper considered these documents to be exempt under section 25 of FOISA as this information was otherwise available for purchase.

Land Register

21. The Keeper explained that, under section 6(5) of the Land Registration (Scotland) Act 1979, she is required to produce or examine documents evidencing events or given effect to in a title sheet, at any time in history. All relevant documents submitted in support of an application for registration must therefore be readily available – this is known as the registration archive.
22. The Keeper explained that, since the commencement of the Land Register in 1981, she has used various archiving tools to record and store this information, including microfiche until the late 1990s. Following digitisation, the systems currently holding LRS archive information are BOPS, EAS, FishFinder and LR Archive Viewer (some of which are used solely for historical searching, having been decommissioned). For each title number, these systems hold:
 - All application forms and form 4 inventories
 - The deeds on which registration is being sought
 - Any ancillary forms, such as reports completed over the title
 - Any superseded deed
 - Any unrecorded link in title
 - Any common burdens deeds
 - All relevant correspondence with the agent, including pre-registration correspondence
 - Any papers apart that detail decisions and instructions made and given in the course of the examination of the application
 - Correspondence with the agent after registration has been completed.
23. The Keeper confirmed that a search of these systems had been conducted at both initial response and review stages. While some information was identified in BOPS, FishFinder

and LR Archive Viewer, nothing was found in EAS. The Keeper considered some of the information identified (comprising forms and deeds) to be exempt under section 25 of FOISA, as this information was otherwise available for purchase. The remainder of the information identified as falling within the scope of Mr Patterson's request was disclosed to him.

24. The Keeper explained that further searches were carried out at review stage to identify the titles within the James Dykes' estate. The corresponding title numbers identified were disclosed to Mr Patterson in the Keeper's review outcome, together with an extract from the deed in favour of James Dykes, depicting the original title. The Keeper considered the individual title sheets and plans to be exempt under section 25 of FOISA.

Other business areas

25. Other than the two main registers described above, the Keeper explained that two other business areas might hold information in relation to a land registration title, namely:
- (i) Post Registration Enquiries and Rectifications (which deals with correspondence from applicants/solicitors once the registration application has been completed);
 - (ii) Legal Services (which deals with applications that have been subjected to potential fraud, need policy advice, or are part of ongoing litigation against the Keeper).
26. The Keeper explained that, when dealing with an application, these business areas record the title number and supporting information on a spreadsheet detailing the nature of the enquiry. Searches of these spreadsheets, which act as an index to the information held both physically and electronically, alert to the existence of additional information relating to a specific title number.
27. The Keeper confirmed that the searches carried out by these business areas, both prior to and during the investigation, identified no information falling within the scope of Mr Patterson's request.

Email

28. The Keeper explained it was not standard practice to search additional systems such as email, as all information relating to land registration titles was held within the Land Register archive and not stored in email accounts. However, given the terms of Mr Patterson's request for review, a search of the email system had been carried out for any correspondence with Ordnance Survey, East Kilbride Development Corporation and South Lanarkshire Council relating to the titles within the James Dykes' estate, as a "belt and braces" approach on this occasion.

Additional searches required

29. During the investigation, the investigating officer suggested to the Keeper that the properties on the abounding line to the south of the James Dykes' estate would fall within the scope of Mr Patterson's request, given his reference to the situation of the "service strip" on that line. The Keeper agreed that these titles would likely fall within scope, but only in relation to any relevant information not considered exempt under section 25 of FOISA.
30. The Keeper subsequently carried out searches of these titles within her Post-Registration Enquiries and Rectifications and Legal Services business areas, in addition to the LRS archive systems. These resulted in the identification of further information, some of which the Keeper considered to be exempt from disclosure under section 25 of FOISA (being otherwise available for purchase). The Keeper disclosed the remaining further information

identified to Mr Patterson on 24 August 2017 (with any personal information redacted under section 38(1)(b) (Personal information) of FOISA).

31. The Keeper confirmed that, in relation to Mr Patterson's request for information concerning changes to James Dykes' title, she did not hold any further information than had already been disclosed to him (other than the information considered exempt under section 25 of FOISA).

Retention of information

32. The Keeper provided the Commissioner with a copy of her Records Retention Schedule, confirming that information pertaining to Land Register applications was permanently retained.

