

# Decision Notice

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## Decision 243/2014: Mr Paul Quigley and the Assessor for Glasgow City Council

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### **Sale prices used for council tax bandings**

Reference No: 201400893

Decision Date: 20 November 2014



Scottish Information  
Commissioner



## Summary

On 6 February 2014, Mr Quigley asked the Assessor for Glasgow City Council (the Assessor) for information used to set the council tax bandings for a housing development. The Assessor gave some information to Mr Quigley, but withheld other information. The Assessor disclosed further information during the Commissioner's investigation, but continued to withhold sale prices on the basis that they were reasonably obtainable by Mr Quigley other than by requesting them under FOISA.

The Commissioner concluded that the information was not reasonably obtainable to Mr Quigley and required the Assessor to disclose it to him.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 25(1) and (2)(a) and (b)(i) (Information otherwise accessible); 35(1)(d) (Law enforcement)

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

## Background

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1. On 6 February 2014, following earlier correspondence relating to Council tax bandings, Mr Quigley wrote to the Assessor requesting the sale price evidence used to determine the bandings for a named housing development. He stated:  
"I cannot easily or practically obtain the exact information or sales price evidence against properties that was used by the Assessors [sic] Office when determining that [ ] banding was appropriate – only the Assessor can specify exactly what sales market figures they used and for which properties. I am not privileged to know what value information was or was not used by the Assessor and therefore request this information."
2. The Assessor responded on 5 March 2014. He considered the sale price information to be exempt under section 25(1) of FOISA, as he believed it was information Mr Quigley could reasonably obtain (from Registers of Scotland (RoS)) other than by requesting it under FOISA. He provided contact details for RoS.
3. On 16 March 2014, Mr Quigley wrote to the Assessor requesting a review of his decision. He explained why he did not consider the information to be reasonably obtainable.
4. The Assessor notified Mr Quigley of the outcome of his review on 8 April 2014, upholding his application of section 25(1).
5. On 25 April 2014, Mr Quigley wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Assessor's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Quigley made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking

the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. The investigating officer subsequently contacted the Assessor, giving him an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking him to respond to specific questions. In particular, the Assessor was asked to justify his application of section 25(1) of FOISA.
8. Mr Quigley was asked for, and provided, his submissions as to why he believed section 25(1) of FOISA did not apply in this case.
9. In response to Mr Quigley's requirement for review, the Assessor noted that Mr Quigley had previously been provided with a list of properties used as comparators in determining the bandings. Mr Quigley acknowledged this, but did not accept that he could identify which specific properties (or which sales of those properties) had been used to support which bandings.
10. During the investigation, the Assessor provided Mr Quigley with a redacted version of a report used in connection with the banding exercise. The comparator addresses were included in the information disclosed, along with the month and year of the relevant sale. The Assessor still considered the sale prices, which were to be found in the unredacted version of the report, to be exempt under section 25(1) of FOISA.
11. On receipt of this further information, Mr Quigley informed the investigating officer that he had attempted to obtain the sales prices from RoS, using the free public search facility on its website. This was not proving successful. He submitted that having a full search carried out by RoS staff would be very expensive. In the circumstances, he did not accept that he could "reasonably" obtain the information.
12. The investigating officer contacted RoS for advice on the cost of the searches needed to access the information. After some discussion, including comments from the Assessor (and following provision of a considerably higher figure), RoS provided an estimate of £324.00 plus VAT (£388.80). The Assessor was given the opportunity to comment on whether he considered the information reasonably obtainable, given this estimate. During the investigation, the Assessor was also given full opportunity to provide any other submissions he regarded as applicable to the withheld information.
13. The Assessor stated that the reasonableness of the cost, in this context, was a matter for the Commissioner to determine. The Assessor observed that, in terms of section 25(2)(a) of FOISA, information may be reasonably obtainable even if payment is required for access to it.
14. The Assessor also referred to his licence agreement with RoS, which did not extend to providing domestic sales information to the public. He submitted that disclosure of the withheld information would breach that licence and could result in its termination. He referred to discussions where RoS had expressed its dissatisfaction with his office making such information public, although it was never made clear whether these discussions were in the context of this particular request (or indeed in relation to disclosure under FOISA at all).

