

Decision Notice 090/2022

Nairn Ward Business meeting minutes

Applicant: The Applicant

Public authority: Highland Council

Case Ref: 202100420



Scottish Information
Commissioner

Summary

The Council was asked for Nairn Ward Business Meeting minutes and associated papers. The Council disclosed the minutes, but with some information redacted. Additional information was disclosed during the Commissioner's investigation. The Commissioner found that this information should have been disclosed at an earlier date, but that the Council had been entitled to withhold the remaining information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(b) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A), (5) (definitions of "the data protection principles", "data subject", "personal data" and "processing", "the UK GDPR") and (5A) (Personal information)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of "personal data") (Definitions); 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

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 4 February 2021, the Applicant made a request to Highland Council (the Council) for the Nairn Ward Business meeting minutes and associated papers and discussion notes for August 2018 to end October 2018 (inclusive).
2. The Council responded on 4 March 2021 and supplied redacted minutes. The Council withheld some information under a number of different exemptions in FOISA, including section 30(b) and section 38(1)(b).
3. Later the same day, the Applicant wrote to the Council requesting a review of its decision. The Applicant questioned why disclosing information from over two years ago would prejudice the running of Nairn Ward, particularly given that Council officials had "stopped any form of effective minute taking" of the Ward Business meetings.
4. The Applicant specified the parts of the Minutes that she believed had been incorrectly withheld and commented that, as the redactions appeared to involve community projects which were on common good land, and as this was of great public interest, it was hard to see why such information should be withheld.
5. At review, the Council confirmed its previous decision. The Council notified the Applicant of the outcome of its review on 31 March 2021. It commented that, despite being over two years old, many of the same issues still existed within the ward and that disclosure of the information could have a negative effect on some of the work taking place. The Council referred to the need for an organisation to be able to think in private and stated that the Ward Business Meetings were an opportunity for Members (councillors) to share their opinions freely and to seek advice and information from Council staff. The Council explained which

exemptions were used for withholding the information from the parts the Applicant had referred to in her requirement for review:

- 7 September 2018 - Item 2.5 Nairn Play meeting: sections 38(1)(b) and 38(2A)
 - 7 September 2018 - Discussion 10am Links Development p 6: sections 30(b)(i) and (ii)
 - 5 October 2018 - 2.0 Ward Manager's report: sections 30(b)(i) and (ii)
 - 5 October 2018 - 2.5: sections 30(b)(i) and (ii).
 - 5 October 2018 - 10.30 am Links development Plan: sections 30(b)(i) and (ii).
6. On 31 March 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Council's review because she believed the information, as set out in paragraph 5 above, had been wrongly withheld and that the public interest favoured disclosure of the information.

Investigation

7. 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.
8. On 13 April 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
9. 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 answer specific questions about why it had withheld information in the minutes.
10. During the investigation, the Council agreed to disclose more information to the Applicant. It did this in December 2021.
11. The Applicant told the Commissioner she still required a decision, given that there were still several whole sections redacted.

Commissioner's analysis and findings

12. 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 him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 30(b) - Prejudice to effective conduct of public affairs

13. Section 30(b)(i) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The inhibition must be substantial, in other words of real and demonstrable significance. It must also be at least likely, not simply a remote or hypothetical possibility.
14. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. Both exemptions are subject to the public interest test in section 2(1)(b) of FOISA.

15. In applying both of these exemptions, the chief consideration is not whether the information constitutes advice or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank provision of advice or, where relevant, the free and frank exchange of views.
16. Each request must be considered on a case-by-case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views or provision of advice. The content of the withheld information needs to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
17. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

The Applicant's view

18. As noted above, the Applicant questioned, given the age of the information and the way minutes were taken, whether the exemptions in section 30(b) could apply. The Applicant said that Nairn Ward monthly meetings are prearranged formal meetings with minutes. The Council officials attend and the business of the meetings is not commercial, rather the normal day-to-day running of the town, which used to be done in public in the days of the Nairn District Council. However, the meetings go on "behind closed doors" and the minutes are only available by disclosure under FOISA and are not ratified at the three-monthly Nairn Area Committee meetings.

The Council's view

19. The Council withheld some information in terms of section 30(b)(i) and (ii) of FOISA. Its review notice explained that a Ward Business Meeting was an opportunity for the Councillors and staff to discuss any matters associated with the Ward. The 2018 minutes detailed the discussions that took place. Despite being over two years old, many of the same issues still exist within the ward and the Council believed that disclosure could have a negative effect on some of the work which is taking place at present. The Council submitted that "there is a general acceptance within FOISA that an organisation has to be able to think in private and the Ward Business Meeting was an opportunity for the Members to share their opinions freely and to seek advice and information from staff".
20. The Council explained that Ward Business Meetings came about as a result of the creation of multi-member wards and are an opportunity for ward members to meet with the ward manager and other Council staff to discuss issues relating to their local ward. The ward manager usually keeps an action note as reminder of what was agreed, but these do not represent formal Council committees. The Council explained that, where Councillors are required to take decisions, these issues would be taken to the Nairn Area Committee which is held in public.
21. The Council submitted that, at Ward Business Meetings, Members take the opportunity to discuss a wide range of local matters and this can include discussion around other individuals and groups. As the meetings are not public, "the conversation is free and frank and the members do not expect that a record of their discussion will be published".

