

Decision Notice

Decision 159/2017: Mr A and the City of Edinburgh Council

Lair records

Reference No: 201700941

Decision Date: 26 September 2017



Scottish Information
Commissioner

Summary

The Council was asked for copies of interment and/or digging book entries for named lairs. The Council withheld the information as it considered disclosure would prejudice substantially the effective conduct of public affairs.

After investigation, the Commissioner found that the Council had incorrectly withheld the information and required its disclosure.

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 effective conduct of public affairs); 57(1), (1A) and (2) (The expression "historical record")

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 1 March 2017, Mr A made a request for information to the City of Edinburgh Council (the Council). He asked for the interment and/or digging book entries for named burial lairs at Kirkliston.
2. The Council responded on 24 March 2017. It withheld the requested information under two exemptions in FOISA: section 30(c) (Prejudice to effective conduct of public affairs) and section 26(a) (Prohibitions on disclosure).
3. On 28 March 2017, Mr A wrote to the Council requesting a review of its decision. He suggested that if the Council considered that disclosure of the lair holder's details would breach their rights under the Data Protection Act 1998 (the DPA), it could redact the details.
4. The Council notified Mr A of the outcome of its review on 3 May 2017. The Council stated that it was relying solely upon section 30(c) of FOISA to withhold the requested information, and provided further explanation as to why it considered the exemption applied.
5. On 21 May 2017, Mr A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He submitted that lair and burial records had been disclosed by other authorities, crematoria and family history societies. He asked the Commissioner to uphold his complaint against the Council.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 13 June 2017, the Council was notified in writing that Mr A had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application, and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. Mr A was invited to explain why, in his view, the withheld information should be disclosed, and provided comments.
10. During the investigation, the Council was asked to clarify or expand upon aspects of its submissions.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr A and the Council. She is satisfied that no matter of relevance has been overlooked.

Historical Records

12. Sections 57 and 58 of FOISA make it clear that information in a historical record cannot be exempt by virtue of any specified sections in FOISA. For the purposes of the exemption in section 30(c) of FOISA, a record becomes a "historical record" after 15 years. The Council relied on section 30(c) to withhold the requested information. As the requested information was for lair records, the Commissioner considered that it was likely that some of these records were over 30 years old.
13. The Council was asked to comment on this point. It stated that the relevant records were stored together at a crematorium and the latest records were created in September 2017. The records are manually updated with full details of recent burials in Council cemeteries. The Council considered that section 57(2) of FOISA was applicable.
14. Section 57(2) of FOISA states that where records created at different dates are for administrative purposes kept together in one file or other assemblage, all the records in that file or assemblage are to be treated as created when the latest of those records was created.
15. The Commissioner accepts that section 57(2) is relevant, because of the way the records are kept. She is satisfied that the lair records held by the Council are not historical records as defined by FOISA, given that the last lair entry was only added recently to the Council records.

Section 30(c) – Prejudice to 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 disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

17. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances.

The Council's submissions

Proof of ownership of a lair

18. The Council explained that when a lair is purchased, the purchaser is issued with a title deed which includes their name and address to confirm ownership. If the title deed is lost, and someone wishes to lay claim to a lair, then the Council would make an initial check to determine whether the right is genuine. Lair ownership is not straightforward and a lair can only legally belong to one person. Family members will not have equal rights to a lair. The checks are based upon what knowledge the claimant has of the lair and will include questions which the deed holder would be expected to know, such as who purchased the lair (name and address), who else is buried there, and in what order.
19. In addition to completing these checks, the Council explained that it requires an indemnity from the person requesting the burial ground to be opened. This declares that the person has the right to open the grave, and that they take responsibility for the actions of Council staff in opening and interring either ashes or full coffin burials. The indemnity protects the Council in cases of future dispute. Once full burial has taken place, whether ashes or coffin, the only way they can be removed is by exhumation on order of a Sheriff. This is a complicated and expensive legal process, and of course very upsetting for the families.
20. Having consulted with other authorities, the Council submitted that "indemnity" is the procedure most used by other authorities to protect against fraudulent or unlawful use of a grave. The indemnity protects the Council and puts the onus on the applicant to identify the correct grave space.

Disclosure of lair information under FOISA

21. If the information which Mr A requested was made publicly available, the Council considered that it may facilitate the interring of bodies in wrong graves.
22. The Council stated that it did not distinguish between the ages of the records when considering whether the information could be disclosed under FOISA. The Council submitted that its reason for withholding the information is not linked specifically to it being personal data but more to the fact that the lair details provide a record of transaction which can be used to prove or verify current ownership.
23. The Council confirmed that it holds contact details of the original purchaser of the lair, but this information may not be up to date and finding the right owner is not always straightforward.
24. Mr A commented that some of the information in a lair record could be obtained from a headstone. In response, the Council stated that (when assessing a claim) it does not solely seek information about the deceased that could be obtained elsewhere, but also additional contextual information.

