

Decision Notice

Decision 136/2016: Mrs Y and Glasgow City Council

Motor assessor's report

Reference No: 201600171
Decision Date: 27 June 2016



Scottish Information
Commissioner

Summary

On 2 September 2015, Mrs Y asked Glasgow City Council (the Council) for the name of an independent motor assessor and a copy of the assessor's report.

The Council withheld the report in terms of section 36(1) of FOISA (as information to which a claim of confidentiality could be maintained in legal proceedings). Following a review, Mrs Y remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had responded to Mrs Y's request for information in accordance with Part 1 of FOISA. The Council was correct to withhold the information under section 36(1). She did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of environmental information); 5(1) (Duty to make available environmental information on request)

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.

Background

1. On 2 September 2015, Mrs Y made a request for information to the Council. The information requested was the name of an independent motor assessor and the assessor's report. This report related to damage sustained by Mrs Y's car.
2. The Council responded on 1 October 2015. The Council explained that the report was prepared for the Council by Strathclyde Collision Investigations Division (SCID). The Council withheld the report under section 36(1) of FOISA as it had been received by the Council's claims section solely as a result of an intimation of a claim for compensation against the Council. The Council's view was that the public interest in the disclosure of this information did not outweigh the public interest in maintaining confidentiality.
3. On 9 November 2015, Mrs Y wrote to the Council requesting a review of its decision. Mrs Y request for review raised other issues about the inspection report which are not considered in this decision notice.
4. The Council notified Mrs Y of the outcome of its review on 8 December 2015. The Council upheld its initial decision to withhold the SCID report under section 36(1) of FOISA.
5. On 27 January 2016, Mrs Y applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mrs Y stated she was dissatisfied with the outcome of the Council's review because the Council withheld the information she had requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mrs Y 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 19 February 2016, the Council was notified in writing that Mrs Y had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information 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 or the EIRs it considered applicable to the information requested.
9. During the investigation, on 17 May 2016, the Council disclosed the name of the assessor to Mrs Y. This disclosure was made by the Council to Mrs Y as the person involved in the claim, and therefore was not technically a disclosure in terms of FOISA. Nevertheless, the Commissioner will not consider whether the name of the assessor was correctly withheld by the Council at review.
10. By way of background, this case relates to damage to Mrs Y's car. The Commissioner makes no comment on any liability and nothing in this decision should be read as a finding or a comment on any such liabilities. The Commissioner's remit is limited to whether the Council complied with Part 1 of FOISA (or the EIRs) in its review response to Mrs Y.

Commissioner's analysis and findings

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

FOISA or the EIRs

12. Under section 1(1) of FOISA, a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. Similarly, regulation 5(1) of the EIRs creates a duty on public authorities to make environmental information available upon request.
13. The Council dealt with Mrs Y's request under FOISA. The Council was asked if it had considered whether Mrs Y's request fell to be dealt with under the EIRs, rather than FOISA. The Council confirmed that it had considered whether to treat the request for a copy of the SCID report under FOISA or under the EIRs.
14. The Council explained that to establish whether the information requested was environmental information, the content of the report was considered. The report detailed an assessment of damage to a motor vehicle. Accordingly, the subject matter of the request was information concerning vehicular damage. Reference to a pothole was only in the context of determining the nature and cause of the damage to the car. Had the subject matter of the report been the pothole, then the Council would have treated the request under the EIRs.

15. The Council submitted that the information contained in the report did not fall within the definition of “environmental information” contained in regulation 2(1) of the EIRs. In particular, car damage (being the subject matter of the report) does not constitute (i) state of the elements; (ii) factors affecting or likely to effect the elements of the environment; (iii) measures and activities affecting or likely to affect the elements of the environment; nor (iv) the state of human health and safety.
16. The Commissioner agrees with the Council and is satisfied that the information covered by this request is not environmental information, as defined in regulation 2(1) of the EIRs. The Council was therefore correct to consider the request solely in terms of FOISA.

