



Scottish Information
Commissioner

**Decision 170/2006 – Mr Najem Al Hasan,
Expressplans.com and Midlothian Council**

*Various requests for information relating to Midlothian Council's
building control function*

Applicant: Mr Najem Al Hasan, Expressplans.com

Authority: Midlothian Council

Case No: 200502372

Decision Date: 14 September 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
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Decision 170/2006 Mr Najem Al Hasan, Expressplans.com and Midlothian Council

24 requests for information relating to Midlothian Council's building control function submitted via a questionnaire – appeal made in relation to the handling of seven of those requests — Section 25 (Information otherwise accessible)

Facts

Mr Hasan, acting on behalf of Expressplans.com, submitted a questionnaire containing 24 separate requests for information to Midlothian Council (the Council). The Council refused to release information in response to seven of those requests, arguing that section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA) (Information otherwise accessible) could be applied in relation to each request.

Following investigation, the Commissioner found that the requested information was otherwise accessible through the Council's publication scheme, and that the Council had therefore fully complied with Part I of FOISA in its response to Mr Hasan's information requests.

Background

1. Mr Hasan, acting as a representative of the architectural practice Expressplans.com, submitted 24 information requests to the Council on 17 February 2005. These 24 requests were made in the form of a questionnaire, and related to various aspects of the Council's building control function. A full copy of Mr Hasan's questionnaire is set out in Appendix 2 to this Decision Notice.
2. The Council sought clarification in relation to aspects of Mr Hasan's information requests, and issued a formal response on 28 February 2005.
3. This response provided information in relation to 17 of Mr Hasan's requests. The Council informed Mr Hasan that much of the information provided was otherwise available but, where the information was either easily extracted from Council systems or already calculated for the Council's own use, the information would be provided.



4. The Council also informed Mr Hasan that information in relation to the remaining seven questions (those contained under Questions 5-11) was not readily available to the Council in the requested format. The Council stated, however, that this information was available from the public register and could be accessed through the Council's publication scheme. The Council therefore informed Mr Hasan that the requests in relation to these seven questions would be refused under section 25(1) of FOISA (Information otherwise accessible).
5. Mr Hasan requested that the Council review its decision on 16 April 2005.
6. The Council responded to this request on 29 April 2005, informing Mr Hasan that its decision to refuse to respond to questions 5-11 under section 25(1) of FOISA had been upheld.
7. Mr Hasan submitted an application for decision to me on 29 July 2005. The case was assigned to an investigating officer.

The Investigation

8. Mr Hasan's appeal was validated by establishing that he had made a request for information to a Scottish public authority (the Council), and had appealed to me only after asking the authority to review its response to his request.
9. Mr Hasan suggested in his application that he considered that the requested information should be accessible to the Council from its internal systems, and therefore should have been provided in response to his requests.
10. My investigating officer then contacted the Council in order to seek their submissions in relation to this case.
11. These submissions were subsequently provided and additional submissions and clarification was sought and received by my Office during the course of the investigation.



The Commissioner's analysis and findings

12. The Council argued, in its submissions to my Office, that the disputed information was exempt from release in response to a request under section 1(1) of FOISA, on the grounds that section 25(1) applied to that information.
13. Section 25(1) of FOISA sets out that information which the applicant can reasonably obtain other than by requesting under section 1(1) of FOISA is exempt information. The Council asserted that the requested information was available through its publication scheme. Section 25(3) of FOISA creates a presumption that information which is available through an authority's publication scheme should be considered to be reasonably obtainable for the purposes of section 25(1). (The full text of section 25 is set out in the Appendix 1 to this decision.)
14. The issue to be considered in relation to this case, therefore, will be whether the information requested by Mr Hasan can, in fact, be reasonably obtained by him through the Council's publication scheme.
15. In its communications with my Office, the Council asserted that the requested information was available through its publication scheme under the Class K1 – *'Building Control'*.
16. Class K1 of the Council's publication scheme sets out that information relating to the Council's building control function is available through both the Council's website, and from paper printouts. The Council asserted that the information sought by Mr Hasan was accessible through its weekly lists, which fell within the scope of Class K1. These lists are issued on a weekly basis by the Council, and provide details of all building warrant applications received and building warrants issued over the course of the previous week.
17. The Council suggested that Mr Hasan could obtain access to all of the weekly lists issued between 1 January 2004 and 31 December 2004 from its publication scheme. These lists, suggested the Council, would contain all the raw data required for Mr Hasan to formulate a response to each of the seven outstanding information requests. In order to formulate a response, Mr Hasan would simply have to compare the receipt date of each application against the subsequent issue date of the relevant building warrant, in order to determine the time period within which it was approved. This information could then be collated in order to obtain a response to the requests made under questions 5-11.
18. My investigating officer sought clarification from the Council as to whether the methodology proposed would facilitate access to the specific information sought by Mr Hasan.



