

Decision Notice

Decision 058/2019: Mr T and the Scottish Ministers

Funding information

Reference No: 201801762

Decision Date: 15 April 2019



Scottish Information
Commissioner

Summary

The Ministers were asked about loans made to third parties in excess of £1.5m, within a specified time period. The Ministers withheld some of the information as they considered disclosure would be substantially prejudicial to commercial interests or the effective conduct of public affairs.

The Commissioner investigated and found that the Ministers had identified and located all the relevant information they held, but also that they had not been entitled to withhold information under the above exemptions. The withheld information was disclosed during the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy)

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 22 August 2018, Mr T made a request for information to the Scottish Ministers (the Ministers). The information requested was a list of all loans made to third parties by the Scottish Government for amounts in excess of £1.5m in the period 1 January 2016 to 17 August 2018. In addition, for each loan, he asked for the following:
 - (a) Name of party
 - (b) Date loan granted
 - (c) Amount of loan
 - (d) Purpose of loan
 - (e) Interest rate charged
 - (f) Basis of repayment
 - (g) Current balance (amount owed).
2. The Ministers responded on 13 September 2018. They told Mr T that the information was exempt from disclosure under section 25(1) of FOISA, as it was available on the Scottish Government website. They directed Mr T to a response to a previous request where the information could be located: this provided details of loans over £100,000, subject to the redaction of information under sections 33(1)(b) and (2)(b) of FOISA.
3. On 13 September 2018, Mr T wrote to the Ministers, requesting a review of their decision on the basis that his request for information differed from the previous request he had been directed to.
4. The Ministers notified Mr T of the outcome of their review on 11 October 2018. The Ministers upheld the application of section 25(1) of FOISA, explaining that the earlier response had

provided details of all loans in excess of £100,000 (including all loans falling within the scope of the present request). They acknowledged, however, that they had not responded at the level of detail sought in the present request and provided a table with information under the headings specified in the request. Some information was redacted, as follows:

- (a) The names of recipients of farm payments, under section 38(1)(b) of FOISA;
 - (b) The names of the recipients, and the purposes, of six loans, under section 30(c) of FOISA (Prejudice to effective conduct of public affairs);
 - (c) For three of those six loans, the information at (b) was also withheld under section 33(1)(b) of FOISA (Commercial interests and the economy).
5. On 17 October 2018, Mr T wrote to the Commissioner's Office. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T stated he was dissatisfied with the outcome of the Ministers' review because he did not agree with the application of sections 30(c) and 33(1)(b) of FOISA. He did not dispute the withholding of information under section 38(1)(b).
 6. Mr T later questioned whether the Ministers had identified and provided all of the information that fell within the scope of his request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr T 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.
8. On 7 November 2018, the Ministers were notified in writing that Mr T had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr T.
9. On 23 November 2018, the Ministers provided the information, explaining that on that date it had also provided Mr T with the information for three loans, previously withheld under both section 30(c) and section 33(1)(b) of FOISA.
10. On 29 November 2018, the Ministers provided Mr T with a further copy of the table, with details of the three remaining loans (previously been withheld under section 30(c) of FOISA). Therefore, the Ministers provided all of the information that they had previously withheld under sections 30(c) and 33(1)(b) of FOISA.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on their earlier decision to withhold information under sections 30(c) and 33(1)(b), with specific reference to the requirements of these exemptions. They were also asked to explain the steps they had taken to identify and locate the information requested.
12. The Ministers responded. They remained of the view that they had correctly applied section 30(c) and section 33(1)(b) of FOISA in dealing with Mr T's request.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr T and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Was all relevant information identified, located and provided by the Ministers?

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information the authority should hold.
16. 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.
17. The Ministers submitted that they had interpreted Mr T's request as a request for details of loans that had been actually made, as outlined in the request, and drawn on by the loan recipients.
18. The Ministers also confirmed the searches and enquiries they undertook to ascertain what information they held falling within the scope of Mr T's request, detailing the searches undertaken. These included searches of relevant electronic and paper records, and consultation with portfolio Finance Managers and relevant business areas. The Ministers provided supporting evidence confirming the outcomes of their searches.
19. The Ministers confirmed that the conclusion of the searches and enquiries was that no information was held, in addition to the information provided to Mr T in response to his review and during the investigation.
20. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Ministers interpreted Mr T's request reasonably and took adequate, proportionate steps with a view to identifying and locating the information requested by Mr T. Consequently, on the balance of probabilities, the Commissioner is satisfied that the Ministers identified all of the information held and falling within the scope of Mr T's request.

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

21. 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.

