

Decision Notice



Decision 120/2012 Stonehouse Community Council and South Lanarkshire Council

Address of an establishment which is used to provide accommodation to homeless persons

Reference No: 201200512
Decision Date: 19 July 2012

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Summary

Stonehouse Community Council (the Community Council) asked South Lanarkshire Council (the Council) for the number of establishments it used to provide bed and breakfast accommodation to homeless persons and for the addresses of these establishments.

The Council disclosed information about one of the establishments it used, but withheld the details of the other, on the grounds that it was exempt from disclosure under section 30(c) of FOISA (substantial prejudice to the conduct of public affairs). The Council believed that the establishment concerned would withdraw its services if its address was disclosed, disrupting the Council's ability to meet its obligations to provide accommodation to homeless persons. Stonehouse remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold details of the establishment concerned under the exemption in section 30(c) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs)

Housing (Scotland) Act 1987 sections 29(1) (Interim duty to accommodate in case of apparent priority need); 31(1), (2) and (3) (Duties to persons found to be homeless)

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 21 December 2011, the Community Council wrote to the Council requesting the following information in relation to establishments used to provide accommodation both with and without breakfast to homeless people in South Lanarkshire:
 - a) How many establishments does the Council use and what are their addresses.
 - b) How much has been paid out to each of these establishments in the past five years including the financial year to date broken down by financial year.
 - c) Have any tenders been issued to contract with these establishments.



2. The Council responded on 19 January 2012. In response to part (a) of the request, it provided the name of one bed and breakfast establishment currently used to accommodate homeless persons, but refused to provide the address of a second provider that it uses on an occasional basis (the establishment). The Council relied on the exemption in section 33(1)(b) of FOISA for withholding this information, as it considered that disclosure would be likely to prejudice substantially commercial interests. The Council did not specify whose commercial interests would be prejudiced or how they would be prejudiced.
3. In its response, the Council also provided the Community Council with information which fully addressed parts b) and c) of its request.
4. On 25 January 2012, the Community Council wrote to the Council requesting a review of its decision. The Community Council commented that the Council had provided no justification as to why it considered the exemption in section 33(1)(b) of FOISA applied to the identity of the establishment. The Community Council asked the Council to confirm whose commercial interests were at stake, the nature of those interests, whether the necessary level of harm could be evidenced and in what way this harm would occur if the identity of the establishment were to be provided. The Community Council also asked the Council to explain where the public interest lay in relation to the withheld information.
5. The Council notified the Community Council of the outcome of its review on 22 February 2012. Having reconsidered its position, the Council indicated that it was no longer seeking to rely on section 33(1)(b) of FOISA for withholding the information. However, it now considered the identity of the establishment to be exempt from disclosure under section 30(c) of FOISA on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
6. The Council explained that it primarily uses a particular “bed and breakfast” in Stonehouse to provide temporary accommodation for homeless people, but on occasion this cannot be used and the establishment is asked to provide accommodation in those cases. The Council explained that the establishment had indicated that it would withdraw from its Service Level Agreement with the Council in relation to the provision of temporary accommodation for homeless people if its address was disclosed in response to the Community Council’s request, because the establishment considered that disclosure of the information would affect its business.
7. The Council advised the Community Council that, if the establishment were to withdraw its services, the Council would have difficulty in meeting its statutory obligations, and its services to homeless people would be disrupted. It highlighted that, when the Council last advertised, the only providers that responded indicating that they were willing to provide these services were the establishment and the bed and breakfast in Stonehouse.
8. The Council set out, in detail, its consideration of the public interest test, and concluded that the public interest lay in maintaining the exemption in this case.



9. In a letter dated 19 February 2012 (but received by the Commissioner on 14 March 2012), the Community Council stated that it was dissatisfied with the outcome of the Council's review and applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
10. The application was validated by establishing that the Community Council 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

11. On 5 April 2012, the investigating officer notified the Council in writing that an application had been received from the Community Council and gave the Council an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions.
12. A response was received from the Council on 10 May 2012. Further submissions were sought, and received from, the Council during the investigation and the Council provided the investigating officer with copies of its Service Level Agreement with the establishment and with correspondence received from the establishment.
13. During the investigation, the Community Council was also provided with a summary of the submissions made by the Council and was invited to comment on these and to provide its view on why it considered that the public interest in disclosing details of the establishment outweighed the public interest in withholding it. A response was received from the Community Council on 27 May 2012.
14. The relevant submissions received from both the Council and Stonehouse Community Council will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



