

Decision Notice 107/2020

Submissions and communications relating to Decision Notice issued by Commissioner

Applicant: The Applicant

Public authority: Aberdeenshire Council

Case Ref: 201901344



Scottish Information
Commissioner

Summary

The Council was asked for a submission it made to the Commissioner in a specific case, and the communications from the Commissioner to the Council that this was in response to.

The Commissioner investigated and found that the Council had wrongly withheld some information under section 30(c) of FOISA. He also found that the Council had failed to fully comply with section 1(1) of FOISA, in only identifying some information falling within the scope of the request after his investigation had started.

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)

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 11 November 2018, the Applicant made a request for information to Aberdeenshire Council (the Council). He made reference to an email he had been sent by the Council on 12 October 2018, which referred to a submission made by the Council to the Commissioner in response to a specific case. The information requested was a copy of that submission and a copy of the communications from the Commissioner to the Council that the submission was in response to.
2. The Council responded on 28 November 2018. It had consulted with the Commissioner's office (this is addressed in more detail below) and refused to provide the information requested as it considered this to be exempt from disclosure in terms of section 30(c) (Prejudice to effective conduct of public affairs) of FOISA, taking the view that the public interest favoured non-disclosure. As the investigation (to which the request related) was ongoing, the Council believed disclosure at that stage would substantially prejudice the formal process involved for that, and future, investigations. In the Council's view, disclosure would deter parties from providing comprehensive submissions to the Commissioner in future, which in turn would reduce the quality of the Commissioner's investigations and the decisions reached.
3. On 12 January 2019, the Applicant wrote to the Council, requesting a review of its decision on the basis that, as the Commissioner's investigation was now complete and the Decision Notice published, the argument that the case was ongoing was no longer valid. He argued that the information related to the Council's submissions of evidence to a judicial process, where there was a strong public interest in its disclosure, and so the Council should have had no expectation that the information would be withheld. He further argued that, while the Commissioner's Decision Notice gave the gist of the Council's submissions, it was impossible to reconstruct the Council's arguments from the decision. For these reasons, he believed the Council's refusal did not fully address the public interest in disclosure.

4. The Council notified the Applicant of the outcome of its review on 11 February 2019, fully upholding its original decision. It concluded that the information requested should not have been disclosed at the time of the request, or indeed subsequently after the appeal was concluded, as to do so would likely deter public authorities from providing comprehensive submissions to the Commissioner in future.
5. On 11 August 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because it failed to show how and why disclosure of the information would be likely to substantially prejudice the effective conduct of public affairs. He provided arguments in support of his view, which are set out later in this Decision Notice. The Applicant was further dissatisfied that, in his view, the Council had failed to fully address the public interest arguments made in his request for review.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 27 September 2019, the Council was notified in writing that the Applicant 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 to answer specific questions. These focussed on the Council's justification for withholding the information under section 30(c) of FOISA, including the public interest. The Council was also asked to provide confirmation of the information withheld from the Applicant.
9. As the Council was withholding the information under an exemption in FOISA which is subject to the public interest, the Applicant was also invited to submit any further comments on the public interest in disclosure of the information.
10. The Council provided submissions to the Commissioner along with the information withheld from the Applicant. In addition, it provided the Commissioner with a copy of a further disclosure to the Applicant on 31 October 2019, in which it re-released information previously disclosed to him.
11. On 11 December 2019, following the issue of the Court of Session Opinion [2019] CSIH 57¹, which considered the Commissioner's decision in the case to which the information request related, the Applicant provided further comments on the public interest in disclosure of the information.
12. The Council was invited to provide any further submissions on disclosure of the information. In response, the Council confirmed its reliance on section 30(c), and indicated that some of the information was also being withheld as personal information. In light of this, the Council was asked to provide full submissions justifying the withholding of any personal information under the exemption in section 38(1)(b) of FOISA.

¹ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0>

13. The Applicant was also invited to comment on his legitimate interest in accessing any personal information being withheld under section 38(1)(b).
14. Both parties provided further submissions to the Commissioner.
15. The Applicant subsequently confirmed he was raising no dissatisfaction with the personal data withheld under section 38(1)(b).

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.
17. Given that the Applicant confirmed he was raising no dissatisfaction with any personal data being withheld under section 38(1)(b), the Commissioner will not consider this matter further within this decision notice.

