

Decision Notice 014/2021

Financial report and related correspondence

Applicant: The Applicant

Public authority: Fife Integration Joint Board

Case Ref: 202000165



Scottish Information
Commissioner

Summary

FIJB was asked for a “turnaround” report prepared by a consultant in November 2018, with any interim versions, summaries of, or responses to the report and correspondence, emails, meeting minutes and internal correspondence relating to it.

FIJB provided some of the information but withheld the rest, including the full report, on the basis that disclosure would substantially prejudice the effective conduct of public affairs.

The Commissioner investigated and found that, while FIJB was correct to withhold some internal correspondence, it was wrong to withhold the report, summaries of the report and its action plans. He required FIJB to disclose the information to the Applicant.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 2 October 2019, the Applicant made a request for information to Fife Integration Joint Board (FIJB). The information requested was:
 - (i) The full “turnaround” report that was presented to the senior leadership team by a consultant in November 2018, as referred to in Audit Scotland’s report on FIJB’s finances (page 53).
 - (ii) Any interim versions, summaries of or responses to the above that were presented to FIJB board members.
 - (iii) Correspondence, emails, meeting minutes and all written communication in the senior leadership team regarding the above turnaround report. If this was too broad, the Applicant stated that he was interested specifically in the period from November 2018 up to and including June 2019.
 - (iv) Correspondence, emails, meeting minutes and all written communications between the senior leadership team and members of the FIJB regarding the above turnaround report. If this was too broad, the Applicant stated he was interested specifically in the period from November 2018 up to and including June 2019.

The Applicant understood the director and chief finance officers had changed recently, so was looking for communications with both the current and former position holders. He assumed when Audit Scotland was referring to the Senior Leadership Team it was using the partnership’s own definition.

2. FIJB responded on 7 November 2019, confirming that it held the information requested but withholding all of the information, as follows:
 - (i) FIJB applied section 40(b) of FOISA as it considered disclosure would, or would be likely to, cause substantial prejudice to the exercise of FIJB’s functions

- (ii) FIJB again applied section 40(b) and also section 36(2) of FOISA, as it considered the information had been provided by another person and disclosure would constitute an actionable breach of confidence
 - (iii) FIJB applied sections 30(b) and 30(c) of FOISA as it considered disclosure would inhibit the free and frank exchange of views within the Fife Health and Social Care Partnership Senior Leadership Team and otherwise prejudice substantially the effective conduct of public affairs
 - (iv) As (iii).
3. On 8 November 2019, the Applicant wrote to FIJB requesting a review of its decision, arguing that:
- with regard to section 40 of FOISA, disclosure of information that had already been reported on would not cause significant probability of substantial prejudice to FIJB's functions;
 - with regard to section 36(2), the key findings of the report had already been reported on by Audit Scotland, and so was unclear where the obligation to keep the report confidential came from and
 - with regard to section 30(b) and 30(c), the matter within the information was now settled and of an age to allow disclosure.
 - FIJB had not considered the public interest test when applying these exemptions; he explained why he believed the public interest was best served by disclosure.
4. FIJB notified the Applicant of the outcome of its review on 12 December 2019, apologising for failing to meet the timescales for the review and his original request. FIJB provided the Applicant with some of the information requested at parts (i) and (ii) of his request. It withheld the remainder of the information under section 30(c) of FOISA as it did not view the information as historic. FIJB disclosed some of the information at (iii) and (iv) of the original request, upholding section 30(c) for the remainder.
5. On 30 January 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of FIJB's review because he believed it to be in the public interest for the information to be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 6 February 2020, FIJB was notified in writing that the Applicant had made a valid application. FIJB was asked to send the Commissioner the information withheld from the Applicant. FIJB provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. FIJB was invited to comment on this application and to answer specific questions. These focused on FIJB's application of section 30(c) of FOISA to the withheld information.

9. FIJB and the Applicant provided submissions to the Commissioner.

Commissioner's analysis and findings

10. 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 the Applicant and FIJB. He is satisfied that no matter of relevance has been overlooked.

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

11. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
12. The word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
13. There is no definition of “substantial prejudice” in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would likely occur; therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.

The Applicant's submissions

14. The Applicant considered FIJB had not made a strong case for section 30(c). He argued that the report was shared with members of the Integration Joint Board, made up of elected Councillors and members appointed by NHS Fife, and that fear of reputational damage did not allow FIJB to withhold the information requested under this exemption.

FIJB's submissions

15. In its submissions, FIJB explained that in order to inform the report the consultant met the majority of the Senior Leadership Team (SLT) and frank discussions took place. It contended that these discussions were intended to remain confidential and that a resulting high-level summary would be for internal discussion only: this discussion would then lead to a more formal action plan (which had been prepared, and was disclosed to the Applicant at review stage).
16. FIJB submitted that the release of the report would have a detrimental effect on its ability to engage in an open manner with the SLT and other colleagues, leading to serious damage to FIJB's ability to conduct its affairs effectively. It argued that full and meaningful engagement with relevant staff was necessary to inform management decisions, to ensure its continued successful operation.
17. FIJB further contended that disclosure might result in damage to working relationships and create a challenging working environment, if proposals/views submitted on an internal/confidential basis were published outwith the senior management/ member environment.