25. The Council provided the Commissioner with a copy of a burial record. The Council explained that it does not permit members of the public to view interment records by visiting the Council offices.

Harm in disclosure

26. The Council considered that disclosure of the type of information requested by Mr A would substantially harm its ability to ensure that graves within the cemeteries it manages are correctly reopened. The Council could not provide definitive examples of harm that had occurred to its organisation following an incorrect claim of lair ownership. It considered that the current system in place is largely successful in preventing fraudulent or mistaken burial.
27. The Council provided examples of two cases that had reached the Scottish Courts which, in its view, evidenced the impact of both the non-disclosure and disclosure of this type of information.
28. The Council considered that disclosing the information would result in an “unwitting free for all”, when members of the public could lay claim to a grave in good faith without actual legal ownership. Disclosure would mean that individuals would have access to all the necessary information presently used to verify a claim. It argued that making such information publicly available would be comparable to publishing details of a bank card and pin number.

Mr A's submissions

29. Mr A noted that other authorities had disclosed lair information. He argued that if the information is exempt from disclosure, no other organisation (such as family history societies) would be able to publish such information.

The Commissioner's view

30. The Commissioner has considered the submissions from both parties carefully. She notes that the Council's arguments for section 30(c) of FOISA focus on its view that disclosure would enable an individual to wrongfully lay claim to a lair, which could then lead to a burial in the wrong lair, and that this could result in court action against the Council.
31. The Council has procedures in place to check ownership of lairs, as detailed above. The Council has not presented a clear explanation as to how an individual who has obtained an interment record could successfully prove that they had a legal right to a lair, on the basis of that information alone. An interment record does not seem to contain the specific details required by the Council to prove ownership. The Commissioner does not accept that the Council has explained or evidenced to her how disclosure of an interment record would in itself lead to an incorrect claim of ownership.
32. In addition, the Council has stated that it requires an individual without the lair title deeds to provide an indemnity to protect the Council against any future claim for wrongful burial. The Commissioner considers that, if anything, this weakens the Council's argument that disclosure of lair information could encourage fraudulent claims of lair ownership: if an individual did use the lair information to lay claim to a lair they did not rightfully own and provided an indemnity, then the Council would be protected against any future court action regarding a wrongful burial.
33. The Council stated that other authorities have a similar indemnity process, which forms part of the checks to ensure that rightful ownership of a lair is proved.
34. In the Commissioner's view, the indemnity process *protects* the Council against any claim for wrongful lair ownership, which is separate from the issue of *preventing* claims for wrongful

lair ownership. The Commissioner considers that the Council has put in place measures that would deter wrongful claims, but such measures can never prevent all wrongful claims, no matter if an individual had access to an interment record or not.

35. The Commissioner is aware that other authorities have disclosed lair records, as noted by Mr A. She is not aware of any claims of wrongful lair ownership, following disclosure of lair records.
36. The Commissioner is not satisfied that the Council has provided convincing arguments as to why disclosure of an interment record would, in itself, enable an individual to rightfully claim ownership of a lair.

The Commissioner's conclusions

37. In conclusion, the Commissioner is not satisfied, on the basis of the submissions put forward by the Council, that disclosure of the withheld information would, in itself, enable an individual to successfully lay claim to a lair that they did not own. Therefore, the Commissioner does not consider that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs, as required if information is withheld under section 30(c) of FOISA. She does not uphold the Council's reliance upon this exemption.
38. Given that the Commissioner does not accept that section 30(c) applies, she is not required to consider the public interest test in section 2(1)(b) of FOISA.
39. The Commissioner requires the Council to disclose the withheld information to Mr A. In disclosing the requested information, the Council may withhold any personal data relating to lair holders disclosure of which would breach the DPA.

Decision

The Commissioner finds that the City of Edinburgh Council (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 A. The Council wrongly withheld information under section 30(c) of FOISA.

The Commissioner therefore requires the Council to disclose the requested information, by Friday, 10 November 2017, with the exception of personal data which, if disclosed, would breach the Data Protection Act 1998.

Appeal

Should either Mr A or the Council wish to appeal against this decision, they have the right to 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

26 September 2017

Appendix 1: 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.

57 The expression “historical record”

- (1) For the purposes of this Part, a record becomes a “historical record” in accordance with subsections (1A) to (1C).

- (1A) A record becomes one at the end of the period of 15 years beginning with 1st January in the calendar year following the date on which the record is created.

...

- (2) Where records created at different dates are for administrative purposes kept together in one file or other assemblage, all the records in that file or assemblage are to be treated for the purposes of this Part as created when the latest of those records is created.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info