Whether the Council identified all the relevant information

18. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
19. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
20. In its submissions to the Commissioner, the Council explained it was not necessary to undertake an extensive search, given that the request related only to the Council's submissions in respect of a specific previous investigation. It submitted that the officers responsible for drafting and submitting the response in this case were asked to provide the documentation identified and considered for disclosure.
21. On examination of the withheld information provided to the Commissioner, it was clear to the Investigating Officer that some information, dating back to the start of the Commissioner's previous investigation (to which the request related), appeared to have been omitted. The Council was asked to give further consideration to the information it considered to fall within scope of the request, and resubmit that to the Commissioner. The Council subsequently provided the Commissioner with a revised set of withheld information.
22. In terms of the scope of the request, the Council confirmed that it did not consider certain information to fall within scope, namely:
 - any communications which comprised acknowledgements, or which concerned requests for extensions to submission deadlines, given that none of these communications sought, or provided submissions;

- any information post-dating the email referred to in the request (i.e. the email sent to the Applicant by the Council on 12 October 2018), as any such correspondence would have been created after that email.
23. For some of the further information identified, which had already been disclosed to the Applicant during the previous investigation (to which the request related), the Council was asked if it wished to rely on section 25(1) (Information otherwise accessible) of FOISA for this information, given that the Applicant already had access to that information.
 24. In response, the Council took the view that the request related solely to the Council's submission, lodged with the Commissioner, in respect of the previous investigation. Noting that the Investigating Officer took a different view, in that the scope of the request was wider, the Council maintained that this was not the information that the requester was actually seeking in terms of his request.
 25. The Council confirmed it did not wish to rely on section 25(1) of FOISA for the information previously disclosed to the Applicant. Instead, it provided the Applicant with a further copy of this information on 31 October 2019, acknowledging that the information may have fallen within scope of the request and apologising for the omission.

The Commissioner's views

26. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Council had taken adequate, proportionate steps in the circumstances to identify and locate all of the information it held that fell within the scope of the request.
27. In terms of the scope of the request, the Commissioner does not concur with the Council's view that the request related solely to the Council's submission, lodged with the Commissioner, in respect of the previous investigation. The request itself is clear, in that it seeks not only the Council's submission but also the communications from the Commissioner that this was in response to.
28. Neither does the Commissioner agree with the Council's view that some of the further information identified, and already disclosed to the Applicant during the previous investigation, did not fall within scope. This information was attached to the Council's submissions to the Commissioner in the previous investigation and so must be considered as part of those submissions, notwithstanding its earlier disclosure to the Applicant.
29. However, the Commissioner does concur with the Council's position, as set out in paragraph 22 above, that the information described in that paragraph does not fall within scope, for the reasons stated.
30. In conclusion, the Commissioner finds that, by interpreting the scope of the request too narrowly, the Council failed to initially identify all of the information falling within scope, and so failed to comply with section 1(1) of FOISA.

Section 30(c) of FOISA – Prejudice to effective conduct of public affairs

31. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

32. 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 applying 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.
33. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

The Applicant's submissions

34. In his application to the Commissioner, the Applicant submitted that the gist of the Council's argument was that disclosure of the information would inhibit public authorities from providing submissions to the Commissioner in future investigations, yet it had failed to explain how and why disclosure of this specific information would be likely to cause substantial prejudice to the effective conduct of public affairs. He took the view that the Council was claiming there was a class exemption for all information of this nature.
35. In the Applicant's view, the information was supplied by the Council to the Commissioner in the expectation that it might be referred to in a Decision Notice, or as part of a settlement process, and as such, there was no expectation of confidentiality surrounding its content.
36. On 11 December 2019, the Applicant submitted further comments on the public interest in disclosure of the information. These focussed on whether the Opinion of the Court of Session, recently issued in respect of a decision by the Commissioner concerning the case to which this request related, increased the public interest in disclosure of the information.
37. Further to this, the Applicant argued that the Council's review outcome appeared to claim section 30(c) as a class exemption, whereas previous decisions by the Commissioner (and the Court of Session) did not support section 30(c) class exemptions. In the Applicant's view, the Council's review outcome did not explain how disclosure of communications which are directed towards establishing facts can inhibit public authorities from wishing to ensure decisions by the Commissioner are factually correct, and whether there was any aspect particularly "chilling" in the requested information.
38. The Applicant further submitted, on 13 February 2020, that the Council seemed to be applying a "chilling effect" argument to justify withholding the information under section 30(c).
39. On 11 March 2020, and again referring to the Court of Session Opinion, the Applicant further argued that there was a strong public interest in understanding the process that led to its publication. In his view, access to the communications between the Commissioner and the authority would make clear how, in its submissions to the Commissioner, the authority had described certain legal relationships, and how the Commissioner had interpreted the authority's communications.

