



Scottish Information
Commissioner

Decision 178/2007 Sean Clerkin and Communities Scotland

Request for interim report relating to enquiry and inspection of Glasgow Housing Association

Applicant: Sean Clerkin
Authority: Communities Scotland
Case No: 200700827
Decision Date: 27 September 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 178/2007 Sean Clerkin and Communities Scotland

Request for interim report relating to Communities Scotland's enquiry and inspection of Glasgow Housing Association – information not held – upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1 (General entitlement); 2 (Effect of exemptions); 15 (Duty to provide advice and assistance); 17 (Notice that information is not held).

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

Facts

Mr Clerkin requested from Communities Scotland (CS) a copy of an interim report in relation to an ongoing enquiry and inspection of the Glasgow Housing Association (GHA). CS responded by refusing the request, citing various exemptions under FOISA. Following a review, CS concluded that the exemptions stood and that it had been correct to refuse the request. Mr Clerkin remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation CS stated that no interim report existed and so a notice that the information was not held (under section 17 of FOISA) should have been issued to the applicant. Following the investigation, the Commissioner found that CS had failed to deal with Mr Clerkin's request for information in accordance with Part 1 of FOISA in certain technical respects, while accepting that the information was not in fact held.



Background

1. On 13 March 2007, Mr Clerkin wrote to Communities Scotland (CS) requesting findings of their recent enquiry and inspection into the Glasgow Housing Association and in particular "... an interim report of what has been gleaned to date."
2. On 10 April, CS wrote to Mr Clerkin in response to his request for information. In that response CS refused the request, citing the exemptions in sections 30(b)(i) and (ii), 30(c) and 36(2) of FOISA to justify that refusal.
3. On 30 April 2007, Mr Clerkin wrote to CS requesting a review of its decision.
4. On 29 May, CS wrote to notify Mr Clerkin of the outcome of its review. The review concluded that the exemptions in sections 30(b)(i) and (ii), 30(c) and 36(2) had been properly applied and that CS was correct to refuse the request.
5. On 11 June 2007, Mr Clerkin wrote to my Office, stating that he was dissatisfied with the outcome of CS's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Clerkin had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
7. On 17 July 2007, CS was notified in writing that an application had been received from Mr Clerkin and was asked to provide my Office with specified items of information required for the purposes of the investigation. In line with established protocols, and CS being an executive agency of the Scottish Ministers (then called the Scottish Executive), the Scottish Ministers (the Ministers) responded to the notification. The case was then allocated to an investigating officer.

The Investigation

8. The investigating officer contacted the Ministers on 21 August 2007, asking it to provide comments on the application in accordance with section 49(3)(a) of FOISA and to respond to certain specific questions. The Ministers responded on 30 August 2007.



9. In its submissions, the Ministers explained that at the time of Mr Clerkin's request the CS inspection team held over 3000 documents relating to a nine week on-site inspection of GHA. It confirmed that CS had indeed refused Mr Clerkin's request on the basis of exemptions in sections 30(b)(i) and (ii), 30(c) and 36(2) of FOISA, on the basis that these documents contained the information requested.
10. However, the Ministers stated that it was clear to it following notification of Mr Clerkin's application to my Office that he had not requested any of those documents in his request. Rather, the Ministers submitted, Mr Clerkin only sought an interim report on the inspection.
11. As this was something CS does not normally produce (and, in any event, had not been produced in this case at the time of Mr Clerkin's request), the Ministers conceded that it might have been more appropriate for CS to have issued a notice under section 17 of FOISA, telling him that the interim report he had requested was not held. The Ministers confirmed that CS was no longer relying on the exemptions cited earlier.
12. The Ministers then explained the process and procedures used by CS in conducting an inspection and advised that a draft report would be produced by the end of August 2007, the final report, following consultation, comments and any necessary redrafting, being due for publication (subject to any review required by GHA) in October 2007. The Ministers confirmed that Mr Clerkin would be sent a copy of the final report when it was published.
13. I am satisfied from the terms of Mr Clerkin's request that he was looking for an interim report on the inspection rather than the whole set of information gathered for the purposes of the investigation at the time of his request. He refers to "an interim report of what has been gleaned to date" and I take that to mean a report setting out interim findings and conclusions as at the time of the request or some earlier date. The focus of this investigation must therefore be on establishing whether that information did, in fact, exist at the time of Mr Clerkin's request. On 21 August 2007, Mr Clerkin was advised of the changed circumstances and the Ministers asked to provide evidence that no draft report existed at the time of Mr Clerkin's request on 13 March.
14. On 30 August the Ministers provided a schedule of the key dates for GHA inspection, along with further details of the process, a project plan and copies of relevant correspondence with GHA. The Ministers also provided a link to CS's *Guide to Inspection* (which contains its inspection procedures), accessible on the agency's website at http://www.comunitiesscotland.gov.uk/stellent/groups/public/documents/web_pages/ripcs_005646.pdf