19. The Council was asked to confirm, for example, that the terms “received” and “issued” used in the weekly lists were equivalent to the terms “approved” and “registered” used in Mr Hasan’s questionnaire (and defined in the Glossary of Terms appended to that questionnaire). The Council confirmed that these terms were equivalent, setting out that the “issue” date was the date on which a building warrant was formally issued, while the “received” date used related only to the receipt date of valid applications.
20. The Council was also asked to confirm that there were no circumstances under which details of applications would be withheld from the weekly list. Mr Hasan’s requests sought details of the total number of applications approved within specific timescales during 2004 – were information to be withheld from the weekly lists under any circumstances, then the data available from those lists would not allow accurate totals to be calculated. In response, the Council confirmed that the weekly lists represented a full and accurate record of applications received and approved, and there were no circumstances under which information would be withheld from these lists.
21. Having considered the information available within the weekly lists, I am satisfied that the information requested by Mr Hasan under Questions 5-11 of his questionnaire can be calculated from the raw data available within those lists. It is also clear to me that those lists are reasonably obtainable under the Council’s publication scheme.
22. As a result, I conclude that the Council acted fully in accordance with FOISA in refusing to respond to the requests made under Questions 5-11 of Mr Hasan’s questionnaire, on the grounds that the information was exempt under section 25(1) of FOISA.
23. Section 25 is an absolute exemption, in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA. I am therefore not obliged to consider where the public interest lies with regard to the release of this information.

Decision

I find that Midlothian Council acted in accordance with Part 1 of FOISA in refusing to respond to the requests made by Mr Hasan under Questions 5-11 of his questionnaire, on the grounds that the information was exempt from release under section 25(1) of the Freedom of Information (Scotland) Act 2002. I find that the requested information is otherwise accessible under the Council’s publication scheme.



Appeal

Should either the Council or Mr Hasan wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 45 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
14 September 2006



APPENDIX 1

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

Section 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.
- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."



APPENDIX 2

Questionnaire submitted by the Mr Hasan to Midlothian Council

Questionnaire

Please answer the following questions in the space provided. Any words highlighted in ***bold and italics*** is further explained in the Glossary to eliminate doubt of their meaning.

1. How many employees were permanently employed by the Building Control Section directly responsible for assessing and issuing Building Warrant applications in the calendar year 2003? (I.e. not administration staff).
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2. How many employees were permanently employed by the Building Control Section directly responsible for assessing and issuing Building Warrant applications in the calendar year 2004? (I.e. not administration staff).
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Between the period 1st January 2004 to 31st December 2004:

3. How many Building Warrant Applications were received by this Local Authority?
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4. How much fee income did these Building Warrant Applications generate for the Local Authority?
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5. How many Building Warrant Applications were ***approved*** within 4 calendar weeks of them being ***registered***?
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6. How many Building Warrant Applications were ***approved*** between 4 and 8 calendar weeks of them being ***registered***?
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7. How many Building Warrant Applications were **approved** between 8 and 12 weeks of them being **registered**?

8. How many Building Warrant Applications were **approved** between 12 and 16 calendar weeks of them being **registered**?

9. How many Building Warrant Applications were **approved** between 16 and 20 calendar weeks of them being **registered**?

10. How many Building Warrant Applications were **approved** between 20 and 26 calendar weeks of them being **registered**?

11. How many Building Warrant Applications were **approved** over 26 calendar weeks of them being **registered**?

12. How many Building Warrant applications were **refused**?

13. How many **refused** Building Warrant Applications were the subjects of an appeal heard by a Sheriff?

14. How many Building Warrant applications were **registered** and **approved** without the need for a "**Plan Assessment/Crit/First Report**" letter, i.e. the proposals as submitted fully complied with the Building Standards (Scotland) Regulations.

15. How many Building Warrant applications were **registered** but subsequently could not be assessed for compliance with the Building Standards (Scotland) Regulations due to a lack of information?



16. From your answer to question 15 above, how many of these applications were then **approved** once the information requested by Building Control was furnished in support of the Building Warrant Application?

17. How many "**Letter of Comfort**" requests did this Local Authority receive?

18. How many "**Letter of Comfort**" were issued by this Local Authority?

19. How much fee income was generated for the Local Authority by issuing "**Letter of Comfort**"?

20. How many cases were referred to the Procurator Fiscal where individuals/organisations had carried out works without obtaining a Building Warrant prior to commencing the works.

21. How many cases were referred to the Procurator Fiscal where individuals/organisations had occupied or used a building without having obtained a **Completion Certificate**?

22. How many **Completion Certificates** were issued?

23. How many **Completion Certificates** did the Local Authority refuse to issue?

24. Please supply us with the standard letter issued by this Local Authority to inform the Applicant/Agent of non compliance – i.e. the cover letter sent with the "**Plan Assessment/Crit/First Report**"



Glossary

“approved” – The formal issuing of a Building Warrant – i.e. the date on the approved set of plans returned to the Applicant.

“registered” – The formal acceptance of a “valid” application, also the date payment is taken for the application and/or when an application is given a unique reference number by the Local Authority.

“refused” – The rejection of a previously **registered** application for whatever reason.

“Plan Assessment/Crit/First Report” – Correspondence from the Local Authority/Building Control/Building Control Officer requesting clarification, further information and/or indicating non compliance with the Building regulations.

“Letter of Comfort” – Letter issued by the Local Authority after works have been carried out by an individual/organisation without the necessary Warrants in place.

“Completion Certificate” – Certification issued by the Local Authority confirming the works specified in the Building Warrant Application have been done in accordance with the Building Regulations as far as can be ascertained.