The Council's submissions

40. In its submissions to the Commissioner, the Council confirmed it wished to maintain reliance on the exemption in section 30(c) of FOISA, for the reasons outlined in its initial response to the Applicant, and taking account of the third party views obtained at the initial request stage, and the issues considered at review stage.

41. The Council submitted that, following receipt of the request, it had sought third party views from the Commissioner's office on disclosure of the information². In response, the views of the Commissioner's office were:
- Given the timing of the request, particularly as the investigation in question was ongoing, disclosure would likely prejudice substantially the formal processes involved in conducting that, and future, investigations.
 - Scottish public authorities must be confident in providing submissions to the Commissioner safe in the knowledge that the information remains confidential, and will only be referred to in a Decision Notice by the Commissioner where necessary.
 - Disclosure of this information, during an investigation, would likely deter authorities from providing comprehensive submissions to the Commissioner in future, which would negatively impact on the quality of the Commissioner's investigations and the decisions reached.
 - The public interest in understanding how the Commissioner reaches his decisions, and that these fairly and fully address the matters raised, is outweighed by that in ensuring that his formal investigation processes are not prejudiced, not only for the investigation in question, but also for future investigations.
42. The Council submitted that it shared the views of the Commissioner's office and responded to the Applicant in these terms, withholding the information under section 30(c) of FOISA.
43. At review stage, the Council upheld its original view, concluding that the submission and correspondence between the Council and the Commissioner should not have been disclosed to the Applicant at that time, nor indeed subsequently after the appeal [to the Commissioner] was concluded, as to do so would likely deter public authorities from providing comprehensive submissions to the Commissioner in future.
44. The Council explained it had considered the issues raised by the Applicant in his request for review, and provided evidence of this:
- The initial response was issued while the investigation was ongoing, and therefore the fact that (at review stage) the investigation in question had concluded was irrelevant: the purpose of the review was to ascertain the Council's compliance with FOISA.
 - The Council took the view that the process was not a judicial one. If it was, the submissions would be made public through the courts, and parties would not expect to have to "reveal their hand" outwith the specific process, as this could be detrimental to the outcome of the case.
 - Parties can appeal to the Court of Session if they believe the Commissioner has erred in law, and it was likely that, under this process, further information or evidence in respect of the parties' submissions might be led, but this was for the parties and the Court to determine.

² Part 2, Section 7 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code) sets out good practice guidance on third party consultation. While this is recommended where a third party's views may help an authority to determine whether an exemption applies, or where the balance of public interest lies, the Code makes clear that it is for the Scottish public authority that received the request, not the third party (or representative of the third party), to determine whether or not information should be disclosed.

- The Decision Notice paraphrased the submissions of both parties, the views of the investigating officer, the relevant information in terms of the law and the submissions provided, the Commissioner's consideration of these and his final view, including any corrective action. The Council took the view that these were generally very clear, and it did not believe it was impossible for individuals to assess the parties' positions or the outcome of the case.
 - The Council also considered the public interest in disclosure of the information.
45. In its later submissions to the Commissioner, the Council acknowledged that much of the information within its communications to the Commissioner had already been released to the Applicant. However, it did not accept that the remaining information should be disclosed.
46. The Council maintained the position that it was entirely justified in applying a valid exemption for withholding the information in this case and had fully complied with the guidance given by the Commissioner's office at the time the request was lodged.
47. The Council further submitted that, at review stage, the review panel was required to determine whether the Council had handled the case appropriately at the time the request was lodged, and it had correctly assessed that the Council had applied the correct processes at that time.