22. The standard to be met in applying the tests contained in section 30(c) is high. In particular, the prejudice in question must be substantial and therefore 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 (which may include the timing of the request).
23. The Ministers applied section 30(c) of FOISA to the information identifying the recipient and purpose for each of six loans listed in the table provided to Mr T.
24. The Ministers drew the Commissioner's attention to the reasoning that they had set out in their review outcome of 11 October 2018. In this, they explained that it was essential for officials to communicate with external stakeholders on issues of an operational or financial nature, and that effective support could only be provided to some loan recipients in confidence. They stated that there had to be some degree of anonymity in some cases, due to the nature of the environment in which the loan recipient was operating, and effective engagement, based on adequate research, was important to ensure any financial support or other issues were supported as robustly as possible.
25. The Ministers stated that disclosing the full terms of the loans was likely to undermine stakeholder trust in the Scottish Government and substantially inhibit negotiations of this type of issue in future. They further claimed that disclosure of the information would dilute their negotiating position and make it more difficult to negotiate with sponsors on the Scottish Government's behalf. This, they believed, would significantly harm the Government's ability to carry out many aspects of its work, and could adversely affect its ability to gather all of the evidence needed to make fully informed decisions.
26. In responding to the Commissioner, the Ministers provided further explanation of the process followed in dealing with Mr T's request. They advised that there was ongoing consideration about what information could be made public in constantly changing circumstances, and that the withholding of the information at the time of the response to the initial application and review was justified.
27. In their submissions to the Commissioner, the Ministers advised that, in considering Mr T's requirement for review, they gave consideration to information that had been disclosed since they had provided the original response of 13 September 2018. They acknowledged that they had disclosed information on 7 September 2018, which was subsequently published on 12 September 2018. The Commissioner notes that some of the information disclosed by the Ministers on 7 September 2018 (which was prior to the initial response in this case) was redacted from table provided in the review outcome of 11 October 2018, as exempt under both section 30(c) and 33(1)(b).
28. The Commissioner further notes that some of the information redacted from the information disclosed had already been published by the Ministers on their own website¹ on 2 May 2017.
29. The Commissioner also notes that the recipient of one of the loans had actively published details of a Scottish Government loan in August 2017². (The Ministers had also applied section 33(1)(b) to withhold this recipient's identity and the loan purpose.)

¹ <https://news.gov.scot/news/gbp-8-35-million-to-support-urban-regeneration-in-the-heart-of-glasgow>

² <https://www.scottishhousingnews.com/article/lar-housing-trust-secures-game-changing-65m-funding-boost>

30. The Commissioner has considered all of the submissions provided by the Ministers as to why the information should be considered exempt from disclosure under section 30(c) of FOISA. He first of all notes that some of the information from the disclosure of 11 October 2018 was already in the public domain, some having been disclosed elsewhere by the Ministers. Given that the information was in the public domain, there could be no justification for applying the exemption contained in section 30(c) of FOISA.
31. The Commissioner further notes that the submissions received from the Ministers on the application of section 30(c) are generic in nature and do not explain why disclosure of this particular information would, or would be likely to, cause the substantial prejudice required for section 30(c) of FOISA to be engaged. The Ministers provided no submissions as to why they were content to disclose the information in full after Mr T's application had been made to the Commissioner, yet believed they were justified in withholding it at the time they dealt with the request. The Ministers have provided no reasoning or evidence to show that there had been any kind of change in circumstances which allowed disclosure at the later time.
32. In the absence of any submissions or evidence supporting risks of the kind described by the Ministers, the Commissioner cannot accept that disclosure of the information, at the time the Ministers dealt with the request, would have prejudiced substantially, or would have been likely to prejudice substantially the effective conduct of public affairs. Having considered all the relevant submissions, therefore, the Commissioner does not accept that the Ministers were correct to withhold the information under the exemption in section 30(c) of FOISA.
33. As the Commissioner does not accept the application of section 30(c), he is not required to consider the public interest test in section 2(1)(b) of FOISA.

Section 33(1)(b) - Commercial interests and the economy

34. The Ministers submitted that some of the information had also been correctly withheld under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is set out in full in Appendix 1. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
35. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
 - (a) whose commercial interests would (or would be likely to) be harmed by disclosure;
 - (b) the nature of those commercial interests; and
 - (c) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
36. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

