

Decision Notice



Decision 114/2013 Mr Robert Patterson and South Lanarkshire Council

Land Transfer

Reference No: 201202667
Decision Date: 24 June 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 2 August 2012, Mr Patterson asked South Lanarkshire Council (the Council) for information about a land transfer. The Council disclosed certain information, while arguing that other information was publicly available through the Land Register and therefore exempt under section 25 of FOISA. Following an investigation, the Commissioner accepted the Council's position and found that it held no further information which was not exempt under section 25.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and 2(2)(a) (Effect of exemptions); 25(1) and (2) (Information otherwise accessible)

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 2 August 2012, Mr Patterson wrote to the Council requesting:
"... information held in your archive relating to the sale or transfer of land at East Milton Farm, Westwood, East Kilbride, G75 8SN. The transactions were done by East Kilbride Development Corporation which was transferred to East Kilbride District Council, now of course South Lanarkshire Council. It involved the Disposition of 2.202 acres of ground by James Dykes recorded 3rd Feb 1954 and referred to in a plan edged in red, to East Kilbride Development Corporation dated 15th January 1987. This was then disposed back to James Dykes as two pieces of ground illustrated on two plans the extents being 2.090 acres and 0.018 acres on the same date. I believe the solicitors acting for James Dykes were Hill Brown and Co. There is also mention of the date 2nd December 1986.
I am requesting copies of all information held by you including any plans, internal and external correspondence in connection with this."
2. The Council responded on 31 August 2012, advising Mr Patterson, in terms of section 17 of FOISA, that it did not hold the information as it had been destroyed by the Council's archivist.



3. On 22 October 2012, Mr Patterson wrote to the Council requesting a review of its decision. He stated that he had recently received from the Council a copy of a plan forming part of a Disposition to Mr James Dykes from East Kilbride Development Corporation. Mr Patterson commented that the plan “differs materially from the document held in the publicly accessible archives in Edinburgh” and therefore (in his view) the complete document was not available to him from any source but the Council. He pointed out that he had not been informed that this document was withheld because it was available from the public archives. Mr Patterson understood more than one relevant deed to be held by the Council in its archives and asked that the Council supply him with clear copies of all the information.
4. The Council notified Mr Patterson of its review outcome on 26 November 2012. It explained that files on disposals of land were generally destroyed after 10 years. The Council stated that its archivist had confirmed that no records were held by the Council in relation to the transfer of East Milton Farm in 1986. The relevant title packet contained only one document which was not a copy of a recorded deed relating to the transfer. As this was a copy of the relevant deed before it was recorded in the Land Register, and was not otherwise available, the Council provided Mr Patterson with a copy.
5. The Council explained that there were other deeds in the title packet which related to the East Mains Farm site, but these were all recorded in the Land Register and therefore available to the public on payment of the relevant fee. The Council considered that this information fell within the terms of section 25 of FOISA (Information otherwise accessible) and was therefore exempt from disclosure.
6. The review also dealt with Mr Patterson’s point that the plans supplied by the Council’s Estates Team were materially different from those in the public archives in Edinburgh. The Council explained that, since the transfer in 1986, the site had changed from open land to a residential development, so the “land certificates produced by the Keeper of the Land Register for the individual houses may well look different from the 1986 plan.” However, it concluded that this was “not a matter for the Review Panel to consider or comment on.”
7. Following further correspondence, Mr Patterson wrote to the Commissioner on 20 December 2012, stating that he was dissatisfied with the outcome of the Council’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Patterson 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

9. 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. Given the focus of Mr Patterson's application on the Council's refusal to provide copies of the deeds it held, the Council was asked to justify its reliance on section 25 of FOISA (and in this connection to explain its conclusions on what relevant information it held).
10. The relevant submissions received from both the Council and Mr Patterson will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the submissions made to her by both Mr Patterson and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 1(1)

12. In order to comply with section 1(1) of FOISA in relation to any given request, an authority must take reasonable steps to identify and locate all information it holds and which falls within the scope of that request. In the absence of an applicable exemption or other relevant provision of Part 1 of FOISA, it must provide that information to the applicant. In this case, the Council supplied a document to Mr Patterson following its review. In this deed, Mr Patterson identified a number of what he considered to be "irregularities."
13. It must be noted that the accuracy and legitimacy of information *per se* is not a matter for the Commissioner. The Commissioner's powers are limited to determining whether information is held and, if so, whether should be released, along with the authority's technical handling of the request. She cannot comment on the accuracy of any information held by the authority. As the Council has pointed out, there are other statutory remedies for dealing with such issues in relation to title to land
14. The Council was asked during the investigation to confirm that the disposition supplied to Mr Patterson was the only version of this disposition it held. The Council confirmed that it was.
15. The Council was also asked about its destruction schedule for such information. The Council replied that its Records Management Policy referred to the development of retention schedules to cover all areas of the Council. The retention schedule for Legal Services files (with two specialist exceptions) required files to be destroyed 10 years after the date of closing.