Section 30(c) – Effective conduct of public affairs

16. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
17. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
18. The Council has maintained in this case that disclosure of the address (and so the identity) of the establishment would be likely to prompt its withdrawal of its services, undermining the Council’s ability to meet its obligations with respect to the accommodation of homeless persons.
19. It noted that it has a statutory duty to provide accommodation to homeless people and those threatened with homelessness by virtue of Part II of the Housing (Scotland) Act 1987. The relevant provisions are set out in the Appendix to this decision.
20. The Council explained that it currently uses two bed and breakfast establishments to provide temporary accommodation to homeless persons. A bed and breakfast in Stonehouse is used on a regular basis, and the establishment is used when the regular service provider cannot be used. The Council confirmed the number of occasions when the establishment had been used across the year to date.
21. The Council provided the Commissioner with a copy of correspondence from the establishment indicating that it did not want its details to be made public, and said that if the withheld information were released, it would cancel all agreements with the Council.
22. It also provided a copy of its Service Level Agreement with the establishment. Having reviewed this, the Commissioner accepts that the establishment is not bound to continue to provide services to the Council, and it is free to withdraw from its arrangement with the Council if it chooses to do so.
23. The Council explained that it considered there was a real possibility that the establishment would withdraw its services, and it considered that the fact that it could do so without any penalty made the likelihood of that outcome more likely than if the agreement had been more onerous or binding on the establishment.



24. It submitted that, if the establishment did withdraw from the Service Level Agreement, it would have a seriously detrimental effect on the provision of services to homeless persons. It maintained that the Council would be unable to meet its statutory obligations as the other bed and breakfast used to provide accommodation does not have the capacity to meet the full demand, or meet the needs of some homeless persons.
25. The Council concluded that its function in relation to the provision of services to homeless persons would, or would be likely to, be prejudiced substantially by the disclosure of the address of the unnamed provider as this would lead to them withdrawing their service to the Council.
26. Having considered the submissions received from the Council, the documentation setting out the views of the establishment and the terms of its agreement with the Council, the Commissioner accepts that there is a very real likelihood that if the Council were to disclose the identity of the establishment to the Community Council's information request, the establishment would withdraw from its agreement to provide services to the Council.
27. The Commissioner accepts, in the circumstances, that the withdrawal of this service provider would be likely to significantly disrupt the ability of the Council to meet its obligations with respect to the provision of temporary accommodation to homeless people. Given that the Council received few expressions of interest when it last advertised for accommodation providers to assist it in meeting these obligations, she recognises that any disruption to its service provision might not be simply resolved via the use of alternative providers.
28. For these reasons, the Commissioner is satisfied that release of the address of the establishment would, or would be likely to, prejudice substantially, the effective conduct of public affairs with respect to the Council's ability to meet its obligations to provide accommodation for homeless persons. She accepts that the Council correctly applied the exemption in section 30(c) of FOISA in this case.

Public interest test

29. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b), and so the Commissioner must now consider whether, in all the circumstances of the case, the public interest in disclosing the information outweighs that in maintaining the exemption. If it does the Commissioner must require the Council to disclose the information.

Submissions from the Community Council

30. In its submissions, the Community Council highlighted concerns about what it described as a monopolistic situation regarding the provision of accommodation for homeless persons in the area. It argued that this position could be avoided if the Council undertook regular tendering processes, and it expressed doubts as to whether the process followed when appointing the two service providers had been in line with EU procurement law and the Council's standing orders.



31. For these reasons, the Community Council submitted that the public interest lay in being told how contracts are tendered for and who they are awarded to, together with how the Council is spending its money.