The Commissioner's view on information held

33. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
34. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
35. The Commissioner has no locus to comment on the accuracy of the information held by a public authority. Nor does he, in this particular case, have any locus to comment on whether the information held by the Keeper accurately reflects the ownership position, as referred to in the request under consideration here.
36. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that, by the conclusion of the investigation, the Keeper had taken adequate, proportionate steps to establish whether she held any further information falling within the scope of Mr Patterson's request.
37. The Commissioner is concerned, however, that additional searches were necessary during this investigation, to encompass all of the titles falling within the scope of Mr Patterson's request. This was something the Keeper should have addressed when responding to Mr Patterson's request or, at the latest, his requirement for review. Given that it was not resolved until during the investigation, it is clear that the Keeper failed to take adequate steps to identify and locate all the relevant information when responding to Mr Patterson. In this respect, the Commissioner finds that the Keeper failed to comply with section 1(1) of FOISA.
38. In conclusion, the Commissioner accepts that any information relevant to the request would have been capable of being identified using the searches described by the Keeper, both prior to and during this investigation. He is therefore satisfied, on the balance of probabilities, that the Keeper does not (and did not, on receiving the request) hold any further information falling within the scope of Mr Patterson's request.

Section 25 (Information otherwise accessible)

39. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. Section 25(2)(a) provides that information may be reasonably obtainable even if payment is required for access to it. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
40. The Keeper explained she is a non-ministerial government department operating as a trading fund, where income is derived from the information and services provided for the people of Scotland. She submitted she could apply the exemption in section 25(1) of FOISA to the forms and deeds held within the Land Register archive, which are covered by The Registers of Scotland (Fees) Order 2014² (the Order).
41. Copies of the documents covered by this Order, the Keeper explained, are available for purchase from her Customer Service Centres or online portal, and information on the fees chargeable is published on her website or obtainable direct from her Customer Service Centres. The Keeper considered all the information held, i.e. that covered by the Order and falling within the scope of Mr Patterson's request, to be exempt from disclosure under section 25(1).
42. The Keeper confirmed that she held the information in the deeds and forms pertaining to the titles in Mr Patterson's request. This information, the Keeper submitted, is available (on payment of the relevant fee) for inspection via attendance at one of her Customer Service Centres, or by postal delivery if ordered by email, phone or online.
43. The Keeper explained that, in her initial response, she provided Mr Patterson with details of how to obtain information that was exempt from disclosure under section 25(1) of FOISA. This included an explanation that payment would be required for any such information, contact details of where he could obtain the information and details of where to access information on the fees chargeable.
44. The Keeper confirmed that Mr Patterson would have to contact the Keeper at any of the addresses provided and ask for copies of the deeds/forms pertaining to the title numbers he wished to access. Should Mr Patterson wish to obtain this information, it would be made available to him upon payment of the appropriate fee.
45. The Commissioner has considered all of the above submissions carefully. He has also considered the information available on the Keeper's website relating to her Information Services Fees³, pertaining to the availability of information and the corresponding charges payable. He also notes that the Keeper has already provided Mr Patterson with the title numbers for the properties within and abounding the area of the James Dykes estate.
46. In all the circumstances, the Commissioner is satisfied that the information requested by Mr Patterson, contained in deeds and forms and covered by the Order, could reasonably be obtained by him other than by requesting it under section 1(1) of FOISA. The fees payable are the standard fees charged under statute for obtaining documents from a public register, a service which FOISA was not designed to circumvent. Consequently, the Commissioner is satisfied that this information was properly withheld under section 25(1) of FOISA, read with section 25(2)(a).

² <http://www.legislation.gov.uk/sdsi/2014/9780111023570>

³ <https://www.ros.gov.uk/services/fees/information-services-fees>

Decision

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

The Commissioner finds that the Keeper complied with Part 1 of FOISA by correctly withholding some information under section 25(1) of FOISA.

However, the Commissioner also finds that the Keeper failed to comply with Part 1 of FOISA, by failing to take adequate steps to identify and locate all of the information requested by Mr Patterson and falling within the scope of his request. This was a failure to comply with section 1(1).

Given that, during the investigation, the Keeper disclosed to Mr Patterson the further information identified, the Commissioner does not require the Keeper to take any action in respect of this failure, in response to Mr Patterson's application.

Appeal

Should either Mr Patterson or the Keeper of the Registers of Scotland 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

16 October 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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

(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;

...

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;

...

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