

Decision Notice



Decision 116/2008 Andrew Montgomery and Glasgow City Council

Statement of reasons for the decision of the Licensing and Regulatory
Committee

Reference No: 200800598

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www.itspublicknowledge.info

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Summary

Mr Andrew Montgomery requested from Glasgow City Council (the Council) a copy of the statement of reasons for each of two decisions of its Licensing and Regulatory Committee to refuse applications to licence houses in multiple occupation. The Council refused to supply the information on the basis that it was exempt under section 26(a) of FOISA. Following a review, Mr Montgomery remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Council withdrew its reliance on section 26(a) and instead applied section 37(1)(a)(i) of FOISA.

Following an investigation, the Commissioner found that the Council had not dealt with Mr Montgomery's request for information in accordance with Part 1 of FOISA. He found that the Council incorrectly applied section 37(1)(a)(i) of FOISA to the information withheld, and required the Council to provide Mr Montgomery with that information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions) and 37(1)(a)(i) (Court records, etc.)

Civic Government (Scotland) Act 1982 (the Civic Government Act) Schedule 1, paragraphs 17(1), (2) and (4)(a) (Notification of the decisions and giving of reasons) and 18(1) (Appeals)

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

1. On 4 February 2008, Mr Montgomery wrote to the Council requesting a copy of "the statement of reason for the decision of the [Council's] Licensing and Regulatory Committee on 30 August 2007" to refuse the applications for licences for Houses of Multiple Occupancy at two specified addresses.



2. The Council responded on 8 February 2008. It stated that the information requested by Mr Montgomery was exempt from disclosure under FOISA by virtue of section 26(a), disclosure being prohibited by paragraph 17(2) of Schedule 1 of the Civic Government Act 1982 (the Civic Government Act).
3. On 14 February 2008, Mr Montgomery wrote to the Council requesting a review of its decision. In particular, Mr Montgomery was not satisfied that the provision of the Civic Government Act the Council had cited represented a prohibition against disclosure, and therefore did not accept that the Council had been correct in its application of section 26(a) of FOISA.
4. The Council notified Mr Montgomery of the outcome of its review on 13 March 2008. The Council upheld its original decision to withhold the information without amendment.
5. On 18 April 2008, Mr Montgomery wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to him for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Montgomery had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 20 May 2008, the Council was notified in writing that an application had been received from Mr Montgomery and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to Mr Montgomery's request.
9. In response, the Council submitted that it no longer wished to rely on section 26(a) of FOISA in withholding the information from Mr Montgomery. The Council stated that it now wished to rely on section 37(1)(a)(i) of FOISA to refuse the request, and provided reasons as to why it considered this exemption to apply to the request.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions that have been presented to him by both the Council and Mr Montgomery and is satisfied that no matter of relevance has been overlooked.

Background

11. The Council explained that a statement of reasons, as requested by Mr Montgomery, outlined in writing the reasons behind a decision made by the licensing authority (in this case, the Council). The licensing authority did not produce this document automatically following each decision. In terms of the Civic Government Act, Schedule 1, paragraph 17(2), such a document is produced in response to a request being made to the licensing authority by a relevant person within 28 days of the date of the decision made by the authority. The phrase "relevant person" is defined under paragraph 17(4) of Schedule 1 of the Civic Government Act.
12. The Council submitted that in the case of the applications for which Mr Montgomery had sought the statements of reasons, the licence applicant and all other relevant persons were informed of the licensing authority's decisions in writing on 3 September 2007. The licence applicant requested a statement of reasons in respect of both decisions on 30 August 2007, following the verbal decision given by the licensing authority on that date. Both statements of reasons were produced and distributed to the licence applicant and the other relevant persons.
13. Mr Montgomery was not sent copies of the statements of reasons as he was not considered to be a relevant person as defined by the Civic Government Act. Although any person who has made a relevant objection (within the meaning of paragraph 19 of Schedule 1 to the Civic Government Act) may request a statement of reasons, the Council have no record of Mr Montgomery having expressed such an objection to either licence application.
14. The Council advised that the licence applicant's solicitors had proceeded to lodge an appeal against both decisions to Glasgow Sheriff Court. The case called for the first time on 19 October 2007. The relevant statements of reasons had been lodged as productions for both cases in Glasgow Sheriff Court on 6 November 2007. The Council further advised that both cases had been sisted to await the outcome of an associated case and therefore were not yet concluded.

Section 37 – Court records, etc.

15. The Council argued that a statement of reasons was created for the purposes of court proceedings, in this case licensing appeal proceedings. A statement of reasons allowed the licensing authority to outline, in writing, their reasons for arriving at a decision regarding awarding or withholding a licence. It went on to explain that a statement of reasons was not prepared unless specifically requested by a relevant person, and would be sought after the decision as to whether to award a licence had been made and in contemplation of an appeal of the licensing authority's decision.