The Commissioner's view

22. The Council disclosed information during the investigation. In the absence of submissions from the Council as to why the information was considered exempt when it originally

responded to the request, but was no longer exempt, the Commissioner must find that the information was wrongly withheld.

23. There is obviously a limit on how much explanation the Commissioner can give in this decision notice without disclosing the information that has been withheld. The Commissioner has considered the circumstances of the case including the nature of the withheld information, the terms in which views are expressed, and the context in which it was created.
24. In all the circumstances of this case the Commissioner accepts that disclosure of the withheld information would be likely to result in substantial inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, as argued by the Council.
25. He recognises the Applicant's comments about the age of the information, but accepts that some specific issues still exist within the ward and that it was reasonable for the Council to conclude that disclosure of some of the information could have a negative effect on some of the work which is taking place at present. It should be noted that the Commissioner must consider whether the exemption applied as at the time of the request or as at date of review. He is therefore not considering the position as at the date of the Applicant's application for a decision by the Commissioner, or the intervening period between the application date and the date of this decision.

Public interest test

26. The exemptions in section 30(b) are subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The Applicant's view

27. In her requirement for review, the Applicant commented that the parts of the Minutes that had the redactions appeared to involve community projects which were on common good land, and this was of great public interest. She found it hard to understand why such information should be withheld from community members.
28. The Applicant believed this to be "the antithesis of open government." She emphasised that embarrassment, loss of confidence in the authority or seniority were not reasons to redact information, and that the public interest lay in allowing local people to see what councillors and officials are discussing (especially about common good issues).

The Council's view

29. The Council argued that disclosure of this detail would not be in the public interest: the information had been redacted sparingly by it despite the impression of heavy redaction and disclosure would have a significant impact on the Council's and councillors' ability to engage with the Nairn community.

The Commissioner's view

30. The Commissioner recognises that disclosure of the information withheld under section 30(b) would increase transparency and would allow the Applicant and the public, particularly those living within that area or affected by any projects in the area, to gain a better understanding of the information and comments and advice in respect of decisions for a specific community. The Applicant is correct to point to the public interest in transparency and to the public interest in the various subjects that the minutes cover.

31. However, the Commissioner accepts that if disclosure would inhibit participants from commenting or advising frankly and willingly on such issues, or indeed raising issues of concern to them or the community, this could diminish the quality of decision making, which would be not be in the public interest.
32. The Commissioner notes that the Council has disclosed parts of the minutes and there is much that can be taken and understood from the minutes. Whilst it must be acknowledged that this is not the full information that is wanted by the Applicant, this goes some way towards satisfying the relevant public interests.
33. The Commissioner also notes that, where decisions require to be made by councillors, these issues would be taken to the Nairn Area Committee, which is held in public.
34. On balance, the Commissioner has concluded that, in this instance, in respect of the remaining withheld information, the public interest in maintaining the exemptions in section 30(b) outweighs that in disclosure of the information to which the exemptions have been found to apply. He therefore concludes that the Council was entitled to withhold the remaining information under section 30(b) of FOISA.

Section 38(1)(b) - Personal information

35. The Council continues to withhold a small section of the Minutes of 7 September 2018 (Item 2.5 Nairn Play meeting [Page 12 of the document]) under section 38(1)(b) of FOISA, although again it should be noted that the Council disclosed additional information from this section (originally withheld under section 38(1)(b)) during the investigation. In the absence of submissions from the Council as to why the information was considered exempt when it originally responded to the request, but was no longer exempt, the Commissioner must find that the information was wrongly withheld.
36. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR or (where relevant) in the DPA 2018.
37. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the withheld information personal data?

38. The first question the Commissioner must address is whether the withheld information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable individual. "Identifiable living individual" is defined in section 3(3) of the DPA 2018 - see Appendix 1. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR, also set out in Appendix 1.)
39. The withheld text relates to the activities of a named individual. The information clearly relates to that individual. The Commissioner accepts that if this information were disclosed into the public domain then third parties would be able to identify a living individual from the information, given that it relates to a confined local area and subject matter. The Commissioner is therefore satisfied that the withheld information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

40. Article 5(1)(a) of the UK GDPR requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject". The definition of "processing" is wide and includes "disclosure by transmission, dissemination or otherwise making available" (section 3(4)(d) of the DPA 2018). In the case of FOISA, personal data are processed when disclosed in response to a request: as noted above, disclosure under FOISA is deemed to be disclosure into the public domain and not only to the Applicant.
41. Personal data can only be processed if disclosure would be both lawful (i.e. if it would meet one or more of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.
42. The Commissioner will first consider whether any of the conditions in Article 6(1) can be met. Generally, when considering whether personal data can lawfully be disclosed under FOISA, only condition (f) (legitimate interests) is likely to be relevant.