18. FIJB argued that matters could not be seen as settled and historic, but rather that they were still ongoing. Debate was continuing on a number of issues, so the passage of time had not diminished the level of harm.
19. FIJB concluded that disclosure would be likely to cause substantial prejudice to the effective conduct of public affairs, both to staff and trust, and to the ability of senior management to discuss similar matters in future and therefore for the IJB to identify future improvements.

The Commissioner's view on section 30(c)

20. The Commissioner has taken account of all of the relevant submissions as well as the withheld information.
21. The Commissioner is not persuaded that disclosure of all of the remaining information withheld under section 30(c) would cause (or be likely to cause) the harm envisaged by FIJB, with the exception of the content of certain emails (documents 17 and 18).
22. The Commissioner understands that members of FIJB may not agree with all of the points raised in the report, but this is not sufficient to show that substantial prejudice would, or would be likely to, occur. Where such disagreement is evident, except in documents 17 and 18, views are not attributable to specific individuals.
23. The Commissioner considers that, documents 17 and 18 apart, it is difficult to see how the withheld information would be likely to undermine implementation of the action plans. The Commissioner accepts that the report may have informed ongoing work, but cannot see how the report itself can still be subject to ongoing development or how its publication would prevent the professionals within FIJB moving on with the current phases of work in a professional manner.
24. As such, the Commissioner is not satisfied that section 30(c) is engaged in relation to all of the withheld information, as he does not accept that disclosure would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs, in the manner described by FIJB.
25. The Commissioner is satisfied that section 30(c) is engaged, however, in relation to some of the withheld information (namely certain email correspondence – documents 17 and 18), in that disclosure would, or would be likely to prejudice substantially, the effective conduct of public affairs. Individual views are expressed with sufficient frankness in these documents that the Commissioner agrees that harm to ongoing working relationships would be likely to flow from disclosure, with resulting substantial prejudice to the effective discharge of FIJB's functions as a public authority.
26. As the exemption in section 30(c) has been found to apply to some of the withheld information, the Commissioner is now required (for this information) to go on to consider the public interest test in section 2(1)(b) of FOISA.

The public interest

27. As noted above the exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA.

Applicant's submissions

28. The Applicant's view is that there is a strong public interest argument in favour of releasing the information as disclosure would:

- (i) Enhance scrutiny of decision-making processes and thereby accountability and participation
 - (ii) Contribute to ensuring oversight of expenditure of public funds and that the public obtain value for money
 - (iii) Contribute to a debate on a matter of public interest
29. The Applicant has pointed out that large sums of public money are involved, and the public has an interest in how one of Scotland's largest IJBs spends money. In his view, the report is about the financial decision-making process and publishing it would enhance accountability.
30. The Applicant accepts public bodies should be able to have confidential discussions to ensure they function well, but argues that the public have a right to know when governance is not performing well and when public money is not being well spent. He contends that the problems relating to the funding gap at FIJB are of great concern to the people of Fife and that this report would help identify why this is happening.
31. The Applicant states that the parts of the report disclosed to him do not contain the consultant's recommendations, so it is impossible to know whether the action plans reflect the report.
32. The Applicant contends that it is not in the public interest to spend public money on external consultants and then withhold the final report when the findings are not favourable.

FIJB's submissions

33. FIJB apologised to the Applicant for not considering the public interest test in relation to section 30(c) when responding to his request initially.
34. FIJB acknowledged there was a public interest in disclosure, to demonstrate openness and accountability, particularly in the current environment where information related to financial matters. However, FIJB believed this public interest could be met by the disclosure of certain pages of the report, together with the action plan and the published minutes.
35. FIJB contended that this disclosed information allowed the public to understand why the report was carried out and the specific actions being taken forward by FIJB.
36. FIJB argued that the public interest in disclosing the remainder of the report was outweighed by the public interest in ensuring that matters could be discussed and evaluated internally by senior management, in the knowledge that it would not be published. Without this internal scrutiny and frank debate, important improvements would not be debated, addressed and taken forward and this would hinder the delivery of effective public services.
37. FIJB could identify no mitigating factors to justify the potentially adverse effect on engagement with senior management and fostering a working environment conducive to effective working relationships, and so found the public interest fell in favour of withholding the information.
38. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and accepts that disclosure of the information under consideration would go some way to providing that transparency and accountability.
39. On the other hand, with regard to the emails under consideration here, having considered their content and the terms in which it is expressed, the Commissioner finds the harm that

would be caused to ongoing staff relations by disclosure outweighs the undoubted public interest in a key area of public service delivery and issues involving substantial public funds.

40. Consequently, the Commissioner accepts that FIJB correctly withheld certain email correspondence (documents 17 and 18) to which it applied section 30(c).

Decision

The Commissioner finds that Fife Integration Joint Board (FIJB) 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 FIJB was correct to withhold some information (the information in documents 17 and 18) under section 30(c) of FOISA and so complied with Part 1 of FOISA in that respect.

However, he finds that FIJB was not entitled to withhold the remaining information under section 30(c) and that, in so doing, it failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires FIJB disclose the information wrongly withheld, and not already disclosed to the Applicant, by **15 March 2021**.

Appeal

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

Margaret Keyse
Head of Enforcement

27 January 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

...

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

...

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