Requests for ‘copies’ and the ‘true identity’ of applicants — does it matter?

In September 2009, the Inner House of the Court of Session issued its decision in the case of Glasgow City Council and Dundee City Council v the Scottish Information Commissioner which appeared to have wide ranging implications for FOI practice.

The Court’s conclusion on the underlying information requests — which were found to be invalid because they requested copies of documents (as opposed to ‘information’ more generally) and because they were made by solicitors on behalf of an unnamed client — would have surprised many FOI practitioners. However, a closer reading of the decision demonstrates that the implications of the Court’s conclusions may not be quite as wide-ranging as originally envisaged.

This certainly appears to be the view of the Scottish Information Commissioner (the ‘SIC’), who has now (in January 2010) published guidance setting out his interpretation of the Court’s decision, and the lessons he believes public authorities and applicants should draw from it.

Background to case and the Court of Session’s decision

In 2005, the Scottish law firm MacRoberts wrote to Glasgow City Council and Dundee City Council requesting copies of certain types of statutory notice held by the authorities which related to properties within their respective areas. The requests stated that they were made ‘on behalf of a client’, though the client was not named anywhere in the request. It was later discovered that the client was the private title search firm Millar & Bryce.

Both Councils refused to disclose under Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA) because they said exemptions applied to the information. The Council argued that section 33(1)(b) FOISA applied, because of the risk of substantial prejudice to their commercial interests. This was on the basis that the requested notices are used to prepare Property Enquiry Certificates (‘PECs’), the sale of which is a significant source of revenue for the public authorities.

Glasgow City Council also claimed that the requested information was exempt under section 25(1) (‘information the applicant can reasonably obtain otherwise than by requesting it’) because the Council’s publication scheme included PECs. The Council argued that, since MacRoberts could obtain all the information contained in the statutory notices by purchasing a PEC for every property in Glasgow, the information in the notices was otherwise obtainable by them (notwithstanding that that approach would have cost around £18.6 million).

Following an investigation, the SIC concluded that the information was not subject to any exemptions, and ordered the Councils to provide MacRoberts with copies of the notices. Both Councils appealed to the Court of Session.

The decision of the Inner House covered a number of issues raised in the course of the appeal, several of which may be relevant for future cases. The points on which the appeal ultimately turned, however, were the Court’s conclusions that MacRoberts’ information requests were not valid in terms of section 8(1) FOISA.

Section 8(1) FOISA

Section 8(1) FOISA requires that a request for information:

a) is in writing (or some other permanent form);

b) states the name of the applicant and an address for correspondence; and

c) describes the information requested.

The Court reached the view that the request did not fall within this definition because the requests:

1. asked for copies of documents (which was not the same as ‘describing’ the information requested under 8(1)(c)); and

2. were made on behalf of an unnamed person (and so did not provide the name of the applicant as required by 8(1)(b)).

(Continued on page 12)
(Continued from page 11)

It is those parts of the decision that are discussed in the SIC’s recently published guidance (available on the SIC’s website www.itspublicknowledge.info)

Requests for ‘copies’ of documents

The Court’s decision that MacRoberts’ requests were not valid because they requested copies of documents stems from the distinction drawn between ‘information’ and ‘records’ that contain information. According to paragraph 43 of the judgment, “[w]hat a person can request, in terms of section 1(1) FOISA, is the information which has been recorded, rather than the record itself. The right conferred by section 1...is therefore to be given the information, rather than a particular record (or a copy of the record) that contains it.

“Put shortly, [FOISA] provides a right of access to information, not documentation.”

That this is a departure from many practitioners’ understanding of how freedom of information operates should be obvious, given that most public authorities are likely to have received and complied with a large number of requests for copies of specific documents.

The SIC’s guidance notes that the House of Lords, in the case of Sugar v BBC, described a request (under the UK Freedom of Information Act 2000) for a copy of an internal BBC report as ‘a request for information that was properly made’. Indeed, the Inner House itself previously considered an appeal stemming from requests for copies of documents without ever casting any doubt on the validity of those requests: in Scottish Ministers v the Scottish Information Commissioner, the requests sought, among other things, ‘notes of meetings’, ‘all paperwork’ and ‘all correspondence’.

