

Decision Notice



Decision 148/2012 Mr Johnny Gailey and City of Edinburgh Council

Leith Waterworld site

Reference No: 201200534

Decision Date: 3 September 2012

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Rosemary Agnew

Scottish Information Commissioner

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Summary

Mr Gailey asked City of Edinburgh Council (the Council) for correspondence between it and Tesco regarding the Leith Waterworld site. Following a review, the Council notified Mr Gailey that it would neither confirm nor deny whether any information relating to the sale of the site existed or was held. Following an investigation, the Commissioner concluded that it was not entitled to do this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 16(1) (Refusal of request); 18(1) (Further provision as respects responses to requests)

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 23 December 2011, Mr Gailey wrote to the Council requesting the following information:
“...all correspondence between CEC and Tesco (or a party acting on Tesco’s behalf) regarding the Leith Waterworld site, either received or sent over the last year (1 December 2010 - 22 December 2011).”
2. The Council responded on 24 January 2012. It released some information pertaining to the site, subject to the redaction of personal data under section 38(1)(b) of FOISA. It refused to release the remainder of the information covered by his request, on the basis that its disclosure would (or would be likely to) prejudice Tesco’s commercial interests substantially and therefore section 33(1)(b) of FOISA applied.
3. On 25 January 2012, Mr Gailey wrote to the Council requesting a review of its decision. He set out reasons why he believed disclosure to be in the public interest. He did not challenge the withholding of information under section 38(1)(b) of FOISA.



4. The Council notified Mr Gailey of the outcome of its review on 22 February 2012. The Council confirmed, with reasons, that it considered section 33(1)(b) of FOISA to apply to any information withheld from Mr Gailey. In addition, the Council stated that it now wished to apply section 18 of FOISA, which allowed it to decline to state whether it held correspondence with Tesco.
5. On 20 March 2012, Mr Gailey wrote to the Commissioner, 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 Gailey 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. On 10 April 2012, the Council was notified in writing that an application had been received from Mr Gailey, as required by section 49(3)(a) of FOISA. Also in accordance with section 49(3)(a), the investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The relevant submissions received from both the Council and Mr Gailey will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 18 of FOISA – neither confirm nor deny

10. As stated above, the Council applied section 18 of FOISA following a review of its handling of Mr Gailey's request. It adhered to this position in its submissions to the Commissioner.
11. Section 18 gives a Scottish public authority the right to refuse to reveal whether information exists or is held by it in certain limited circumstances. It is crucial to the application of this provision that the authority, in its dealings with the applicant, does not in fact reveal whether the information exists or is held.



12. In this case, the Commissioner is of the view that the Council's initial response to Mr Gailey's request, dated 24 January 2012, did reveal to him whether the information he was seeking existed and was held. The Council released certain information to Mr Gailey at that point, advising him that it would not release any further information falling within the scope of his request. It confirmed that the exemption in section 33(1)(b) of FOISA was being applied to the withheld information, stating that its letter constituted a formal refusal notice in terms of section 16 of FOISA.
13. It follows from the issue of a refusal notice under section 16 – a refusal to disclose information which the authority holds and which it considers to be exempt – that the authority giving that notice holds the information to which it relates. That, in any event, was evident from the terms of the Council's letter of 24 January 2012. The Commissioner does not accept that an authority can give such confirmation to an applicant and then subsequently revert to a position whereby it refuses to confirm or deny the existence of the information in question. To do so would make no sense and, in the Commissioner's view, would risk bringing into disrepute a provision designed for a very serious purpose.
14. Although the Council was asked to explain why it considered itself entitled to apply section 18 in the circumstances, it failed to do so. It simply referred to its reliance on section 18 following the review.
15. In all the circumstances, therefore, the Commissioner finds that the Council was not entitled to apply section 18 of FOISA in dealing with Mr Gailey's request for review. She therefore requires the Council to deal with that request in accordance with section 21 of FOISA, other than by applying section 18.

DECISION

The Commissioner finds that the 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 Gailey. The Commissioner has found that the Council was not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the requested information existed or was held by it.

The Commissioner therefore requires the Council to respond to Mr Gailey's request, other than in terms of section 18 of FOISA, by 19 October 2012.

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and City of Edinburgh Council



Appeal

Should either Mr Gailey or City of Edinburgh 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.

Rosemary Agnew
Scottish Information Commissioner
03 September 2012



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.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

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