



Decision 037/2005 Mr George Bethune and East Renfrewshire Council

Request for building warrant information

**Applicant: Mr George Bethune
Authority: East Renfrewshire Council
Case No: 200501308
Decision Date: 14 October 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



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Request for building warrant information – application forms and plans relating to building warrant applications withheld – whether disclosure of the information is prohibited by or under an enactment – section 26(a) of the Freedom of Information (Scotland) Act 2002

Facts

Mr Bethune requested information held by East Renfrewshire Council (the Council) concerning two building warrants issued by the Council in relation to a neighbouring property. The Council allowed access to some of the information requested but refused to release copies of the application forms and plans on the basis that the information was exempt under section 26(a) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council claimed that disclosure of the information was prohibited by the Building (Procedure) (Scotland) Regulations 2004, a piece of legislation that was not in force at the time the request was made. This decision was upheld when Mr Bethune sought a review by the Council. Following this review, Mr Bethune asked the Commissioner to investigate his case.

Outcome

The Commissioner found that the Council had breached Part 1 of FOISA in deciding to withhold certain information concerning building warrants from Mr Bethune. The Council was wrong to rely upon section 26(a) of FOISA, which states that information must be withheld where an enactment prohibits its disclosure, on the basis that the Building (Procedure) (Scotland) Regulations 2004 were not in force at the time the request for information was refused. However, in light of the subsequent commencement of regulation 58 of the Building (Procedure) (Scotland) Regulations 2004 on 1 May 2005, the Commissioner found that the Council's application of the section 26(a) exemption under FOISA must now be upheld and accordingly did not order the Council to release the information to Mr Bethune.

The Commissioner also found that the Council had breached Part 1 of FOISA in failing to respond to Mr Bethune within 20 working days after receiving his request and his subsequent request for review.



Appeal

Should Mr Bethune or the Council wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 23 January 2005, Mr Bethune sent a request for information to the Council by e-mail. Mr Bethune required access to all information held by the Council in relation to two specific building warrants that pertained to a neighbouring property. One warrant had been approved by the Council on 21 May 2003 and the other on 30 September 2004. Mr Bethune also requested any other building warrant information relating to past or current works at that address.
2. The Council replied to Mr Bethune on 22 February 2005. The Council stated that any information that had been requested which fell under the terms of Part II of the Building Standards Register would not be released as it was exempt from disclosure under section 26(a) of FOISA. Section 26(a) exempts from release information if its disclosure is prohibited by or under any enactment. (The word "enactment" includes statutory instruments, such as the Building (Procedure) (Scotland) Regulations 2004.). The Council also relied on section 38 of FOISA to withhold the information. Section 38 relates to personal information.
3. Mr Bethune was advised that any other building warrant information relating to past or current works at the property was archived on microfiche at the Council. These works were listed in the Council's letter.
4. On 25 February 2005, Mr Bethune requested a review of the decision of 22 February 2005. He stated that he believed the grounds for refusal cited by the Council were unsound and should be reversed.
5. The Council advised Mr Bethune of the outcome of the review on 31 March 2005. The use of the section 38 exemption was not upheld on review, but the application of the section 26(a) exemption was confirmed on the basis that regulation 58 of the Building (Procedure) (Scotland) Regulations 2004 ("the 2004 Regulations") prohibited disclosure under FOISA.



6. Mr Bethune wrote to my Office on 4 April 2005, applying for a decision in relation to his request. He expressed his dissatisfaction with the Council's decision.
7. An Investigating Officer was then assigned to this case.

The Investigation

8. Mr Bethune's appeal was validated by establishing that he had made a valid information request to a Scottish public authority, and had appealed to me only after requesting that the authority review its response to his request.
9. A letter was sent to the Council on 7 April 2005, informing it that an appeal had been received and that an investigation into the matter had begun. The Council was invited to comment on the case under the terms of section 49(3) of FOISA.
10. The Council was also asked to provide supporting documentation for the purposes of the investigation. This included any information concerning the Council's use of the section 26(a) exemption. It was noted that the Council had relied upon the 2004 Regulations to justify its use of the exemption. However, the 2004 Regulations did not come into force until 1 May 2005. The Council was therefore asked to provide details of why it had relied on legislation which was not in force at the time of Mr Bethune's request.
11. The Council's response was received on 21 April 2005.

The Commissioner's Analysis and Findings

12. Under section 24 of the Building (Scotland) Act 2003, local authorities are responsible for maintaining a building standards register (the register) for the area of the authority. This register contains information in relation to applications for building warrants and amendments to building warrants, the manner in which such applications have been dealt with, and completion certificates and their acceptance or rejection. The Building (Scotland) Act 2003 states that register must be kept open for public inspection at all reasonable times.



