



Decision Notice 074/2023

Minutes of meetings

Applicant:

Authority: Highlands and Islands Enterprise

Case Ref: 202300098

Summary

The Applicant asked the Authority for copies of minutes of meetings of its Board and of its Risk & Assurance Committee. The Authority stated that the minutes were due to be published and were therefore exempt from disclosure. The Commissioner investigated and found that the Authority did not have a settled intention to publish the minutes, and so the exemption did not apply. The Commissioner required the Authority to respond anew to the Applicant's requirement for review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) Effect of exemptions; 27(1) (Information intended for future publication); 47(1) and (2) (Application for decision by Commissioner)

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 8 June 2022, the Applicant made a request for information to the Authority for:
 - Minutes of HIE Board meetings held subsequent to 24 September 2021.
 - Minutes of HIE Risk & Assurance Committee [RAC] meetings held subsequent to 25 September 2021.
2. The Authority did not respond to the request.

3. On 22 July 2022, the Applicant wrote to the Authority, requesting a review of its decision on the basis that it had not responded to the request.
4. The Authority notified the Applicant of the outcome of its review on 19 August 2022. It stated that it was in the process of reviewing the minutes, with the aim of publishing them over the coming days. This approach was, it submitted, in line with section 27(1) of FOISA (Information intended for future publication). The Authority advised that it had published the HIE Board minutes for 26 October 2021, 25 November 2021 and 14 December 2021.
5. On 25 January 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated it was dissatisfied with the outcome of the Authority's review because it considered the exemption did not apply and no minutes had been published since the Authority had stated its intention to do so: the Authority did not, in the Applicant's view, have a genuine intention to publish.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 24 February 2023, the Authority was notified in writing that the Applicant had made a valid application. 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 Authority was invited to comment on this application and to answer specific questions. These related to the Authority's reasoning for relying upon the future publication exemption, and its consideration of the public interest in this context. The Authority provided its response.
9. The Applicant provided its comments on why it did not consider the exemption applied and on the public interest in disclosure of the withheld information.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 27(1) – Information intended for future publication

11. Section 27(1) of FOISA provides that information is exempt from disclosure where the following tests are met:
 - the information is held with a view to its being published, by a Scottish public authority or any other person, at a date not later than 12 weeks after that on which the request for the information is made;
 - when the request is made, the information is already being held with that view; and
 - it is reasonable, in all the circumstances, that the information be withheld from disclosure until the intended publication date.
12. Section 27(1) recognises that, where it is intended to make information available, public authorities should, within reason, have space to be able to determine their own publication

timetables and deal with the necessary preparation, administration and context of publication. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.

13. Under this exemption, information intended for publication within 12 weeks is exempt from disclosure where it is “reasonable in all the circumstances” to withhold the information until the planned publication date. The authority should be able to demonstrate that a publication timetable has already been decided and that it is not simply delaying the release of information for 12 weeks.
14. It should be noted that there is no requirement within section 27(1) that publication must actually take place as planned, but the information must already be held with a view to publication at the time the request is received.
15. In order for section 27(1) to be upheld, the Commissioner must consider whether all of the tests required by this exemption can be met in the circumstances of a particular case.

The Authority's submissions about the exemption

16. The Authority provided some background in relation to its Board and Committee meetings and the preparation and approval of minutes.

Partial publication

17. The Authority stated that partial publication was standard practice and had been for several years. The nature of the commercial relationships the Authority had with its clients dictated that, while it sought to be as open and accountable as possible in publishing minutes, certain items might need to be redacted on occasion, usually for reasons of commercial sensitivity, prejudice to the effective conduct of public affairs or data protection.

Delay between meeting and publication

18. The Authority submitted that it had experienced significant resource challenges over the past few years, which was exacerbated during the Covid-19 “Lock Down” period. The Authority stated that only recently had it managed to have a fully resourced Executive Team, and so it was now possible to publish minutes once approved at the subsequent Board / Committee meeting as stipulated on its website. The Authority stated that it was aiming to move forward to achieve this within 10 days of the minutes being approved at the subsequent Board / Committee meeting.

The Applicant's submissions about the exemption

19. The Applicant submitted that it was clear that the exemption did not apply. In the Applicant’s view, when the Authority made the statement that it would publish the minutes, the information should already have been published months earlier.
20. The Authority had not published minutes within less than nine months during the last two years, so any claim that it would publish within 12 weeks was a stalling tactic, and it did not have a settled intention to publish. The Authority claimed in July 2022 that it would publish minutes within 10 days of them being signed off, but it had not done so. The Applicant noted that the most recent publication of minutes was still many months after the actual meeting taking place.

