

Court of Session narrows the scope of Freedom of Information in Scotland

Overview

In a recent decision against the Scottish Information Commissioner ("**SIC**"), the Court of Session has effectively narrowed the meaning of the term "information" under the Freedom of Information (Scotland) Act 2002 ("**FOISA**") and raised the issue of who is an "applicant" under freedom of information legislation.

Appeals were brought by Glasgow City Council ("**GCC**") and Dundee City Council ("**DCC**") against decisions of the SIC in relation to requests for information made by MacRoberts Solicitors ("**MacRoberts**") on behalf of Millar & Bryce ("**M&B**"). The facts of the appeals are closely related and as a result the Court heard both cases together.

The Facts

The Glasgow City Council Case

On 17 February 2005 MacRoberts sent various requests to GCC requesting information on behalf of its clients. MacRoberts did not tell GCC at this stage who its clients were. MacRoberts requested copies of all notices served under various building and planning legislation since 17 February 2005. GCC failed to respond within 20 days and MacRoberts then requested a review under FOISA. When the Council failed to respond to the request, MacRoberts approached the Commissioner.

On 31 May 2005, the SIC's office contacted GCC, giving them written notice of the applications by MacRoberts and inviting GCC's comments. GCC claimed that under FOISA there was no obligation for them to release the information. They sought to rely on section 25(1) which states that information will be exempt if it can be reasonably obtained by other means. GCC ran a scheme whereby it could provide customers with a Property Enquiry Certificate ("**PEC**") on request for a fee. The information requested by MacRoberts could be found on these PECs.

Further, GCC claimed that under section 33(1) its commercial interests would be prejudiced by giving away such information for free, as a substantial income was obtained through the PEC service. To allow MacRoberts access to the information without charge would mean that there was no longer a requirement for such a service.

The SIC eventually decided that the information was not exempt as MacRoberts had requested *copies* of the notices and therefore the PECs would not satisfy this request. In any case, to obtain all the information under the publication scheme, a PEC would be required for each of the 300,000 houses in Glasgow. The cost of ordering so many PECs would have been in excess of £18million and therefore it could not be said that the information was available under the publication scheme.

The Dundee City Council Case

MacRoberts wrote to DCC requesting similar information as in the GCC case on behalf of M&B. DCC refused the request under section 33(1) of FOISA on the basis that it would substantially prejudice its commercial interests. MacRoberts requested a review of this position but DCC still refused to disclose the information.

MacRoberts appealed to the SIC and DCC was then notified of the applications and invited to submit its comments. DCC maintained that, as the requests had in effect come from M&B to enable them to extend their version of the PEC service to Dundee, this would put M&B in direct competition with DCC. Therefore releasing the information under FOISA would substantially prejudice DCC's commercial interests.

The SIC office issued its decision on 15 August 2007 and re-iterated what had been said in the GCC case.

Both Councils appealed the decision of the SIC.

The Decision of the Court

In reaching its decision, the judge raised important questions about the definition of "information" under FOISA as well as the meaning of "applicant".

Information

MacRoberts had requested from both Councils copies of the statutory notices i.e. documents rather than the information contained within those documents.

FOISA provides access to "information recorded in any form". There is a clear distinction between the information itself and the record in which it is contained, for example a document. FOISA provides a right of access to information, but it does not follow that an applicant has a right of access to the documentation in which it is contained.

The Court took the view that where a request does not detail fully the information requested, but instead refers to the document within which the information can be found, as was the case here, it is reasonable to take the view that it is the *information* and not the document itself which is relevant and should be provided.

Applicant

The second important point addressed by the Court concerned the fact that MacRoberts was acting as an agent on behalf of M&B. The SIC had not taken this into account when coming to its decision.

Under FOISA, information will be exempt from disclosure if it can reasonably be obtained by the applicant other than by a request under the legislation. By ignoring MacRoberts' status as an agent, the SIC failed to have regard to the fact that M&B as a private search company could otherwise obtain all the information it requires from PECs and from searching public records.

Further, the Court went on to say that certain provisions of FOISA make it necessary for the principal and not the agent to be regarded as the applicant. The Judge concluded:

1. the requests were invalid as they were not requests for "information" and MacRoberts had failed to disclose the true applicant;
2. the SIC was incorrect to reach his decision on the basis that copy notices constituted information under FOISA, they were merely documents; and
3. the SIC had failed to take into proper account the fact that the information was available through the Councils' publication schemes, and by their nature, M&B had access to the information.

Comment

This case illustrates a significant shift in dealing with freedom of information requests. It has narrowed the definition of "information" under FOISA and has made it easier for public authorities to hold back information by providing summaries of what is contained in any documents, rather than providing copies, albeit redacted in some cases. According to the judgement, "the right is to be given the information, rather than a particular record (or copy of the record) that contains it". This seems to follow the rationale used by the English courts in the recent data protection case *Ezsias v The Welsh Ministers* which potentially narrowed the subject access right.

It is also important to note that for a request for information under FOISA to be valid, it must disclose the name of the applicant. The SIC must take a subjective view of any application on the basis of the nature and circumstances of the applicant and he will be unable to do so if the agent fails to disclose his principal at the time of the request. If it is unclear who the principal is, the SIC should make further enquiries to establish this.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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