15. If the licence was terminated, the Assessor argued, this would inhibit his statutory duties in relation to the collection of taxes and electoral registration. In this connection, he referred to section 35(1)(d) of FOISA.
16. The Assessor also provided the investigating officer with the text of an email he had received from RoS. This expressed a desire that applicants seeking this kind of information be referred to RoS and asked if RoS could be informed of the outcome of the investigation. The email indicated that the information sought by Mr Quigley was available through “a number of mechanisms”, including a free house price search facility on RoS’s own website and via property websites such “Zoopla” and “Rightmove”. RoS made no mention of the possibility of the licence being terminated if the information were to be disclosed under FOISA.
17. The Assessor confirmed that he had no further submissions to make on this matter.
18. In order to ascertain whether the sales prices sought for the dates held by Mr Quigley were or were not accessible through the online search function, the investigating officer undertook several searches over a period of two days, using the facility identified by RoS on its website. Out of a sample of nine addresses, only one produced a sale price and the others were not recognised. Out of a further sample of eleven addresses, none were recognised.
19. A similar search was carried out on the “Zoopla” and “Rightmove” websites. Sales as far back as 1990, 1991 and 1992 (the relevant period for the sale comparators) could not be identified on either of these.
20. Finally, the investigating officer obtained submissions from RoS on whether it was under any statutory obligation to make this information available, with a view to considering whether section 25(2)(b)(i) of FOISA applied.

## **Commissioner’s analysis and findings**

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21. 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 Mr Quigley and the Assessor. She is satisfied that no matter of relevance has been overlooked.

### **Section 35(1)(d) – Law enforcement**

22. Section 35(1)(d) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the assessment or collection of any tax or duty (or of any imposition of a similar nature).
23. The exemption in section 35(1)(d) of FOISA is a qualified exemption. This means that even if the authority considers the exemption to apply, it can only withhold the information if, in all the circumstances, the public interest in maintaining the exemption (and therefore withholding the information) outweighs the public interest in disclosure. It is a matter for the authority to provide submissions to the Commissioner with supporting evidence to justify its reliance on exemptions.
24. The Assessor submitted that disclosure of the withheld information would be a breach of its licence agreement with RoS, potentially resulting in the agreement being terminated. Having considered the clause referred to by the Assessor in this connection, the Commissioner accepts that disclosure under FOISA is not a purpose envisaged by RoS in supplying the Assessor with the information. It is possible that RoS might regard disclosure to Mr Quigley

as being in breach of the licence, although there is nothing in any correspondence the Commissioner has seen (or in the discussions the investigating officer has had with RoS for the purposes of this investigation) to suggest this is likely. There is certainly nothing in any of that correspondence (or those discussions) to suggest that RoS would contemplate termination of the licence in the event of disclosure.

25. The Commissioner accepts that termination of the licence *might* make it more difficult for the Assessor to perform his functions in relation to the assessment of local taxes, which *might* in turn make it more difficult for the local authority to perform its functions in relation to the collection of those taxes. However, the Assessor's submissions contain only unsupported assertions that disclosure would lead to termination of the licence which would in turn, be harmful to his functions. On the basis of the arguments put forward by the Assessor, she cannot conclude that the harm claimed would amount to substantial prejudice. She would also observe that there is nothing in section 35(1)(d) which could reasonably be interpreted as applying to electoral registration functions.
26. Before any such harm could be considered likely, the Commissioner would need to be satisfied that the termination of the licence (as a result of disclosure) was at least likely. As indicated above, she has received nothing in the course of this investigation to suggest that such termination is more than a remote possibility. On that basis, she cannot accept that section 35(1)(d) could be said to apply. Having reached that conclusion, she is not required to go on to consider the public interest test.

#### **Section 25(1) and (2) – information otherwise accessible**

27. 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. The exemption in section 25(1) is absolute: in other words, it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
28. The Assessor noted that information may be reasonably obtainable even if payment is required for access to it. Section 25(2)(a) provides for this. The Assessor did not wish to comment on whether the cost of obtaining this particular information should be considered reasonable in the circumstances.
29. The Commissioner notes that section 25(2)(b)(i) of FOISA provides that information is to be taken as reasonably obtainable if the authority holding it is *obliged under any enactment*, to communicate it to members of the public on request, either free or on payment of a fee. This was not raised specifically by the Assessor, but the Commissioner believes it would be prudent in this case to consider it.
30. The investigating officer asked RoS whether it could identify any enactment (i.e. any statutory provision) under which it would be obliged to provide the information Mr Quigley was seeking. RoS did not consider there to be any such basis on which it would be obliged to provide the information in question. RoS confirmed that it did provide a commercial service through which such information could be provided for a fee, but there was no specific enactment requiring it to do so.
31. In the circumstances, the Commissioner cannot accept that section 25(2)(b)(i) of FOISA can apply in this case. The rest of section 25(2)(b), which also applies to information available to the public on request, does not apply to information held by, or obtained from, RoS.
32. The Commissioner must still consider all the circumstances under which this information may be obtained, with a view to considering whether that access can be regarded as reasonable.

As indicated above, information may be reasonably obtainable even if payment is required for access to it. It does not follow that information obtainable on payment will always be reasonably obtainable, and the Commissioner would consider the level of payment to be one of the factors which would be relevant in considering the reasonableness of access.