16. The Council explained that the 10 year period was based on the Law Society of Scotland's Guidelines for Ownership and Destruction of Files. In relation to sales of land, the Law Society recommended retention for only one year after completion. However, the Council had chosen to have a universal 10 year retention period.
17. Having considered the Council's explanations, the Commissioner accepts that the Council identified and located the information it held falling within the scope of the request, and in doing so, complied fully with section 1(1) of FOISA. Given the nature of the land registration process, discussed further below, there would appear to be no point in the Council holding "alternative" versions of registered titles to land. The Commissioner will now consider the question of making that information available to Mr Patterson.

Section 25

18. 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 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
19. The Council submitted that the withheld title deeds were available from the Land Register. Therefore, Mr Patterson would be able to ascertain which deeds he required by instructing a search of the Land Register, which would disclose the title deeds affecting the area. Mr Patterson would then be able to order the deeds by reference to that search. It followed, the Council submitted, that the information sought by Mr Patterson was reasonably obtainable and therefore exempt in terms of section 25 of FOISA.
20. Mr Patterson had disputed this, in particular because he was seeking what he regarded as a "properly completed document". He had not been able to obtain such a document from his visits to the Registers of Scotland. He explained that he would have been willing to purchase such a document.
21. The Council explained the process and information involved:
 - In 1986, the Council's statutory predecessors, East Kilbride Development Corporation, sold part of the East Milton Farm site to James Dykes. The Corporation kept a copy of the Disposition transferring that land in its title packet ("the 1986 Disposition"). This document, which is not available from the Land Register (see below), was provided to Mr Patterson.
 - The 1986 Disposition was signed by the Corporation and delivered to Mr Dykes' solicitors in return for the price. Mr Dykes' solicitors would have then forwarded it to the Land Register along with the other registration documents. On receiving the application for registration, the Keeper would, subject to checking, register Mr Dykes' title in the Land Register for Scotland: the Council explained that this was the final and essential link in giving someone legal ownership of an area of land.



- Mr Dykes' solicitors would have received from the Keeper a Land Certificate showing the site contained in the 1986 Disposition plotted on the Ordnance Survey Map and showing Mr Dykes to be the owner of that site. The Council would not have any knowledge of, or indeed any interest in, the contents of that Land Certificate. It was a matter for Mr Dykes and his solicitors to be satisfied that the Land Certificate issued to him truly reflected what he had purchased from the Corporation.
 - The 1986 Disposition delivered to Mr Dykes' solicitors was not something that was available to the public, as it was only used for the processing of Mr Dykes' application for a Land Certificate.
 - The site was then further developed and individual plots sold to the various owners. These owners in turn would have received an individual Land Certificate from the Keeper showing the area purchased. The Council commented that it had no concerns regarding the transfer of land in 1986.
22. The Council's explanation of the land registration process concurs with the Commissioner's understanding. In this case, it does not appear to be disputed that titles to land are publicly accessible documents. They can be found within the Land Register and made available (for a fee) by the Registers of Scotland¹.
23. However, Mr Patterson's contention was that the particular titles he was seeking were not reasonably accessible to him, since they were not available other than from the Council. The Council acknowledged that this is the case for some of the information it holds (a copy of which, as noted above, it provided to Mr Patterson). Given the explanation provided by the Council and accepted by the Commissioner, it is not apparent to the Commissioner why the Council should hold further relevant documents which do not appear in the Land Register.
24. In her briefing on section 25², the Commissioner has made clear that a public authority applying this exemption needs to be alert to its duty to provide advice and assistance to a requester in terms of section 15(1) of FOISA. Paragraph 3.7 of the briefing notes that the authority should take steps to ensure that the exact information requested is actually reasonably accessible elsewhere. It should not assume that the applicant will know where and how the information can otherwise be obtained, and it should provide guidance on how it can be accessed.
25. From the correspondence the Commissioner has seen, she is satisfied that Mr Patterson is aware of how the information can otherwise be obtained.
26. In the light of the above, the Commissioner accepts that the information requested by Mr Patterson and not provided by the Council was otherwise reasonably accessible to him. Therefore, she concludes that the Council correctly found the information to be exempt from disclosure under section 25(1) of FOISA.

¹ <http://www.ros.gov.uk/>

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>



DECISION

The Commissioner finds that South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Patterson.

Appeal

Should either Mr Patterson or South Lanarkshire 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.

Margaret Keyse
Head of Enforcement
24 June 2013



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.
...
- (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;
 - (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.

...