The Commissioner's views on section 30(c)

48. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
49. In assessing whether the exemption in section 30(c) applies, the Commissioner has taken account of a number of factors, including the timing of the request. He must make his decision based on the position at the time the Council issued its review outcome, the circumstances of this particular case and the withheld information itself. (In *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8³, the Court of Session stated (at paragraph 31) that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5).)
50. The Commissioner notes that, at the time of the initial request, the investigation, to which the withheld information relates, was still ongoing. He notes that the Council provided its submissions, in response to his requests for these, in confidence, and in the expectation that the information would not be disclosed, except where necessary to allow the Applicant to comment on relevant matters or to be referred to in the decision on the case. In the Commissioner's view, he must be allowed to conduct his investigations, and Scottish public authorities must have the confidence to provide submissions, in the knowledge that the information is confidential, and that only where necessary will it be referred to in any Decision Notice issued by him.
51. The Commissioner accepts that disclosure, at request stage, could have led to a loss of faith in this process and prejudice substantially future investigations, should Scottish public authorities become less likely to provide full submissions to the Commissioner for these purposes. This would clearly have a negative impact on the quality of the investigations and, ultimately, the decisions issued by the Commissioner.

³ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

52. As such, the Commissioner concurs that disclosure of the information, at request stage, would have been likely to prejudice that investigation.
53. The Commissioner notes that the Council adopted the same position when it responded to the request for review. At that time, the investigation in question (to which the request related) had concluded and a Decision Notice had been issued and published on the Commissioner's website. The Applicant, in that case, had lodged an appeal to the Court of Session.
54. The Commissioner notes the comments made by the Applicant, referenced in paragraphs 36 and 39 above. In the Commissioner's view, the arguments submitted by the Applicant here relate to the Court of Session appeal's conduct, costs and outcome, matters which were not extant at the time the Council issued its initial response or its review outcome. As such, the Commissioner is unable to consider these arguments as being relevant to the decision taken by the Council at the time it issued its review outcome.
55. The Commissioner has also taken into account the Applicant's contention that the Council has applied section 30(c) as a class exemption in this case. Having considered the content of the information in the Decision Notice for the investigation to which this request relates, the Commissioner takes the view that this largely reflects the submissions requested from, and made by, the Council.
56. The Commissioner is concerned that the Council appears to have misunderstood the role of the review process, particularly with regard to timing. As noted in paragraph 49, the review should consider the information held at the time the request was received and the circumstances at the time the review is being carried out (not the position at the time of the request).
57. Therefore, and as set out above, the Commissioner must make his decision based on the position at the time the Council responded to the request for review, on the circumstances of this particular case at the time of the review and the information itself (held at the point of receipt of the request). Having done so, the Commissioner concludes that disclosure of the information, at the time the Council responded to the request for review, would not result in the harm envisaged by the Council, given a Decision Notice, which, in this case, largely reflected the submissions requested from and made by the Council, had been issued and published.
58. The Commissioner recognises that any request for information, even for submissions of the nature under consideration here, requires to be considered on a case-by-case basis, looking at the impact of disclosing that particular information and taking into account all other relevant circumstances, including timing. The Commissioner does not consider there is any basis, even in section 45 (Confidentiality of information obtained by or furnished to the Commissioner) of FOISA, for regarding information of this nature to be inherently exempt, without exception, and for all time.
59. For these reasons, the Commissioner concludes that the Council was not entitled to withhold the remaining information in this case, at review stage, under the exemption in section 30(c) of FOISA. Given this conclusion, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

60. As no further exemption has been claimed to justify the withholding of that information (other than some personal data withheld under section 38(1)(b) to which the Applicant has confirmed he has no objections), the Commissioner requires the Council to disclose it to the Applicant.

Decision

The Commissioner finds that Aberdeenshire 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 the Applicant.

The Commissioner finds that the Council wrongly withheld the information under consideration under the exemption in section 30(c) (Prejudice to effective conduct of public affairs) of FOISA.

He also finds that the Council failed to fully comply with section 1(1) of FOISA in only identifying some information as falling within the scope of the request after his investigation had started.

Given that, during the investigation, the Council issued the Applicant with a further response, disclosing some of the further information identified as falling within scope, the Commissioner does not require the Council to take any further action in respect of this failure in response to the Applicant's application.

However, the Commissioner requires the Council to provide the Applicant with the other information found to have been wrongly withheld under section 30(c) by **2 November 2020**.

Appeal

Should either the Applicant 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.

Daren Fitzhenry
Scottish Information Commissioner

17 September 2020

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.

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