16. Both appeals, the Council argued, would eventually succeed or fail on the strength of the licensing authority's statement of reasons. Both of the documents requested by Mr Montgomery had therefore been lodged in Glasgow Sheriff Court as productions in the ongoing appeal process. This process had been underway when Mr Montgomery had requested the information. In the Council's view, it followed that the information had been prepared by the Council in contemplation of such appeal proceedings and that it was not obliged to release the information under FOISA.
17. The Council acknowledged that it must establish whether it held the information solely because it was contained, in this case, within court documentation. The Council argued that in this instance the statement of reasons was an intrinsic part of its productions in the relevant court case. It argued that these documents had been prepared solely by the Council in its capacity as licensing authority for the purpose of lodging them with a Court to explain its decision in the event of an appeal, and that they had indeed been lodged with the court.
18. The Council suggested that the documents withheld were akin to an initial writ, as referred to in the Commissioner's briefing on section 37 of FOISA <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2645&sID=131> . Like the initial writ example, the Council argued, the statements of reasons would be exempt because, at the time of Mr Montgomery's request, they had already been lodged at court. If no appeal had been lodged and the documents requested had not been lodged in court at the point of Mr Montgomery's request, then the Council acknowledged that they would require to be released.
19. Section 37(1)(a)(i) provides that information is exempt if it is contained in a document lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter *and* a Scottish public authority holds the information *solely* because it is contained in such a document. The purpose of section 37 is specifically to leave the legal dispute resolution system in charge of its own processes as regards the disclosure of information. Although judges, courts and tribunals are not generally covered by FOISA, public authorities may hold information relating to proceedings in which they are involved. The Commissioner recognises that these documents should be afforded appropriate protection, but is of the view that this exemption cannot be stretched to cover proceedings which are merely contemplated or envisaged by an authority.
20. From the evidence provided by the Council, it is clear that the documents which fall within the scope of Mr Montgomery's request were, at the time of his request, lodged with a court for the purposes of proceedings.
21. However, as stated previously, information is exempt under section 37(1)(a)(i) of FOISA only where a public authority holds it *solely* because it is contained in a document falling within the category described in the exemption.



22. In this instance, Mr Montgomery sought a copy of the statements of reasons requested by the licence applicant under paragraph 17(2) of Schedule 1 of the Civic Government Act. It may be likely that such a statement will be requested in contemplation of an appeal to the sheriff under paragraph 18(1) of the Civic Government Act, and it is possible (but by no means certain) that such an appeal will follow from consideration of the statement, but the Commissioner does not accept that it follows that such a statement will become a document to which section 37(1)(a)(i) applies simply by virtue of it having been lodged with the court by the time it is requested under FOISA.
23. The information in question was created by the Council and provided to the licence applicant and other relevant persons prior to the appeal being made to the sheriff because the Council was under a statutory obligation to do so. Once it was created, it may have facilitated the making of an appeal to the sheriff, but it could not be described as being held by the Council *solely* because it is contained in a document lodged with, or otherwise placed in the custody of, a court in terms of section 37(1)(a)(i) of FOISA. The act of lodging the document with the court could not alter the fact that it was held by the Council previously, for purposes which were not directly connected to actual court proceedings, and the Commissioner does not consider that its lodging with the court altered its character so fundamentally as to make it a document held solely for that purpose.
24. In conclusion, the Commissioner is not satisfied that the Council was correct in its application of section 37(1)(a)(i) of FOISA to withhold the information requested by Mr Montgomery. Consequently the Commissioner is not satisfied that the Council acted in accordance with Part 1 (and in particular section 1(1)) of FOISA in responding to Mr Montgomery's request.

DECISION

The Commissioner finds that Glasgow City Council failed to comply with Part 1, and in particular section 1(1), of the Freedom of Information (Scotland) Act 2002 (FOISA), in responding to the information request made by Mr Montgomery. The Council was incorrect in its application of the exemption in section 37(1)(a)(i) of FOISA to the information sought by Mr Montgomery.

The Commissioner therefore requires Glasgow City Council to supply Mr Montgomery with copies of the statements of reasons for the two properties specified in his request, by 31 October 2008.

Decision 116/2008
Mr Andrew Montgomery
and Glasgow City Council



Appeal

Should either Mr Montgomery or Glasgow City Council wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
16 September 2008



Appendix

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 –

...

- (d) section 37; and

...

37 Court records, etc.

- (1) Information is exempt information if it is contained in-

- (a) a document-

- (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter

...



and a Scottish public authority holds the information solely because it is contained in such a document.

Civic Government (Scotland) Act 1982

Schedule 1 Licensing – Further Provisions as to the General System

17 Notification of the decisions and giving of reasons

- (1) A licensing authority shall, within 10 days of being required to do so under sub-paragraph (2) below, give reasons in writing for arriving at any decision of theirs under this Schedule –
- (a) to grant or renew a licence or to refuse to do so;
- ...
- (2) Reasons for a decision referred to in sub-paragraph (1) above shall be given by the licensing authority on a request being made to the authority by a relevant person within 28 days of the date of the decision.
- ...
- (4) In this paragraph, “relevant person” means –
- (a) in respect of a decision specified in sub-paragraph (1)(a) above, the applicant or any person who made a relevant objection or representation (within the meaning of paragraph 19 below) in relation to the application to which the decision relates;
- ...

18 Appeals

- (1) Subject to sub-paragraph (2) below, a person who may, under this Schedule, require a licensing authority to give him reasons for their decision may appeal to the sheriff against that decision.
- ...