33. In this case, the Commissioner is not satisfied that the information sought by Mr Quigley can be obtained by any of the means identified by the Assessor which would not involve the payment of a fee. The steps taken to investigate this are described in paragraphs 18 and 19 above.
34. In this case, it is not disputed by Mr Quigley that the information is held by RoS, in a public register. But obtaining the information is not simply a question of asking for it and it being provided. Having considered all relevant submissions she has received, the Commissioner is not satisfied that the information can be obtained from RoS other than through a specific search, carried out on Mr Quigley's instructions and on payment of a fee. In other words, RoS would not simply be providing the information; it would be providing Mr Quigley with a service.
35. There was lack of clarity during the investigation on the cost of this service. This is partly due to the nature of the service, and the Commissioner accepts that it may not be possible to provide a definitive estimate without specific engagement. For the purposes of her analysis, the Commissioner will take RoS's final figure of £324 plus VAT (£388.80) as a reasonable estimate. She notes that the Assessor (the authority seeking to benefit from section 25(1)) did not wish to comment on the level of the cost involved. Mr Quigley submitted that the quoted figure represented a significant amount of his disposable income. He suggested that the estimate appeared to be a "best case scenario" and that the final cost could be higher. He thought it likely that queries might arise in relation to at least some of the properties, which he would not be able to answer with the information available to him. He did not believe information only available in this way, through a bespoke solution tailored to the needs of the individual, could be regarded as reasonably obtainable.
36. The Commissioner must consider each case on its own circumstances, and that includes each case where section 25(1) is claimed to apply. As with any other exemption, a Scottish public authority seeking to rely on this one must be prepared to justify its application, with reference to robust evidence where relevant. Here, the Assessor has relied very largely on assertions, refusing to comment on the cost of the service involved and leaving it (for the most part) to the Commissioner to explore with RoS what would be required to obtain the information. This is not the level of engagement the Commissioner expects from authorities seeking to benefit from the provisions of FOISA.
37. Clearly, there are situations where it is appropriate for a Scottish public authority to apply section 25(1) to information it holds. Provided it can point the requester in the appropriate direction, there is no reason (for example) why it should be expected to give the requester a substantial volume of information which the requester could just as readily obtain from the internet or some other open public source. Previously, the Commissioner has accepted the application of section 25(1) in relation to information held by RoS, in relation to information to be found in specific documents available from RoS on request, such as title deeds or the Title Sheet for a property. Here, the situation is somewhat different, in that a bespoke search would be required to locate and provide the information. The Commissioner would not say that this necessarily excludes the information from the ambit of section 25(1), but she does believe the need for a search in this case is relevant in considering whether the information is reasonably obtainable.

38. The Commissioner has also taken account of the nature and circumstances of this particular applicant. Mr Quigley is a private individual, not seeking the information in the course of a business or profession. In that context, the Commissioner believes it reasonable to acknowledge that the sums quoted for a search would be relatively significant to the applicant.
39. In the light of the above, taking into account all the particular circumstances of this case and all relevant submissions she has received, the Commissioner is not persuaded that this information is reasonably obtainable by Mr Quigley, other than by requesting it under FOISA. The Commissioner cannot, therefore, uphold the application of section 25(1) of FOISA in this case and requires the Assessor to disclose to the withheld sales figures to Mr Quigley.

### **Observations about the Assessor's handling of the request**

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40. There is no doubt that the requested information is held in its entirety by the Assessor. It was already collated into a document, and hence a form, approximating to Mr Quigley's requirements. That document was disclosed to Mr Quigley with the withheld information redacted. In other words, the Assessor took specific steps to redact existing information; information which at the time of the review it was not claiming should be withheld for any reason other than it was reasonably accessible to Mr Quigley.
41. Whilst there are occasions where it might be appropriate to withhold information in this way under section 25(1), the Commissioner must question whether the approach in this case is really the kind of approach that the section 25(1) exemption was designed for, under an Act that presumes disclosure. She is certain that it is not an approach consistent with the general ethos of FOISA.

### **Decision**

The Commissioner finds that the Assessor for Glasgow City Council (the Assessor) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Quigley. By incorrectly applying sections 25(1) and 35(1)(d) of FOISA to the withheld sale prices, the Assessor failed to comply fully with section 1(1).

The Commissioner therefore requires the Assessor to disclose the remaining withheld information to Mr Quigley, by 12 January 2015.

### **Appeal**

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Should either Mr Quigley or the Assessor for Glasgow City 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.



## **Enforcement**

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

**Rosemary Agnew**  
**Scottish Information Commissioner**

**20 November 2014**

## Appendix

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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.

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- (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;

- (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;

...

#### 35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);

...

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