13. The register consists of two parts:
 - Part I contains a list of applications, including details of any certificates from approved certifiers and decisions and copies of notices served under sections 25 to 30 of the Building (Scotland) Act 2003 when issued, altered or withdrawn.
 - Part II consists of copy building warrants, copy completion certificates, copies of any certificates from approved certifiers submitted in support of building warrants or completion certificates, principal drawings and specifications, and all other documents submitted to the local authority for registration in the building standards register.
14. The Building (Procedure) (Scotland) Regulations 1981 (as amended) ("the 1981 Regulations") came into operation on 30 November 1981 and were in force until they were superseded by the 2004 Regulations. The 2004 Regulations were made on 30 September 2004, laid before the Scottish Parliament on 1 October 2004, and Part I of the Regulations and regulations 30, 31, 35, 36, 37 and 38 came into force on 4 November 2004. Regulations 57 and 58 of the 2004 Regulations, which deal specifically with the building standards register, came into force on 1 May 2005.
15. The 1981 Regulations stated that a register of applications must be kept by each local authority and where an application has been lodged with the authority but no decision taken, "any person claiming to have an interest" may inspect the application and any associated plans that had been lodged. The 1981 Regulations also stated that where a decision has been taken on an application lodged with an authority, "any person showing reasonable cause" may inspect the application and any associated plans.
16. Therefore, under the 1981 Regulations, there was no general obligation upon a local authority to provide copies of building warrant applications and associated plans to the public other than where there was a statutory duty to do so (i.e. where a person could show reasonable cause). Persons who had no statutory right to have sight and/or copies of building warrant applications were therefore not entitled to require the authority to provide copies of such information. In other words, prior to 1 May 2005, a local authority could exercise its discretion in deciding whether or not to allow a person access to building warrant applications. Unless a person could show a legitimate interest the Council's stance was that it would not allow access to such documents unless it had received the consent of the owner of the property. In the case of Mr Bethune, the Council had sought the owner's consent to allow access to the documents but this had been denied.
17. The situation after 1 May 2005 is more restrictive. Regulation 58(5) of the 2004 Regulations restricts access to Part II of the register in regard to residential buildings to an "interested party", i.e. an owner, occupier, tenant or prospective tenant. Mr Bethune does not fall into this category.



18. I will now go on to consider whether the Council was correct in applying the section 26(a) exemption in FOISA to Mr Bethune's request on the basis of the 2004 Regulations.

Consideration of the use of the section 26(a) exemption

19. Although Mr Bethune had sight of documents which fell under Part I of the building standards register, he was refused access to documents that fell under the provisions of Part II. The information that is contained in Part I of the register includes the date the application was received, name and address of applicant and agent, summary of the proposal, estimated cost, date of grant of building warrant, and date of issue of completion certificate where one has been issued. The information withheld from Mr Bethune under Part II of the register includes application forms and plans, progress charts, site inspection sheets, copy building warrants relative to the building warrant applications and some related correspondence concerning the later of the two applications. This information was withheld under section 26(a) of FOISA.
20. Section 26(a) is an absolute exemption, which means that the public interest does not have to be considered when applying the exemption.
21. The Council contends that regulation 58 of the 2004 Regulations constitutes a prohibition on disclosure. Regulation 58(1) gives a general right to access to the information contained in the building standards register but this right is restricted by paragraph (3) of regulation 58.
22. Paragraph (3) of regulation 58 states that documents shall not be available for inspection or for copying in the cases to which paragraphs (4) and (5) apply.
23. Paragraph (4) of regulation 58 states that documents shall not be available for inspection or copying 'where disclosure or copying would raise security concerns but not where the owner of the building to which the documents relate has consented, in writing to that disclosure or copying.' As mentioned previously, the Council sought the owner's consent to disclose copies of the plans but this was denied.
24. Paragraph (5) of regulation 58 applies to residential buildings and states that documents contained in Part II of the register shall not be available for inspection or copying:

'where the relevant building is a residential building unless the application is by an interested party and for the purposes of this paragraph "interested party" means any owner, occupier, tenant or prospective tenant.'



25. Mr Bethune argued that regulation 58(3) should be interpreted to mean that the documents contained in Part II of the register would need to fall under both paragraphs (4) and (5) of regulation 58 for the restriction set out in paragraph (3) to apply. In other words, the relevant building would have to be a residential building with security implications for regulation 58(3) to apply.
26. The Council disagreed with Mr Bethune's interpretation of the regulation. It was argued that if the requirements of both paragraphs (4) and (5) had to be satisfied in order to justify the exemption of documents from inspection or copying, it would mean that buildings which have security concerns but which are not residential, such as banks or police stations, would not be covered by the exemption. It was argued that this would be contrary to the intended import of the legislation, and I concur with the Council's view.
27. Section 26(a) can be used by a public authority to exempt information when an enactment prohibits the release of information. There can be no discretionary element to the prohibition. In relation to Mr Bethune's case, regulation 58 of the 2004 Regulations clearly prohibits disclosure of the information that was requested which is contained in Part II of the register. Therefore, if the section 26(a) exemption had been applied after 1 May 2005, it would appear to have been applied correctly in this case. However, the Council applied the section 26(a) exemption in its refusal notice of 22 February 2005, in response to Mr Bethune's request, dated 23 January 2005. At that time, the 1981 Regulations were still in force.
28. Prior to the 2004 Regulations coming into force the Council could have exercised its discretion under the 1981 Regulations when it considered whether or not to allow access to the information requested by Mr Bethune on 23 January 2005. However, the Council decided to deny access to the information requested on the grounds that the 2004 Regulations, which were due to come into force on 1 May 2005, constituted an enactment that prohibited disclosure. Since the 2004 Regulations were passed by Parliament after FOISA came into force, the Council argued that the restrictions imposed by the 2004 Regulations took full account of any rights available under FOISA. The Council's view was that to allow Mr Bethune access to the information contained in Part II of the register would therefore be contrary to the Parliamentary intention that lay behind the 2004 Regulations.
29. The Council argued that Parliament's intention was clear when the 2004 Regulations were made and that the wording of section 26(a) of FOISA was such that it was intended to apply to all enacted legislation, not just to legislation which had been enacted and had been brought into force.



