

Decision Notice



Decision 024/2014 Hillend View Limited and North Lanarkshire Council

Communications between North Lanarkshire Council and the Care
Inspectorate

Reference No: 201301885
Decision Date: 13 February 2014

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 16 November 2012, Hillend View Limited (Hillend View) asked North Lanarkshire Council (the Council) for all information concerning meetings, discussions or communications between the Council and the Care Inspectorate regarding Hillend View or Hillend View Care Home (the Care Home). The Council withheld the information under various exemptions in Part 2 of FOISA.

Following an investigation, the Commissioner found that the Council was entitled to withhold the majority of the information under the exemption in section 30(c). The Commissioner did not accept that two of the withheld documents were exempt under section 30(c) and required the Council to disclose these to Hillend View.

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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 16 November 2012, solicitors acting on behalf of Hillend View asked the Council for all information it held in relation to meetings, discussions or communications which had taken place between the Council and the Care Inspectorate regarding Hillend View or the Care Home in the last twelve months. Any reference to correspondence with Hillend View in this decision is a reference to correspondence with solicitors acting on Hillend View's behalf.
2. The Council responded on 18 December 2012, and disclosed a file note to Hillend View. The Council redacted information from the file note under the exemptions in sections 30(c) and 38(1)(b) of FOISA. This was on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs, or would breach any of the data protection principles in the Data Protection Act 1998, respectively. The Council withheld other documents under the exemption in section 30(c).



3. On 17 January 2013, Hillend View wrote to the Council requesting a review of its decision. Hillend View expressed surprise that the only information that had been disclosed by the Council was the redacted file note. Hillend View considered there was an obvious public interest in ensuring transparency and accountability in decision making. Hillend View did not express dissatisfaction with the Council's application of the exemption in section 38(1)(b) of FOISA to the personal data of individuals.
4. The Council notified Hillend View of the outcome of its review on 18 February 2013, which upheld its application of the exemption in section 30(c) of FOISA. At this stage, the Council also applied additional exemptions to the withheld information.
5. On 14 August 2013, Hillend View wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Hillend View made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 22 August 2013, the Council was notified in writing that an application had been received from Hillend View and was asked to provide the Commissioner with the information withheld from it. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded on 17 October 2013, providing submissions on its application of the exemptions in sections 30(c), 35(1)(a), 35(1)(b) and 35(1)(g) of FOISA to the withheld information.
10. During the investigation, the Council disclosed to Hillend View two documents which it had previously withheld. These documents have been discounted from consideration in what follows.



Commissioner's analysis and findings

11. 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 her by both Hillend View and the Council. She is satisfied that no matter of relevance has been overlooked.

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

12. 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”. “Otherwise” is used to differentiate this exemption from other exemptions – such as substantial inhibition to the free and frank provision of advice or exchange of views – covered in other parts of section 30. Section 30(c) is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
13. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, 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 be likely to, occur, and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
14. The Council applied this exemption to all of the withheld information in this case. The information comprised file notes, correspondence and minutes of meetings.
15. The Council explained that it had ongoing concerns in relation to adult protection and the safety of residents at the Care Home. The Council submitted that the withheld information set out its actions and deliberations regarding its investigation of the Care Home. It considered that disclosure of the information would substantially prejudice its ability to properly investigate and address these concerns. In its view, disclosure of this information into the public domain would advertise the deliberation and information gathering of the Council in an investigatory capacity.
16. The Council stated that some of the information had been provided to it on condition of confidentiality. The Council argued that disclosure of the information would substantially risk prejudicing its reputation of being able to protect confidences, in future investigations. In the Council's view, this could deter members of the public from coming forward to assist in future investigations, to the certain detriment of the Council's ability to discharge that function effectively.