The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Clerkin and the Ministers and I am satisfied that no matter of relevance has been overlooked.
16. I have examined the documents submitted and referred to by the Ministers in relation to the various stages of the CS inspection of GHA (and in relation to inspections of this kind more generally) and am satisfied that these provide sufficient evidence and clarity in respect of the processes, timings and outcomes of this inspection.
17. The documents supplied confirm that Stage 1 of the inspection (preparation) took place between 29 September 2006 and 16 February 2007. Stage 2 (on-site fieldwork) took place between 19 February and 20 April 2007. According to the project plan supplied, Stage 3 (Reporting) was due to commence with report drafting on 23 April 2007, last 45 days and end on Friday 22 June 2007. This last period was, however, extended at the request of GHA. The draft report was issued to GHA on 23 August 2007.
18. Given the timings noted above, I am satisfied that at the point Mr Clerkin made his request the CS inspection team was in the middle of the fieldwork stage of the inspection. Further, I am satisfied from the CS inspection procedures, that it is not normal practice for CS to produce a draft report prior to the designated point in Stage 3 of the inspection, the reporting stage: as indicated above, this happened in the case of the GHA inspection on 23 August. I am also satisfied that there is nothing in the CS inspection procedures that provides for the production of anything that might be described as an interim report on the inspection prior to the production of the draft report: there does not appear to have been any particular reason why such a report should have been produced in the case of the GHA inspection and in any event I am satisfied that none was in fact produced.
19. These two factors combined are sufficient to satisfy me that, at the point Mr Clerkin made his request, CS could not provide Mr Clerkin with an interim report because it did not hold that information.
20. While I am satisfied that no information in relation to Mr Clerkin's request can be provided, I am less satisfied with CS's responses to Mr Clerkin's request.



Technical breaches of FOISA

21. In view of the original responses by CS to Mr Clerkin's request and the contradictory submissions made to my Office by the Ministers upon notification of Mr Clerkin's application, I have no alternative but to find that CS breached section 17 of FOISA in failing to issue Mr Clerkin with a notice that it did not hold the information he requested. I can only conclude that the responses it did make to both the request and the request for review were the consequences of inadequate consideration of what appears to me to have been a reasonably clear and unambiguous request. In any event, it was open to CS to seek clarification of the request when it was received in accordance with section 1(3) of FOISA: CS does not appear to have considered that necessary.
22. Given that the FOISA regime and the requirements under which public authorities must act to comply with it have been in operation now for almost three years, it is of considerable concern to me that an authority should fail to arrive at a reasonable interpretation of either the applicant's request or the subsequent request for review, particularly where the applicant is misled as a consequence. I am also concerned in the circumstances of this case that the authority's failure to identify the information requested as not held appears to have led to a further failure to explain why it was not held. In my view, it was clearly important in this case that the applicant should understand that the relevant inspection process (both generically and in this particular case) made no provision for the production of the information he was seeking, and I consider CS's failure to do this to have been a breach of its duty to provide the applicant with advice and assistance in accordance with section 15 of FOISA.

Decision

In failing to interpret Mr Clerkin's request appropriately and advise him in terms of a notice under section 17 of FOISA that the information he requested was not held, I find that Communities Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). I also find that Communities Scotland failed to comply with its duty under section 15 of FOISA in failing to provide Mr Clerkin with any explanation as to why the information was not held.

Given that there is no information held I do not require Communities Scotland to provide Mr Clerkin with any information. However, I do require Communities Scotland to note my comments in paragraphs 24 and 25 of this Decision Notice when dealing with requests for information in future.



Appeal

Should either Mr Clerkin or Communities Scotland 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
27 September 2007



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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- (3) If the authority –
 - (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- (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
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (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;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-



- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.