



Decision Notice 138/2024

Complaints against a councillor

Authority: Moray Council

Case Ref: 202201309

Summary

The Applicant asked the Authority for information on staff complaints made about a named councillor between a specified period. The Authority refused to confirm nor deny whether it held relevant recorded information, stating that, if it existed and was held, it would be exempt from disclosure and that it would not be in the public interest to reveal whether the information existed. The Commissioner investigated and found that the Authority was not entitled to refuse to reveal whether the information existed or was held. He required the Authority to issue a new response.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 30(c) (Prejudice to effective conduct of public affairs); 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 26 May 2022, the Applicant made a request for information to the Authority. She asked for the following information about staff complaints made against a named councillor between May 2017 and April 2022:
 - how many complaints were made

- the date of each complaint
 - if a complaint relates to physical abuse, and the nature of that abuse
 - if a complaint relates to verbal abuse, and what was said
 - how each complaint was resolved
2. The Authority responded on 23 June 2022. The Authority refused, under section 18(1) of FOISA, to confirm nor deny that it held the information requested, or if it existed, stating that to do so would be contrary to the public interest. The Authority stated that, if the information did exist and was held, it may be exempt from disclosure under the exemptions in sections 30(c) (Prejudice to effective conduct of public affairs) and 38(1)(b) (Personal information) of FOISA.
 3. On 12 July 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because there were some details in the public domain relating to the information requested and that the information requested should be made available in the interests of openness and transparency.
 4. The Authority notified the Applicant of the outcome of its review on 12 August 2022, upholding its original decision that it could neither confirm nor deny that it held the information or if it existed.
 5. On 17 November 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because:
 - she believed that disclosing details of the number of complaints about the named councillor was in the public interest
 - she did not believe that disclosing the information requested would result in the release of personal information
 - she disagreed with the Authority's view that releasing complaints information would have a negative impact on complainants and prevent them from coming forward
 - she believed that in refusing to provide the information requested the Authority gave the impression that it was not being open and transparent.

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 November 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application.
8. The case was subsequently allocated to an investigating officer.
9. The Authority was invited to comment on this application and to answer specific questions, with specific reference to section 18 and in conjunction with section 30(c) and 38(1)(b) of FOISA.

10. The Applicant was also invited to comment on her application, in particular on why it would not be contrary to the public interest to confirm nor deny that the information requested was held by the Authority.

Commissioner's analysis and findings

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

Section 18(1) – “neither confirm nor deny”

12. As mentioned above, the Authority refused to confirm nor deny whether it held any information falling within the scope of the Applicant's request relative to the named councillor.
13. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA;
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
14. Where an authority has chosen to rely on section 18, the Commissioner must establish whether the authority is justified in stating, that to reveal whether the information exists or is held, would be contrary to the public interest. He must also establish whether, if the information existed and were held by the authority, the authority would be justified in refusing to disclose that information by virtue of any of the exemptions listed in section 18(1).
15. The Commissioner must ensure that his decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any depth on the authority's reliance on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held. The same applies to any submissions that are submitted by an Applicant.
16. In this case, the Authority submitted that, if it did hold any information falling within the scope of the request regarding the named councillor, it would be exempt from disclosure under the exemptions in sections 30(c) and 38(1)(b) of FOISA.
17. Where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means he is unable to comment in any detail on the Authority's reliance on sections 30(c) or 38(1)(b), or on other matters which could have the effect of indicating whether the information exists or is held by the Authority.
18. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on

the basis that any relevant information (if it existed and were held) would be exempt information under one or more of the listed exemptions. Where the exemptions are subject to the public interest test in section 2(1)(b) of FOISA, the Authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption outweighs any public interest there would be in disclosing any relevant information it held.

19. The Commissioner must first, therefore, consider whether the Authority could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and were held.

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

20. 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.
21. The standard to be met in applying the tests contained in the section 30(c) exemption 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).

The Authority's submissions

22. The Authority submitted that to confirm nor deny whether it held the requested information relating to the named councillor would, or would be likely to, prejudice substantially the effective conduct of public affairs in terms of its ability to investigate complaints and it would also damage working relationships.
23. The Authority explained that it has a duty of care to all individuals, that it has established complaints procedures in place and that the investigation of complaints should be completed in a protected space.
24. The Authority explained that to confirm nor deny whether it held the requested information disclosing complaints would have a negative impact on whether employees felt comfortable making complaints, particularly as it had a relatively small number of employees which would make it easier to identify employees by their department or service.
25. The Authority also argued that if a complaint was, for example, made frivolously, it would be unfair on the subject of the complaint for details to be made publicly available and that making information relating to complaints public could result in unfounded complaints being submitted to damage the reputation of councillors.
26. The Authority also contended that if a complaint received about a councillor was made public, this could result in working relationships being negatively impacted which, in turn, could affect decision making, negatively impacting the Authority as a whole and, in particular, its ability to deliver efficient and effective services.

The Applicant's submissions

27. The Applicant explained that she did not accept that disclosure of the requested information, if it existed and was held, would result in the substantial prejudice claimed by the Authority.
28. The Applicant believed that disclosure would instead, positively highlight that the Authority took complaints seriously which would, in turn, encourage complainants to come forward.
29. By not disclosing the information requested, if it existed and was held, the Applicant considered that the Authority gave the impression that it was not being open and honest, which negatively impacted its reputation
30. The Applicant also noted that information relating to complaints having made been against the named councillor was already in the public domain.