Why then did the Inner House reach the conclusion it did in Glasgow City Council?

One analysis is that the Court’s distinction between documents and information reflects Glasgow City Council’s argument that the information contained in the statutory notices sought by MacRoberts could be obtained through the purchase of PECs. In other words, the Council wanted to provide the information contained in the requested documents without providing the documents themselves. The prohibitive cost of purchasing the required number of PECs gave the Council a strong incentive to want to insist that MacRoberts use that route to obtain the information (and MacRoberts’ clients a strong incentive to want copies of the actual notices).

It was in this specific context that the Court felt the need to consider whether FOISA created a right to be provided with particular documents, or simply with information that might be contained in those documents. With that complexity in mind, it is perhaps easier to understand why the Court took the approach it did.

MacRoberts’ insistence on being provided with copies of the notices themselves may go some way to explaining why the Court decided that the requests were not sufficiently clear to be valid, rather than simply deciding that Glasgow City Council was entitled to choose how to provide MacRoberts with the information contained in the notices. In particular, MacRoberts’ refusal to be content with an entitlement to receive the relevant information through the PEC route perhaps created sufficient confusion to cast doubt on what exactly it was they were seeking.

In light of these peculiar (if not unique) complexities, it is perhaps unlikely that the decision will have the wider application to other cases that practitioners may first have thought. This point is illustrated most obviously by paragraph 45 of the Court’s decision, which states that “where the request does not describe the information requested...but refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant.”

The SIC’s new guidance is built around the likelihood that most cases involving requests for copies of documents will fall within that ‘reasonably clear’ category. It explains that “[s]ection 8 of FOISA provides that an applicant must describe the information requested. The purpose of this description...is to allow a public authority to identify and locate the information.

“However, FOISA does not prescribe how the information sought must be described. It is obvious that it is possible to describe information by reference to documents; the Court of Session recognised this in the Glasgow City Council case...a reference to a specific document is a commonplace way of describing the information sought and can be of assistance to an authority in identifying and locating the information.”

In most cases, it is likely to be reasonably clear that an applicant who
The guidance also reminds public authorities of their duty, under section 15 of FOISA, to provide advice and assistance to applicants. This obliges public authorities to advise an applicant who has made an invalid request on how to make a valid one. In addition, the guidance recommends a ‘belt-and-braces’ approach for FOI applicants, suggesting that they phrase requests so as to ask for, for example, “the information contained in the correspondence between the Council and Company A”, rather than copies of that correspondence itself.

Identity of the ‘true applicant’

The second key branch of the Court’s decision — that MacRoberts’ requests were invalid because they did not disclose the identity of their client — may also have limited application outside the particular circumstances of the case.

According to the decision, the identity of the true applicant would, among other things, be relevant when considering whether the information sought was ‘reasonably obtainable’ by that specific applicant for the purposes of section 25(1) FOISA. The Court also referred to the general principle that something done by an agent should be treated as the act of the person instructing them. Since the requests stated that MacRoberts were acting as agents for a client, but did not name that client, they had not complied with the section 8 requirement to give the applicant’s name.

“The SIC’s guidance notes that this problem should be avoided in future as long as applicants making requests on behalf of another person specify who that person is. Alternatively, anyone who did not want to be named in a request could have someone else make it on their behalf, as long as the request makes no mention of there being anyone ‘behind the scenes’, i.e. the person making the request would be the applicant.”

Conclusion

The SIC’s guidance provides both applicants and public authorities with valuable insight into the approach he intends to take in future to the issues raised in the Glasgow City Council decision.

While parts of the guidance may seem to depart from aspects of the Inner House’s decision, a close reading of the two documents reveals a more consistent approach.

Whether the Inner House regards the SIC’s guidance as consistent with its decision remains to be seen. Indeed, it may not be long before an authority that has interpreted the decision more widely challenges the SIC’s approach in court.