

Decision Notice



Decision 135/2008 Mr Euan Pearson and Fife Council

Housing Service's consultation response to a planning application

Reference No: 200800470

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Summary

Mr Pearson requested from the Council a copy of its Housing Service's consultation response in respect of a planning application. The Council responded by stating that the information was exempt from release under FOISA. Following a review, Mr Pearson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Pearson's request for information in accordance with Part 1 of FOISA, by incorrectly claiming that the information was not held and alternatively arguing that it was exempt as being intended for future publication and on the basis that its disclosure would substantially inhibit the free and frank exchange of views. As Mr Pearson had been provided with the information in question during the course of the investigation, the Commissioner did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 27(1) (Information intended for future publication) and 30(b)(ii) (Prejudice to effective conduct of public affairs).

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 29 February 2008, Mr Pearson wrote to the Council requesting the following information:
“...a copy of Housing Service's consultation response to Development Control ...in relation to planning application 08/00313/EFULL”
2. The Council responded on 3 March 2008, refusing to supply the information on the basis that it was exempt under section 30(b)(i) and (ii) of FOISA. The Council also stated that it would be unable to provide the information until such time as the planning application was reported either to a future Departure Hearing and/or the Area Development Committee.



3. On 5 March 2008, Mr Pearson wrote to the Council requesting a review of its decision. In particular, he was dissatisfied with the reasoning supplied as to why section 30 of FOISA applied (no explanation being given as to how “prejudice” would arise from disclosure) and also highlighted that the Council had made information of a similar type available in connection with other planning applications.
4. The Council notified Mr Pearson of the outcome of its review on 31 March 2008. The Council informed Mr Pearson that it had no objection to releasing the information in question when it became available but that its Housing Services had not yet reached a concluded view with respect to this planning application. It informed Mr Pearson that the information held at that time was incomplete and that, as would not be helpful to release an ongoing exchange of correspondence, section 30(b) of FOISA applied. The Council also cited section 17 of FOISA, on the basis that the specific information sought was not held by the Council at that time. The Council reiterated that it was willing to release the information when it was available and referred Mr Pearson to section 27 of FOISA, emphasising that the information asked for did not actually exist at that time.
5. On 31 March 2008, Mr Pearson wrote to the Commissioner’s Office, 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.
6. The application was validated by establishing that Mr Pearson 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. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer contacted the Council on 29 April 2008, providing an opportunity to make 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 the information requested.
8. In its response, the Council confirmed its reliance on sections 17, 27 and 30 of FOISA.
9. Mr Pearson was supplied with a copy of the Housing Service’s consultation response during the course of the investigation. However, he wished to continue his application to the Commissioner as he was not satisfied that the information supplied reflected the information held by the Council at the time of his original request.
10. On further questioning the Council identified a document which was held at the time of Mr Pearson’s original request. This document was an early draft of the document supplied on 1 July 2008. This document, which had been superseded by the actual consultation response, was also supplied to Mr Pearson during the course of this investigation.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered any information withheld from Mr Pearson along with all of the submissions presented by both Mr Pearson and the Council and is satisfied that no matter of relevance has been overlooked.
12. In this instance, as Mr Pearson was supplied during the course of the investigation with all documents falling within the scope of his request, the Commissioner's remit will therefore be limited to considering whether or not the Council acted in accordance with Part 1 of FOISA in responding to Mr Pearson's request, *at the time it dealt with his request and subsequent request for review*.
13. In its response to Mr Pearson and within their submissions to this Office, the Council stated that it did not hold the information requested, having given notice to that effect in terms of section 17 of FOISA.

Section 17 – Notice that information is not held

14. In order to determine whether the Council was correct to give Mr Pearson notice under section 17(1) of FOISA to the effect that the information requested was not held, the Commissioner must establish whether the Council holds (or held at the time of Mr Pearson's request) information which would address his request.
15. During the course of the investigation, it became apparent that Mr Pearson was aware that the Council had formulated its consultation response to some extent by the time of his information request, having been provided with a summary of its contents prior to his request while being advised that the full response would not be released until after the planning application had been determined.
16. Although not complete (as explained below), it is clear that the Council indeed held a draft of the report in question at the time of Mr Pearson's request, a copy of which was subsequently supplied to him. While not the final version of the consultation response, this had clearly been provided to the Development Service by the Housing Service at the time of the request. In the circumstances, the Commissioner is satisfied that what was held fell within the scope of Mr Pearson's request and therefore concludes that the Council was incorrect in responding to that request by giving notice in terms of section 17(1) of FOISA.
17. In withholding the information identified by the Council as falling within the scope of Mr Pearson's request, the Council cited sections 30 and 27 of FOISA.

Section 30(b)(ii) – Prejudice to effective conduct of public affairs

18. The Council argued that the information identified was exempt under section 30(b)(ii) of FOISA. This exemption applies if disclosure of the information in question would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. It is subject to the public interest test contained in section 2(1)(b) of FOISA.



19. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views. As he has also indicated before, “inhibit” suggests a suppressive effect, which must be of real and demonstrable significance to qualify as substantial. For the inhibition to be at least “likely”, there must be a genuine probability that it will come about.
20. The Council submitted that the information supplied by the Council’s Housing Service to its Development Service in February 2008 had advised of the number of units required to meet the affordable housing provision guidance, a figure which had not changed since then. The key difference between February’s and June’s (i.e. the final response) recommendations from Housing had been the question as to whether an off-site contribution (as suggested by the developer) would be acceptable in meeting the Council’s policy or not. However, as no details about the proposed affordable housing sites potentially being made available had been forwarded to the Council for consideration, no formal agreement could be given to the other sites’ suitability and appropriateness for residential use. The response from Housing Services in February therefore was not fully complete as other options had still to be formally investigated by all parties.
21. The Council further submitted that it was normal practice for it not to release information in advance of the appropriate report being submitted to the appropriate Committee of the Council. The Council concluded that as the information available at the time of Mr Pearson’s request was incomplete, that disclosure would have inhibited the free and frank exchange of views for the purposes of deliberation.
22. Having considered the information in question, the Commissioner is satisfied that the information held by the Council at the time of Mr Pearson’s request was, at the time the Council dealt with that request and the subsequent request for review, exempt under section 30(b)(ii) of FOISA. Although the Commissioner does not accept that disclosure of incomplete data or work in progress will necessarily substantially inhibit, or be likely to substantially inhibit, the free and frank exchange of views for the purposes of deliberation, in this case he has taken into account the context in which the information was created and in particular the timing of Mr Pearson’s request relative to the determination of the planning application.
23. Given that the Commissioner has upheld the application of the exemption in relation to this information, he has gone on to consider the public interest test, as required by section 2(1)(b) of FOISA.



Public interest in relation to section 30(b)(ii)

24. The public interest test requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the relevant exemption. Information should only be withheld if the public interest in maintaining the exemption outweighs that in disclosure.
25. Neither in response to Mr Pearson nor during the investigation did the Council provide arguments of any substance as to why disclosure would be contrary to the public interest. While the Commissioner considers that in many cases of this kind it will be possible to present a substantial case for maintaining the relevant exemption in the public interest, generally he does not believe it is for him to develop such arguments himself. In this case, he can see no reason why the public interest demands that he identify relevant arguments where the Council has not done so itself. On the other hand, there is usually a general public interest (as there would appear to be in this particular case) in information being accessible, to enhance scrutiny of decision-making processes and thereby improve accountability and participation. In the absence of any relevant arguments for maintaining the exemption, these public interest arguments in favour of disclosure would appear to be the only ones to be taken into account in this case.
26. In conclusion, therefore, the Commissioner is not satisfied in the circumstances of this case that the public interest in disclosure is outweighed by that of maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he cannot accept that the Council was correct in withholding the information from Mr Pearson under section 30(b)(ii).

Section 27(1) – Information intended for future publication

27. The Council also withheld the information from Mr Pearson under section 27(1) of FOISA. This exemption is also subject to the public interest test and applies where information is held with a view to its publication at a date not later than 12 weeks after the date on which it is requested. The information must be held with that view when it is requested and it must be reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.
28. It will be clear from the above that a key requirement of section 27(1) is that the information must be held at the time of the request with the intention that it will be published within 12 weeks. On being asked about this, the Council advised that the important factor so far as it was concerned for information such as this was not that it was withheld for “a set period of 12 weeks” but rather that it was withheld until it was complete. No evidence was provided as to whether in the circumstances completion was expected to take more or less than 12 weeks, or for that matter as to the period within which it was customary to complete such consultation responses. In fact, the final consultation response is dated “June 2008”.



29. Given the Council's response to the investigation in relation to the period for publication, the Commissioner cannot accept that the information was held at the time of Mr Pearson's request with a view to publication at a date not later than 12 weeks after the date of the request. Consequently, he cannot accept that the information would have been exempt under section 27(1) of FOISA and is not required to go on to consider the public interest test for the purposes of that exemption.
30. The Commissioner has concluded that the information requested by Mr Pearson was held by the Council at the time of his request and that the Council was not entitled to withhold it under either of the exemptions claimed. Given that the information has since been released to Mr Pearson, he does not require the Council to take any action.

DECISION

The Commissioner finds that the Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Pearson. By incorrectly applying sections 17(1), 27(1) and 30(b)(ii) of FOISA the Council failed to comply with Part 1.

Given that the Council have now supplied Mr Pearson with the information in question, the Commissioner does not require the Council to take any action in response to these failures.

Appeal

Should either Mr Pearson or Fife 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
13 October 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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.



...

27 Information intended for future publication

(1) Information is exempt information if-

(a) it is held with a view to its being published by-

- (i) a Scottish public authority; or
- (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

(b) when that request is made the information is already being held with that view; and

(c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

(b) would, or would be likely to, inhibit substantially-

...

(ii) the free and frank exchange of views for the purposes of deliberation; or

...