



Scottish Information
Commissioner

**Decision 001/2008 Mr David E S Middleton and
Dundee City Council**

Investigation report

Applicant: Mr David E S Middleton

Authority: Dundee City Council

Case No: 200700015

Decision Date: 8 January 2008

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 001/2008 Mr David E S Middleton and Dundee City Council

Request for a copy of the investigation report regarding the failure of a glass pane at the Wellgate Library, Dundee – report withheld under 35(1)(g) (read in conjunction with 35(2)(e) and 35(2)(i)) of the Freedom of Information (Scotland) Act 2002 - the Commissioner ordered the Council to disclose the report

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections: 1(1) (General entitlement); (2) (Effect of exemptions); 16(1) and (2) (Refusal of request) and 35(1)(g), (2)(e) and (i) (Law enforcement)

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

Facts

Mr Middleton requested a copy of the investigation report into the failure of a glass pane at the Wellgate Library, Dundee (the Report) from Dundee City Council (the Council). The Council withheld the Report under sections 35(1)(g) of FOISA. The Council upheld this decision on review.

Following an investigation, the Commissioner decided that the Report was not exempt and ordered the Council to disclose the Report to Mr Middleton. The Commissioner also commented on certain technical breaches of FOISA by the Council.

Background

1. On 28 July 2006, Mr Middleton wrote to the Council requesting a copy of the Report.



2. The Council wrote to Mr Middleton on 30 August 2006 refusing to release the Report on the basis that it was exempt from disclosure under section 35(1)(g) (read in conjunction with sections 35(2)(e) and (i)) of FOISA. No reasons were given to Mr Middleton for relying on the exemption beyond reiterating what was contained in the actual exemption.
3. On 11 September 2006, Mr Middleton wrote to the Council requesting a review of its decision to withhold the Report. In his request for review, Mr Middleton commented that the glass pane had fallen onto the floor of the entrance foyer which is continuously in use during library opening hours. Mr Middleton also considered that the public should be made aware of the cause of the accident as many similar glass panes are installed in the library building.
4. The Council subsequently carried out a review and notified Mr Middleton of the outcome of its review on 10 October 2006. The review upheld the Council's earlier decision to withhold the Report and again failed to specify any reasons as to why the exemptions applied. However, the Council did provide Mr Middleton with the probable cause of the failure of the glass pane and reassured him that it did not believe that there was any risk to the public or staff of similar failings in the future.
5. On 27 December 2006, Mr Middleton wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA in relation to the Council's decision to withhold the Report.
6. The application was validated on 22 January 2007 by establishing that Mr Middleton 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 23 January 2007, the Council was notified in writing of Mr Middleton's application and was invited to comment on the application in terms of section 49(3)(a) of FOISA. The Council was also asked to provide my Office with a copy of the Report and to provide detailed submissions in relation to the exemptions it was relying on to withhold the Report, including a full analysis of the application of any harm test contained in the exemption.
8. The Council responded on 13 February 2007. Although the Council had been asked to provide an explanation as to why it had chosen to rely on the exemptions (and to comment on the harm test), it failed to do so and instead referred to the letter dated 10 October 2007 in which it had notified Mr Middleton of the outcome of its review. As noted above, that letter did not explain why the exemptions were being relied on.
9. At this point, the case was allocated to an investigating officer.



The Investigation

10. On 7 March 2007, the investigating officer wrote to the Council, asking it if it still wished to withhold a copy of the Report from Mr Middleton as the investigation into the accident had been completed prior to its receipt of the request from Mr Middleton. The investigating officer again asked for detailed submissions on the use of the exemptions.
11. The Council replied on 11 April 2007, confirming that it was not willing to release the Report to Mr Middleton. Instead of providing the investigating officer with reasons for the use of the exemptions, it merely referred the officer back to its letter of 10 October 2007 to Mr Middleton.

The Commissioner's Analysis and Findings

12. 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 Middleton and the Council and I am satisfied that no matter of relevance has been overlooked.
13. I will first of all consider whether the Report is exempt under section 35(1)(g) of FOISA.

Section 35(1)(g) – Law Enforcement

14. Under section 35(1)(g) of FOISA, information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by a public authority of its functions for any of the purposes listed in section 35(2) of FOISA. The Council argued that the purposes in section 35(2)(e) (i.e. to ascertain the cause of an accident) and 35(2)(i) (i.e. to secure the health, safety and welfare of persons at work) were relevant here.



15. The exemption in section 35(1)(g) is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, when considering the use of section 35(1)(g), I must consider three separate matters in all. First of all, I must consider whether the Council has a function in relation to ascertaining a cause of an accident and/or to securing the health, safety and welfare of persons at work. If I am satisfied that it does, I must then consider whether release of the Report would, or would be likely to, prejudice substantially the Council's ability to carry out one or more of those functions. Even if I am satisfied that release of the information would, or would be likely to, cause this harm, I must order the information to be disclosed unless I find that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

The Council's Functions

16. I will first consider whether the Council has a function to investigate the cause of an accident and/or secure the health, safety and welfare of persons at work.
17. The Council provides library facilities at the Wellgate Centre in Dundee. I therefore accept (although the Council did not provide Mr Middleton or the investigating officer with any information on this point) that, in line with its duties under the Health and Safety at Work etc. Act 1974, the Council has functions relating to both of these purposes.