Submissions from the Council

32. The Council recognised the general public interest in allowing access to publicly held information, and recognised that there can be a “number” of additional public interests in disclosing information. However, it said it was difficult to see how disclosing the information withheld in this case would meet those public interests.
33. The Council did not accept that there is a monopolistic situation with respect to temporary accommodation of homeless people, since it currently uses two providers, and has used other providers in the past. It recognised that the Community Council might have concerns about the Council’s use of its first choice bed and breakfast supplier, because of the perceived issues caused by residents, but it maintained that this did not relate to a monopolistic situation. The Council also responded to the Community Council’s claims about tendering processes, indicating that it had advertised the opportunity to provide accommodation services for these purposes in September 2010.
34. The Council considered that the disclosure of the withheld information would not contribute to the public interest identified by the Community Council. It acknowledged that there is a public interest in ensuring that contracts are awarded in line with statutory requirements and with its own standing orders, but it commented that it could not see how disclosure of the address of the establishment would demonstrate that it had met its obligations.
35. The Council explained that it had estimated the value of the contracts to be below the threshold for the application of the formal EU Procedures, and so no award notice was published. It explained the process that had been followed and indicated that it considered this to be in accordance with its standing orders on contracts. It added that, even if that had been the case that the contract had been improperly awarded, the public interest would lie in the disclosure of the process and not the provider or providers selected.
36. The Council also indicated that it did not accept that it had ‘hidden’ the process of identifying interested parties and entering into appropriate contracts with the providers in question. It maintained that it had been completely open with the Community Council about the relevant processes and provided a copy of previous correspondence with the Community Council in which it had explained how it had awarded contracts for the provision of bed and breakfast accommodation to homeless persons. The Council also noted that the expenditure involved in securing the service provision had been disclosed to the Community Council.
37. The Council submitted that the public interest lay in ensuring that it is able to meet its legal obligations, which in this case concern its duties to homeless individuals and families, and concluded, on balance, that the public interest favoured the maintenance of the exemption in this case.



Commissioner's conclusions

38. The Commissioner considered the submissions from both the Community Council and the Council regarding the public interest test.
39. When balancing the public interest, she recognised the general public interest in public authorities being transparent and accountable. This is relevant in this case because disclosure of the withheld information would identify the establishment that has received public funds for assisting the Council in meeting its obligations to provide accommodation to homeless people. This general public interest is also relevant to the extent that disclosure would enable oversight of the process followed by the Council when awarding contracts.
40. However, the Commissioner does not consider that disclosure of the address of the establishment would contribute significantly to the public interest regarding the matters raised by the Community Council. She notes, for example, that disclosure of the address alone would not offer any insight into the procurement process followed by the Council, other than to identify one of the suppliers that expressed interest and was selected.
41. Disclosure would also not identify the nature of arrangements between the Council and the establishment; show whether or not a monopolistic arrangement exists; or show why the Council uses its first choice provider and how this arrangement came into being.
42. The Commissioner notes that the Council has disclosed its expenditure with the establishment, and with other accommodation providers. It has also provided an explanation of the process followed when procuring the establishment's services.
43. In the circumstances, while the Commissioner recognises that some public interest would be served by disclosure in this case, she considers that it would contribute only to a small extent to understanding of the matters of concern to the Community Council.
44. In considering the public interest in maintaining the exemption, the Commissioner recognises that there is a significant public interest in ensuring that the Council can meet its statutory obligations, and that it is able to provide appropriate temporary accommodation to homeless persons as and when the need arises. Having accepted that disclosure in this case would be likely to cause significant difficulty for the Council in ensuring continuity of this vital service, she also finds there is substantial weight to the public interest in maintaining the exemption in this case.
45. On balance, having weighed up the arguments advanced by the Community Council and the Council, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA was not, at the time the Council notified the Community Council of the outcome of its review, outweighed by the public interest in disclosure of the withheld information.
46. The Commissioner therefore finds that the Council was entitled not to disclose the address of the establishment to the Community Council.



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 Stonehouse Community Council.

Appeal

Should either Stonehouse Community Council 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.

Rosemary Agnew
Scottish Information Commissioner
19 July 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.

...

- (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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



Housing (Scotland) Act 1987

29 Interim duty to accommodate in case of apparent priority need

- (1) If the local authority have reason to believe that an applicant may be homeless they shall secure that accommodation is made available for his occupation—
 - (a) pending any decision which they may make as a result of their inquiries under section 28;
 - (b) where the applicant has, under section 35A, requested a review of a decision of the authority, until they have notified him in accordance with section 35B of the decision reached on review;
 - (c) where, by virtue of a decision referred to in paragraph (a) or (b), the authority have a duty under section 31 to secure that accommodation of a particular description becomes available for the applicant's occupation, until such accommodation becomes available.

...

31 Duties to persons found to be homeless

- (1) This section applies where a local authority are satisfied that an applicant is homeless.
- (2) Where they are satisfied that he has a priority need and are not satisfied that he became homeless intentionally, they shall, unless they notify another local authority in accordance with section 33 (referral of application on ground of local connection) secure that permanent accommodation becomes available for his occupation.

...

- (3) In a case not falling within subsection (2), the local authority shall—
 - (a) secure that accommodation is made available for the applicant's occupation for such period as they consider will give him a reasonable opportunity of himself securing accommodation for his occupation; and
 - (b) furnish him with advice and assistance of such type as may be prescribed, in any attempts he may make to secure that accommodation becomes available for his occupation.

...