Condition (f): legitimate interests

43. Condition (f) states that processing will be lawful if it "...is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data ..."
44. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
45. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - Does the Applicant have a legitimate interest in obtaining the personal data?
 - If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
 - Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Legitimate interest

46. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of the Applicant must outweigh the rights and freedoms or legitimate interests of the data subject before condition (f) will permit the data to be disclosed.
47. The Commissioner is satisfied that, given the role and remit of the meetings (as described above), the Applicant has (and the wider public would have) a legitimate interest in scrutiny of the meetings and in obtaining the personal data.

Is disclosure necessary?

48. Having accepted there is a legitimate interest in the personal data, the Commissioner must consider whether disclosure of the personal data is necessary to meet those legitimate interests. Here, "necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities must consider whether the disclosure is proportionate as a means and fairly balanced as to

the aims to be achieved, or whether the legitimate interests can be met by means which interfere less with the privacy of the data subjects.

49. In the circumstances, the Commissioner accepts that disclosure of the remaining information is necessary to meet the Applicant's legitimate interests. The Commissioner can identify no viable means of meeting the Applicant's legitimate interests which would interfere less with the privacy of the data subject than disclosing this withheld information.

The data subject's interests or fundamental rights and freedoms

50. Having found that disclosure would be necessary, the Commissioner must now balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOISA in response to a request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override the legitimate interests in disclosure. Only if the legitimate interests of the Applicant outweigh those of the data subject can the information be disclosed without breaching the first data protection principle.
51. The Commissioner's [guidance](#) on section 38 of FOISA¹ notes factors that should be taken into account in balancing the interests of parties. He notes that Recital (47) of the General Data Protection Regulation states that much will depend on the reasonable expectations of the data subjects. These are some of the factors public authorities should consider:
- Does the information relate to an individual's public life (their work as a public official or employee) or to their private life (their home, family, social life or finances)?
 - Would the disclosure cause harm or distress?
 - Whether the individual has objected to the disclosure.
52. The Commissioner has also considered the harm or distress that might be caused by disclosure. He accepts the Council's point that disclosure would cause some harm to the data subject.
53. After carefully balancing the legitimate interests of the data subject (the person named) against those of the Applicant (and the wider public), the Commissioner finds that the balance of legitimate interests falls in favour of the data subject.
54. The Commissioner has balanced this with the Applicant's legitimate interest in seeking accountability and transparency. The information now disclosed to the Applicant makes it largely clear what the issue being discussed is in this item. Disclosure under FOISA is, as stated above, disclosure into the public domain. Given that there may be some harm to the data subject through disclosure, the Commissioner accepts concludes that, in these circumstances, disclosure would have a detrimental effect on the data subject. The linking of an action to a specific person, without any explanations, may result in detriment to that person.
55. Having carefully balancing the legitimate interests of the individuals concerned against those of the Applicant (and the wider public), the Commissioner finds that the legitimate interests

¹ <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

served by disclosure of the withheld personal data are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the data subject. Condition (f) in Article 6(1) of the GDPR cannot, therefore, be met in relation to the withheld personal data.

56. In the absence of a condition in Article 6 of the GDPR allowing the personal data to be disclosed, the Commissioner has concluded that disclosing the information would be unlawful. Given the requirement for the processing to be both fair and lawful for the data protection principle in Article 5(1)(a) to be met, the Commissioner must find that the personal is exempt from disclosure under section 38(1)(b) of FOISA

Conclusions

57. The Commissioner concludes that the Council largely complied with Part 1 of FOISA in responding to this request. The Council was correct to withhold some information in terms of section 30(b) of FOISA, but other information could have been disclosed to the Applicant as it did not fall within this exemption. The Council was correct to withhold a specific example of personal data under section 38(1)(b) that was questioned by the Applicant, but its redaction was too extensive for this item.
58. Given that the Council has now disclosed information to the Applicant, the Commissioner requires no action by the Council.

Decision

The Commissioner finds that Highland Council (the Council) partially complied 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, by initially withholding some information in terms of section 30(b) and section 38(1)(b), the Council failed to comply with Part 1 of FOISA.

However, the Council was entitled to withhold the remaining information under those exemptions.

Given that the Council has disclosed to the Applicant the information that it incorrectly withheld, the Commissioner does not require the Council to take any action in respect of this in response to the Applicant's application.

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.

Daren Fitzhenry
Scottish Information Commissioner
27 July 2022

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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or

...

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);

...

- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
- (a) would contravene any of the data protection principles, or
 - (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

...

- (5) In this section-

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the UK GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

...

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

- (5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

...

UK General Data Protection Regulation

Article 4 Definitions

For the purpose of this Regulation:

- 1 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

...

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

- a. processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency")

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

...

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
 - ...
 - (d) disclosure by transmission, dissemination or otherwise making available,
 - ...
- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).
- ...
- (14) In Parts 5 to 7, except where otherwise provided –
 - (a) references to the UK GDPR are to the UK GDPR read with Part 2;
 - ...
 - (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;

- (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

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