Substantial prejudice to the exercise of those functions – the cause of an accident

18. The Report is dated 8 March 2006 and Mr Middleton made his request for information to the Council on 28 July 2006. Therefore, the investigation into the cause of this particular accident had concluded prior to Mr Middleton's request. Consequently, I cannot consider that the release of the Report would, or would be likely to, prejudice substantially the Council's ability to ascertain the cause of this particular accident.
19. However, I need to consider whether the release of the information would have a future effect and so whether it would, or would be likely to, prejudice substantially the Council's ability to ascertain the cause of an accident in future.
20. When withholding information under section 35(1)(g), public authorities must be able to demonstrate that disclosure of the information would, or would be likely to, cause substantial prejudice to the exercise of their functions, i.e. there would be a real likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is possible.



21. My Office wrote to the Council on two occasions (7 March 2007 and 18 April 2007) to request submissions on its reasons for withholding the Report. On both occasions, the Council failed to provide any reasoning, but simply reiterated the exemptions it was relying on. At no point, therefore, has the Council made any attempt to explain why disclosure of the Report would, or would be likely to, prejudice substantially the exercise of its specified functions.
22. Having read the Report in full, and in the absence of any reasoning from the Council, I find it difficult to uphold the decision by the Council to withhold the Report on the basis that it would, or would be likely to, prejudice substantially the exercise of its function to investigate the cause of an accident. There is nothing to suggest, for example, that a consultant (in this case, an independent glass consultant) would refuse to prepare such a report in future or that witnesses would refuse to cooperate with an investigation in future if the Report were to be disclosed.
23. I therefore find that the Council's application of the exemption in section 35(1)(g) (read in conjunction with section 35(2)(e)) of FOISA was not justified in this instance. Since I am satisfied that the Report is not exempt under this particular exemption, I am not required to consider the public interest test in relation to the use of this particular exemption.

Substantial prejudice to the exercise of those functions – secure the health, safety and welfare of persons at work

24. Again, the Council did not provide any submissions as to why it considered that the release of the Report would, or would be likely to, prejudice substantially its ability to secure the health, safety and welfare of persons at work.
25. In the absence of any submissions from the Council, it is difficult for me to come to the conclusion that substantial prejudice would, or would be likely to, occur. In fact, I consider that the release of the Report might, if anything, assist in the securing of the health, safety and welfare of people at work.
26. I also note that the Report itself does not identify any health and safety recommendations that should be put in place following the failure of the glass pane at the library and that, in its review response to Mr Middleton dated 10 October 2006, the Council stated that it did not believe there was any risk to the public or staff of similar failings in the future.
27. I am therefore of the view that the Council's application of the exemption in sections 35(1)(g) (read in conjunction with section 35(2)(i)) was not justified in this instance in that the release of the Report would not, and would not be likely to, prejudice substantially the Council's ability to secure the health, safety and welfare of persons at work.



28. Given that I am satisfied that the Report is not exempt under this particular exemption, I am not required to go on to consider the public interest test in relation to the use of the exemption.

Technical breaches of FOISA

29. The Council had four separate opportunities to explain why it was choosing to withhold the Report, but failed to do so.
30. Section 16 of FOISA sets out what information an applicant must be told if a public authority intends to refuse to disclose information in response to an information request. Section 16(1) is set out in full in the Appendix. In terms of section 16(1)(c) and (d), the public authority must specify the exemption it is relying on to withhold the information and, if not otherwise apparent, why the exemption applies.
31. The Council complied with its duties under section 16(1)(c) by advising Mr Middleton of the exemptions it was relying on and it paraphrasing them in its refusal notice. However, at no point did the Council attempt to explain to Mr Middleton (or, later, to the investigating officer) why the exemption applies. As noted above, section 16(1)(d) requires a public authority to explain why an exemption applies if it is not otherwise apparent. I do not consider that it is at all apparent why the exemptions in section 35 should apply and why disclosure of the Report would, or would be likely to, prejudice substantially the Council's functions as noted above. I therefore find that the Council failed to comply with section 16(1)(d) of FOISA.
32. In terms of section 16(2) of FOISA, where, as in this case, a public authority is relying on an exemption which is subject to the public interest test, the refusal notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
33. Instead of providing Mr Middleton with reasons as to why the Council considered that the public interest in maintaining the exemption outweighed that in disclosing the information, the Council merely advised Mr Middleton that it took the view that the public interest in disclosing the information is outweighed by that in maintaining the exemption. No reasons were given and so Mr Middleton – and, indeed, the investigating officer – were left none the wiser as to why the Council had chosen to maintain the exemption.
34. I therefore find that the Council also failed to comply with section 16(2) of FOISA.



Decision

I find that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in the manner in which it dealt with the information request from Mr Middleton

In withholding the Report from Mr Middleton on the basis of exemptions in section 35(1)(g), the Council failed to comply with section 1(1) of FOISA. I therefore require the Council to provide Mr Middleton with a copy of the Report within 45 days of the date of intimation of this Decision Notice.

I also find that, in failing to provide reasons as to why it was relying on exemptions in section 35(1) and in failing to provide reasons as to why the public interest in maintaining the exemptions outweighed that in disclosure of the information, the Council failed to comply with sections 16(1)(d) and (2) of FOISA. However, I do not require the Council to take any steps in relation to these particular breaches.

Appeal

Should either Mr Middleton or the 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 of the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
8 January 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.

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.

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.
- (2) Where the authority’s claim is made only by virtue of a provision of Part 2 which does not confer an absolute exemption, the notice must state the authority’s reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- [...]
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
 - [...]
- (2) The purposes are-
- [...]
 - (e) to ascertain the cause of an accident;
 - [...]
 - (i) to secure the health, safety and welfare of persons at work;
 - [...]