Section 36(1) - Confidentiality

17. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council withheld the motor assessor’s report under this exemption.
18. Among the types of communication which fall within this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
19. Communications *post litem motam* are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s, or prospective opponent/s, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
20. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
21. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
22. The Council explained that the report was commissioned and produced on behalf of the Council in response to a claim made by Mrs Y to be reimbursed for damage caused to her car which she claimed was caused by a pothole on a road for which the Council is responsible. The Council explained that the claim had been formally logged with the Council before the report was commissioned. Accordingly, it was the Council’s position that “litigation privilege” applied to the report as it fell within the category of “documents created in contemplation of litigation” and forms an “expert report prepared on their behalf,” but does not constitute “routine accident reports prepared as a matter of course at the time of, or shortly after, an accident” (this was with reference to the Commissioner’s Guidance¹ on this exemption). The report was commissioned five months after the accident.

¹ http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decision_Listing.aspx

23. From the information supplied by the Council and Mrs Y, the Commissioner accepts that the Council was reasonable in anticipating litigation (in the sense of a claim against it) and accepts that the report was prepared in contemplation of litigation.
24. Information cannot be privileged unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed. For this to be the case, the information must possess the quality of confidence at that time, i.e. at least up to the point at which the authority carries out a review of its response to the information request and communicates the outcome to the requester.
25. The Commissioner considered whether the confidentiality of the information in the report was compromised by the emails which the Council sent to Mrs Y, which provided her with some information about the assessor's conclusions. Having studied the emails (which were marked "without prejudice"), and the submissions of both the Council and Mrs Y, the Commissioner is satisfied that the content of the report has not been disclosed by the Council in such a way as to result in the loss of the quality of confidence, and that the withheld information has not been made public, either in full or in summary.
26. The Commissioner is therefore satisfied that the information withheld by the Council was prepared in contemplation of litigation and falls (and fell, at the time the Council dealt with the information request and request for review) within the scope of section 36(1) of FOISA.
27. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure).

Public interest test

28. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds: see, e.g., the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 482*².
29. The Council accepted that there is a general public interest in authorities being open and transparent, but believed there was a greater public interest in ensuring the Council's right to:
 - (i) investigate claims fully without investigation material being disclosed; and
 - (ii) prepare fully for potential litigation, including seeking independent, expert analysis of the evidence to determine the extent of any potential liability in order to protect public funds.
30. The Council argued that if such investigations were to be disclosed to the claimant or public outwith normal court procedure, this could inhibit the Council from preparing a robust defence to claims of this nature. On balance, therefore, it was the Council's position that the public interest in disclosure of the information was outweighed by the public interest in maintaining the exemption in section 36(1) of FOISA.

² <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

31. In her application to the Commissioner, and her communications with the Council, Mrs Y argued that there is a public interest in transparency. She also put forward personal reasons for wanting the information. For example, she believed the damage sustained by her car was caused by a pothole, but the Council seemed not to believe this. She said that she had evidenced her view with photographs and information about her vehicle which she had supplied to the Council. Therefore, she believed that there was a public interest in making available the independent report so she could assess why the Council did not accept her evidence. The Commissioner has taken Mrs Y's argument to focus on issues of transparency and accountability; i.e. that disclosure of the report would allow Mrs Y to understand better the Council's position and decisions in relation to her claim.
32. The Commissioner has considered the public interest arguments and she accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. She acknowledges that disclosure of the withheld information would contribute to transparency and accountability in this context. However, on balance, the Commissioner has concluded that in this case there is a greater public interest in allowing the Council to prepare fully for litigation, without these preparations being open to examination by the other party.
33. The Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1) of FOISA and that the Council was correct in withholding the information.

Decision

The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs Y.

Appeal

Should either Ms Y 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.

Margaret Keyse
Head of Enforcement

27 June 2016

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.

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

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