17. In its application to the Commissioner, Hillend View noted that the Council had not provided it with any specific justification for the application of the section 30(c) exemption. In Hillend View's opinion, the Council had provided little detail of how disclosure would limit it in conducting its business effectively and why this outcome would result from disclosure. Hillend View considered that the Council had provided no detail in respect of the level of harm which would result from disclosure; instead the Council had simply stated that it was satisfied that the exemption applied.
18. Having considered the withheld information, the Commissioner is not satisfied that the disclosure of the information in documents 5 and 7 would cause the prejudice suggested by the Council.
19. The information comprises correspondence to the Council regarding the Care Home. In the Commissioner's view, the information is innocuous and routine in nature. The Commissioner does not consider that disclosure of the information would have a detrimental effect on the Council's ability to conduct inquiries and address concerns in similar investigations in future.
20. Consequently, the Commissioner does not consider the exemption is engaged in relation to documents 5 and 7. As the Council has applied no other exemptions to these documents, the Commissioner now requires it to disclose them to Hillend View.
21. The Commissioner is, however, satisfied that disclosure of the remainder of the information requested by Hillend View would result in the prejudice suggested by the Council.
22. The Commissioner agrees with the Council that disclosure of the information could deter members of the public from assisting with any future investigations. In her view, the disclosure of such information would substantially compromise the ability of the Council to conduct similar enquiries and investigations in a candid and confidential manner in future.
23. Consequently, this would, or would be likely to, prejudice substantially the effective conduct of public affairs by having a seriously detrimental effect on the Council's ability to properly carry out its investigatory function in relation to the care management of vulnerable adults. The Commissioner considers that this would be a matter of significant concern.
24. The Commissioner therefore accepts that the Council correctly applied the exemption in section 30(c) of FOISA in relation to the withheld information, with the exception of documents 5 and 7.
25. Given that the Commissioner has upheld the application of the exemption in relation to this information, she has gone on to consider the public interest test, as required by section 2(1)(b) of FOISA.



The public interest test

26. In its requirement for review, Hillend View argued that there was an obvious public interest in ensuring transparency and accountability in the operations of public bodies. In its application to the Commissioner, Hillend View submitted that there was a public interest in ensuring that decisions regarding care homes were properly made.
27. The Council acknowledged that there was a public interest in information relating to how premises which provide adult care services are operated. In the Council's opinion, this was outweighed by the public interest in an authority being able to investigate such premises without the investigation being compromised by the disclosure of information relating to that investigation.
28. The Council also argued that the public interest in the availability of information relating to the operation of care facilities was effectively met by other publicly available information; for instance, inspection reports of the Care Inspectorate which are available on the Care Inspectorate's website.
29. In its response to Hillend View's requirement for review, the Council stated that a Social Work Service should be able to enter case-specific deliberations without apprehension that the subject of those deliberations would be placed in the public domain. In the Council's view, this would constitute an unreasonable fetter on the proper conduct of public affairs and would be a breach of the trust imposed on a Social Work Service.
30. In considering the public interest test in relation to the relevant information, the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making. The Commissioner considers this must be balanced against any detriment to the public interest as a consequence of disclosure. Exempt information can only be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding the information).
31. The Commissioner considers it appropriate that public authorities should be able to gather information, carry out investigations of this nature and make decisions on the basis of full and open discussions. This is especially important given the nature of the client group affected by the Council's investigation in this case.
32. The Commissioner's view is that there is a public interest in ensuring high quality decision making by public authorities and in ensuring that authorities are able to carry out investigations appropriately. In her view, this would be compromised by placing in the public domain matters such as the discussions and correspondence under consideration in this case.
33. Having accepted that disclosure in this case would be likely to cause significant difficulties for the Council in its investigatory role, the Commissioner also finds there is substantial weight to the public interest in maintaining the exemption in this case. Additionally, the Commissioner agrees that the public interest in such cases is served, to a degree, by the availability of individual inspection reports on the Care Inspectorate's website.



34. On balance, having weighed up the arguments advanced by Hillend View and the Council, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA was not, at the time the Council notified Hillend View of the outcome of its review, outweighed by the public interest in disclosure of the withheld information.
35. The Commissioner finds therefore that the Council was entitled to withhold the information sought by Hillend View (with the exception of documents 5 and 7) under the exemption in section 30(c).
36. As the Commissioner has concluded that the remaining information is exempt from disclosure under section 30(c), she is not required to consider the Council's application of the exemptions in section 35 of FOISA.

DECISION

The Commissioner finds that North Lanarkshire 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 Hillend View Limited (Hillend View).

The Commissioner finds that the Council was entitled to withhold some information under the exemption in section 30(c) of FOISA and by doing so, complied with Part 1 of FOISA.

The Commissioner also finds that the remainder of the information was not exempt from disclosure under section 30(c). By withholding this information, the Council breached Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner therefore requires the Council to disclose to Hillend View documents 5 and 7 by 31 March 2014.



Appeal

Should either Hillend View Limited or North Lanarkshire 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.

Margaret Keyse
Head of Enforcement
13 February 2014



Appendix

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.