37. On being asked for submissions regarding this exemption, the Ministers were strongly advised to consider the Commissioner's briefing on section 33³, which provides further guidance on the tests to be met in applying this exemption.
38. In their submissions to the Commissioner, the Ministers again drew attention to the content of their review outcome, in which they advised Mr T that they considered disclosure of some of the information would prejudice substantially the commercial interests of the loan recipients. They had also stated that this section applied where disclosure could hinder those companies from continuing to operate successfully in a commercial environment. They stated that this exemption had been applied where the recipients of the loan operated in a commercially sensitive environment. These claims of harm were broadly reiterated in further submissions to the Commissioner.
39. While the submissions by the Ministers in relation to the application of section 33(1)(b) of FOISA are somewhat scant, the Commissioner accepts that the information in question is commercial in nature.
40. As mentioned above, in order to rely on this exemption, an authority has to evidence why disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority).
41. On the question of harm, the Commissioner must be persuaded by the submissions he has received from the Ministers. In his view, these do not explain how the disclosure of the requested information would have had, or would have been likely to have (at the time the Ministers responded to Mr T's request or his requirement for review), a substantially prejudicial impact on the commercial interests of the third parties. The submissions by the Ministers are speculative in nature, with no evidence to explain how the prejudice required would be manifested should the information be disclosed. The Commissioner would emphasise that he can only consider the information actually sought by Mr T, which relates to loans actually made to third parties.
42. The Commissioner would further note that, where an authority is claiming disclosure would substantially prejudice the commercial interests of a third party, he would expect that the third party is consulted and their views obtained. There is no evidence of this having been done in this case.
43. Taking account of the submissions actually received from the Ministers (as opposed to anything more focused) and the information actually withheld at the time of review, and bearing in mind the information already in the public domain, the Commissioner does not believe he has any option but to find that disclosure of the information would not have had (or been likely to have) the substantially prejudicial impact required for section 33(1)(b) of FOISA to be engaged.
44. It is for the Ministers to provide the required evidence of harm, not for the Commissioner to go out and find it. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under this exemption. Having reached that conclusion, he is not required to consider the public interest test in section 2(1)(b) of FOISA and must require that the information be disclosed.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

45. In conclusion, therefore, the Commissioner finds that the Ministers were not entitled to withhold the information as exempt under sections 30(c) and 33(1)(b) of FOISA, and that by doing so they failed to comply with section 1(1) of FOISA.
46. Given that all the withheld information has since been disclosed to Mr T, the Commissioner does not require the Ministers to take any action in relation to this failure.

Commissioner's observations on the handling of the request and review

47. The following observations are not part of the Commissioner's findings on compliance with FOISA, but cover practice issues the Commissioner has identified during this investigation and about which he has concerns. He hopes these comments are helpful to all Scottish public authorities and requesters. He refers to exemptions (under FOISA) below, but would consider his comments to be of equal relevance to the application of exceptions under the Environmental Information (Scotland) Regulations 2004.
48. In particular, the Commissioner notes that, in providing the initial response to Mr T on 13 September 2018, the Ministers referred to a previous request, which advised that some of the information requested was excepted from disclosure under sections 33(1)(b) and (2)(b) of FOISA. As mentioned above, it is apparent that some of the information withheld from this initial response, and again from the review outcome of 11 October 2018, was already in the public domain.
49. In their submissions, despite acknowledging the disclosure of information on 7 September 2018, the Ministers went on to claim that they had correctly applied regulations 30(c) and 33(1)(b) of FOISA at the time they dealt with Mr T's request. In addition, some of the submissions provided to the Commissioner related to the Ministers claiming that information disclosed to Mr T in the review outcome had been correctly withheld.
50. Also as mentioned above, the submissions by the Ministers to the Commissioner were generic and did not give a sufficiently detailed explanation as to why disclosure of the particular withheld information, in the particular circumstances of this case, would cause harm that would engage either of the exemptions claimed.
51. Overall, the Commissioner cannot stress enough the importance when dealing with requests for information of authorities giving proper consideration to what information has already been disclosed by them, or is available elsewhere within the public domain, before asserting that an exemption applies to the information requested.
52. During the investigation, it was strongly recommended to the Ministers that they give consideration to the Commissioners' briefings⁴ when providing submissions on the exemptions claimed. From the submissions provided, it is not apparent to the Commissioner that this was done, given the lack of focus on the required statutory tests.
53. The Commissioner believes that, had proper consideration been given to the information already in the public domain and whether, in this case, the disclosure would cause the substantial prejudice required for an exemption to be engaged, then it is highly likely that the Ministers would have disclosed the withheld information at the time they dealt with the request, rather than following an application to the Commissioner. Such disclosure may

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx>

have obviated the need for an application to be made to the Commissioner, and avoided what could be considered unnecessary work for both the Commissioner's staff and those of the Ministers.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr T.

While the Ministers identified all of the information held and falling within the scope of Mr T's request, they were not entitled to withhold information under sections 30(c) or 33(1)(b) of FOISA. By doing so, the Ministers failed to comply with section 1(1) of FOISA.

Given that the information has now been disclosed, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Mr T's application.

Appeal

Should either Mr T or the Scottish Ministers 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.

Daren Fitzhenry
Scottish Information Commissioner

15 April 2019

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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.

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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