The Commissioner's view about the exemption

Partial publication

21. The Authority stated that it partially published the minutes, as it was common practice to do so.
22. The Commissioner acknowledges that an authority can publish non-exempt information at some point in the near future, and it would not have to specify when the information would be published.
23. However, a request under FOISA must be considered in its entirety and an ordinary reading of the request under consideration must crystallise that intention and set a (statutory) timescale for applying any relevant exemptions and disclosing the rest. The provisions for giving notice in section 16 of FOISA (Refusal of request) certainly expect that degree of certainty.
24. Although the Authority considers it was reasonable for it to state that it would partially published the minutes, the request must be considered in its entirety and a response (and the exemption, in this case section 27(1) of FOISA: no other has been claimed) must apply to the entirety of the publication.
25. The Commissioner's briefing on [section 27 of FOISA](#)¹, in particular paragraph 7, states that the exemption applies to documents, minutes etc. There is no reference in this briefing to partial disclosure of a document. To accept such an interpretation would be absurd, in any situation where (as here) section 27(1) was intended as the sole response to the request.
26. In the review outcome, the Authority did not inform the Applicant which other exemptions applied to the information that was not going to be published and only referred to section 27(1) of FOISA. In all the circumstances of this case, it is reasonable for the Commissioner to reach a finding on whether the exemption applied to the entirety of the request for the minutes – and, if the Authority intended to publish something less, how could that be said to meet the request the Applicant had actually made?

Settled intention to publish

27. The next and main question for the Commissioner is whether the Authority had a settled intention to publish the report.
28. The Authority submitted that, at the meetings of the Board and the RAC, the previous meeting minutes are reviewed and then published.
29. The Commissioner's decision is based the Authority's submissions and the circumstances that applied at the date of review outcome.
30. From the submissions received, it appears to the Commissioner that the Authority had no specific dates (or even any broader timeframe) identified when the minutes would be published, and nor does there appear to have been a settled view reached at that time over what particular information could or should be published.
31. The Commissioner notes that, within its review response, the Authority stated that it would now publish minutes within 10 days of the subsequent meeting, but this statement was made following the receipt of the request. The Commissioner has been presented with no

¹ [FOISA exemptions | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

evidence to support the argument that the Authority had a settled intention to publish the minutes at that time. In addition, while publication within an intended timeframe is not essential for the exemption to apply, the Commissioner cannot ignore the absence of anything in subsequent events to bear out the presence of such an intention.

32. If the Commissioner were to allow section 27(1) to apply in such circumstances, that would enable authorities to rely on this exemption as a broad instrument to extend the timescales for responding to requests. That does not appear to sit happily with the considerations of public policy envisaged in the Commissioner's briefing as making a delay in publication reasonable in all the circumstances (indeed, a discretionary measure allowing the extension of statutory timescales would appear to run counter to any legitimate considerations of public policy in the context of the statutory scheme established under FOISA).
33. Having considered all of the facts and submissions in relation to the exemption, the Commissioner concludes that the exemption in section 27(1) of FOISA did not apply to the Applicant's request for the minutes of the meetings. There was no clear, settled intention to publish the report at the time the request was received – and there does not appear to have been an intention of any kind, at any time, to publish what the Applicant actually asked for (i.e. a copy of the minutes, in their entirety). That being the case, the exemption could not apply.
34. The Commissioner requires the Authority to issue the Applicant with a revised review outcome, otherwise than in terms of section 27(1) of FOISA (i.e. in line with section 21(4)(b) of FOISA).

Decision

The Commissioner finds that the Authority failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. Specifically, he finds that the Authority was not entitled to withhold the minutes under the exemption in section 27(1) of FOISA.

The Commissioner therefore requires the Authority to issue a revised review response in terms other than section 27(1) of FOISA, by **Thursday, 31 August 2023**.

Appeal

Should either the Applicant or the Authority 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 Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

17 July 2023

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

27 Information intended for future publication

- (1) Information is exempt information if-
 - (a) it is held with a view to its being published by-
 - (i) a Scottish public authority; or
 - (ii) any other person,at a date not later than twelve weeks after that on which the request for the information is made;
 - (b) when that request is made the information is already being held with that view; and
 - (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...