The Commissioner's view

31. Having considered all of the submissions on this point, the Commissioner accepts that disclosure would have the effects claimed by the Authority, which can reasonably be concluded to amount to substantial prejudice to the effective conduct of public affairs, and that the information, if it existed and was held, would therefore be exempt from disclosure under section 30(c) of FOISA.
32. The Commissioner accepts that an individual subject to a complaint would not reasonably expect this data (if it existed and were held) to be disclosed. It is important to bear in mind that disclosure under FOISA is disclosure to the world at large and not just to the person who asks for the information.
33. In the circumstances, the Commissioner agrees that such disclosure in this case would, if the information existed and was held, have the prejudicial effects claimed by the Authority in relation to its ability to carry out complaint investigations and in relation to working relationships.

The public interest test

34. As stated in previous decisions, and as explained in the Commissioner's [guidance](#)¹ on the Public Interest Test, "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.
35. The Applicant explained that she considered disclosure should be made in the public interest given the named councillor's senior role within the Authority.
36. The Authority recognised that circumstances may exist where disclosing information about complaints may be in the public interest; for example, where a "significant" complaint was made. The Authority noted that it had procedures in place to escalate such complaints to the Ethical Standards Commissioner, who produce their own reports which are made publicly available.

¹ [PublicInterestTestFOISA_2023.pdf \(itspublicknowledge.info\)](#)

37. In the circumstances, the Authority concluded that disclosure of the information requested, if it existed and was held, would be contrary to the public interest as it would impact its ability to undertake complaint investigations and would harm working relationships within the Authority.
38. The Commissioner has considered all of the submissions received regarding the public interest test, and while acknowledging the Applicant's submissions, he has to consider whether disclosure of the information, if in existence and held, would be in the interest of the public. This has to be set against the public interest in maintaining the exemption and preventing the substantial prejudice to the effective conduct of public affairs, claimed and accepted above.
39. The Commissioner accepts that there is general public interest in disclosure of the requested information, should it exist and be held by the Authority. This would contribute to ensuring that bodies paid for from public funds are transparent and accountable for their actions.
40. On the other hand, the Commissioner recognises the confidential and sensitive nature of complaint processes and of the impact of disclosure of such information, if it existed and was held, on both those making complaints and those subject to complaints.
41. Overall, there is a strong public interest in maintaining the integrity and fairness of the complaints process, which the Commissioner is satisfied would be prejudiced by disclosing the information requested (if it existed and was held).
42. On balance, therefore, the Commissioner is satisfied that, if the information existed and was held by the Authority, the public interest in maintaining the exemption in section 30(c) of FOISA would outweigh any public interest in disclosure of the information.
43. As the Commissioner is satisfied that the information requested, if it existed and was held, would be exempt from disclosure under section 30(c) of FOISA, he will not go on to consider whether it would also be exempt from disclosure under section 38(1)(b).
44. Having accepted that the Authority could give a refusal notice under section 16(1) of FOISA on the basis that any relevant information would be exempt information by virtue of section 30(c) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether the Authority was entitled to conclude that it would be contrary to the public interest to reveal whether the information requested existed or was held.

The public interest test – section 18(1)

45. The Authority submitted that to reveal whether or not it held the information requested would be contrary to the public interest as to do so would reveal whether or not it had dealt with complaints about a named councillor.
46. The Authority also referred to its submissions regarding the application of the exemption in section 30(c) of FOISA in which it had highlighted the risk of its functions being compromised by disclosure of the information requested (if it existed and were held), both in terms of the prejudicial impact on its complaint handling processes and on working relationships within the Authority.
47. The Applicant submitted that the public interest favoured disclosure of the information requested (if it existed and was held).

48. As rehearsed earlier, the Applicant noted that information relating to complaints having been made against the named councillor was already in the public domain. Specifically, the Applicant referred to the named councillor having, in response to claims that complaints had been made by council staff about their behaviour, issued a public statement (reported in a media article) in which they apologised for their behaviour and confirmed that the matter had been investigated and not taken further.
49. In view of this, and having considered the Authority's submissions fully, the Commissioner, in the specific circumstances of this case, fails to understand how (at the point when the Authority deal with the Applicant's requirement for review) it could have been contrary to the public interest to reveal the existence of the information requested (if it existed and was held).
50. The Commissioner does not accept that confirming or denying the information's existence (or whether it was held) would, given the public statement made by the councillor, cause the prejudice claimed by the Authority. Confirming or denying that the information exists, or is held, is simply just that – it does not extend to disclosure of the actual content or nature of any information (if it existed and was held).
51. In the Commissioner's view, the Authority's arguments for section 18(1) of FOISA focus more on the actual disclosure of any relevant information (if it existed and was held), as opposed to confirmation or otherwise of its existence and whether or not it was held.
52. On balance, therefore, the Commissioner concludes that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.
53. The Commissioner requires the Authority to issue the Applicant with a revised review outcome, otherwise than in terms of section 18(1) of FOISA. He requires the Authority to confirm to the Applicant whether the information requested existed and was held by it when it received the request, and to issue a fresh review outcome in terms of section 21(4)(b) of FOISA.

Decision

The Commissioner finds that the Authority 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 Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.

The Commissioner therefore requires the Authority to reveal to the Applicant whether the information she requested existed and was held by it when it received her request, and to provide her with a fresh review outcome in terms of section 21(4)(b) of FOISA, by **4 August 2024**.

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.

David Hamilton
Scottish Information Commissioner

20 June 2024

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.
- ...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- ...

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.

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).