30. Bennion's *Statutory Interpretation* (4th ed., 2002) states that an item of delegated legislation, such as the 2004 Regulations, "comes into force at the beginning of the day specified in that behalf in the instrument." Therefore regulation 58 of the 2004 Regulations did not come into force until 1 May 2005, as specified in regulation 1(2) of the 2004 Regulations.
31. The fact that regulation 58 of the 2004 Regulations did not come into force until 1 May 2005 means that although the reasoning behind the Council's decision to deny access to the information may have been sound in terms of it exercising its discretion under the 1981 Regulations, the application of the section 26(a) exemption to justify withholding the information was technically incorrect. This is because the 2004 Regulations were not in force at the time the exemption was cited and therefore could not prohibit the disclosure of the information under consideration.
32. Any decision I arrive at must take into account all of the facts and circumstances that apply at the time that my decision is made. Since the 2004 Regulations are now in force, I am bound to consider them when making my decision in this case.
33. At the time of reaching my decision, the 2004 Regulations are now in force and my decision has been considered in light of this. As the law stands today, the Council has no discretion to decide whether or not to allow access to documentation that falls under Part II of the register. The 2004 Regulations, which are now fully in force, clearly state that such documentation is only available to an "interested party". As Mr Bethune does not fall within the definition of an interested party in the 2004 Regulations, he is not entitled to have sight of or copy the information contained in Part II of the register under the terms of the 2004 Regulations. Therefore, considering the Council's application of the section 26(a) exemption in light of the 2004 Regulations which are now in force, I must uphold the Council's decision not to release the information.
34. I note that Mr Bethune applied to my Office on 4 April 2005, i.e. prior to the 2004 Regulations coming into force. This suggests that if this case had been decided before 1 May 2005, then I may have been able to instruct the Council to release the information to Mr Bethune. However, even if I had been in a position to issue a decision notice before 1 May 2005, I am required by law to give public authorities at least 42 days to release information following receipt of my decision. As a result, I do not believe that the time taken to come to this decision has affected the outcome.



Responding to the applicant

35. Finally, I note that the Council replied to Mr Bethune's original request for information on 22 February 2005, one day over the statutory time limit of twenty working days for replying to an information request, as set out in section 10 of FOISA.
36. Section 10(1) of FOISA states that public authorities should comply with a request for information as soon as possible but must, in any event, comply not later than 20 working days after receipt of the request. Public authorities must ensure that they comply with requests within the statutory timeframe.
37. Similarly, when the Council responded to Mr Bethune's request for review on 31 March 2005, its response was also issued one day over the statutory timescale of twenty working days for responding to a request for review. The request for review was received by the Council on 1 March 2005, but it miscalculated the time allowed to respond. Friday 25 February 2005 was a bank holiday, as stipulated by the Banking and Financial Dealings Act 1971, but Monday 28 February 2005 was not.
38. It should be noted that local holidays outwith bank holidays are not considered to be official bank holidays and should be calculated as working days for the purpose of section 73 of FOISA. A list of official bank holidays has been provided by the Scottish Executive on its website:
<http://www.scotland.gov.uk/Publications/2005/01/bankholidays>.

Decision

I find that East Renfrewshire Council (the Council) breached Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Bethune's request. It failed to comply with section 1(1) by claiming that information could not be disclosed because of the Building (Procedure) (Scotland) Regulations 2004 (the 2004 Regulations). Regulation 58 of the 2004 Regulations was not in force at the time the information request was denied and therefore could not prohibit disclosure. In light of the subsequent commencement of regulation 58, however, I find that the Council's application of the section 26(a) exemption under FOISA must now be upheld. As a result, I am not instructing the Council to release the information to Mr Bethune.



I also find that the Council failed to comply with Mr Bethune's request for information in accordance with Part 1 of FOISA, by failing to respond to Mr Bethune within 20 working days after receiving his request, as required by section 10(1). The Council also failed to respond to Mr Bethune's subsequent request for review within the timescale set out in section 21(1) of FOISA. I do not require the Council to take any remedial steps to comply with these breaches in terms of section 49(6)(b) of FOISA.

Kevin Dunion
Scottish Information Commissioner
14 October 2005