

Decision Notice



Decision 047/2010 Mr Alan Davidson and the Board of Trustees for the
National Galleries of Scotland

Cash flow information

Reference No: 200901252
Decision Date: 18 March 2010

www.itspublicknowledge.info

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Summary

Mr Davidson requested from the Board of Trustees for the National Galleries of Scotland (NGS) copies of information presented to the Board of Trustees and to its Audit Committee relating to NGS's cash flow position and investment policy. NGS responded by providing Mr Davidson with some of the information he requested, but withholding certain of the information on the basis of sections 30(c) and 33(1)(b) of the Freedom of Information (Scotland) Act (FOISA). Following a review, where NGS decided to also cite section 30(b)(i) and (ii) of FOISA in relation to some of the information it withheld, Mr Davidson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that NGS had failed to deal with Mr Davidson's request for information in accordance with Part 1 of FOISA, by incorrectly applying the exemptions in 30(b)(i), 30(c) and 33(1)(b) of FOISA to the information withheld. He required NGS to release to Mr Davidson the information previously withheld and falling within the scope of his initial request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(i) and (c) (Prejudice to effective conduct of public affairs) and 33(1)(b) (Commercial interests and the economy)

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 10 April 2009, Mr Davidson wrote to NGS requesting the following information:
 - i. *Copies of all papers presented between April 2008 and March 2009 to meetings of the Board of Trustees of the National Galleries of Scotland or to its Audit Committee containing information on the cash flow position of NGS and/or cash flow projections covering the four years from 2008/9 to 2011/12*



- ii. Copies of all papers presented between April 2008 and March 2009 to meetings of the Board of Trustees of the National Galleries of Scotland or to its Audit Committee containing information on current NGS investment policy or and any changes to that policy*
 - iii. Copies of minutes covering discussions and decisions pertaining to all the above papers.*
2. NGS responded on 13 May 2009. It provided some of the information Mr Davidson had requested, but redacted information from a number of documents on the basis of exemptions in sections 30(c) and 33(1)(b) of FOISA, stating that disclosure of the redacted information would be likely to jeopardise the project in question. NGS also provided partially redacted papers which had been presented to, and discussed in detail by, its Major Capital Projects Committee (MCPC) (it should be noted that this additional information fell outwith the scope of Mr Davidson's request).
3. On 18 May 2009, Mr Davidson wrote to NGS requesting a review of its decision, specifically in respect of the cash flow information he had requested. In particular, Mr Davidson drew NGS's attention to his views on the public interest in disclosure of the withheld information, stating that it was in the public interest that NGS make clear how it proposed to fund major spending commitments at a time of increasing economic difficulty, what contingency plans had been put in place by the Board of Trustees in the event that funding could not be procured, and what the impact of these commitments might be on current services.
4. NGS notified Mr Davidson of the outcome of its review on 16 June 2009. In addition to detailing the conclusions of its review, NGS provided an explanation of how it intended to fund commitments to its major projects over the coming years. NGS confirmed that it was adhering to its decision to withhold the redacted information as detailed in its initial response, citing the exemptions in section 30(b) of FOISA in addition.
5. On 6 July 2009, Mr Davidson wrote to the Commissioner, stating that he was dissatisfied with the outcome of NGS'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 Mr Davidson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 13 July 2009, NGS was notified in writing that an application had been received from Mr Davidson and was asked to provide the Commissioner with any information withheld from Mr Davidson. NGS responded with the information requested and the case was then allocated to an investigating officer.



8. The investigating officer subsequently contacted NGS, 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. In particular, NGS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. NGS's arguments will be considered fully, insofar as relevant, in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Davidson and NGS and is satisfied that no matter of relevance has been overlooked.

Scope of Mr Davidson's information request

10. A prominent feature of this case has been confirming with NGS what information falls within the scope of the request. Submissions were received regarding exemptions applied by NGS to information which turned out to be outside the scope of the request. In the course of the investigation, it was further established that some other information should have been regarded as within the scope of the request and that additional submissions were therefore required. At the end of the day a decision was required on only a very limited amount of information.
11. As has been noted above, in responding to Mr Davidson's request, NGS provided additional information which it believed would be helpful to him (in papers considered by the MCPC), as it referred to the concerns he raised in his request. The Commissioner notes the reasons given by NGS for doing this and accepts that the authority's motivation for providing the information was to offer assistance to Mr Davidson. However, it may have given Mr Davidson the impression that more information within the scope of his request was available than was actually the case. As this material was supplied in redacted form, he believed he was entitled to submit a requirement for review and to make an application to me.
12. For the purposes of this decision, the Commissioner can only consider information falling within the scope of the original request. In this case, that is information which was presented to the Board of Trustees and Audit Committee in respect of cash flow for the four years specified, together with minutes of the relevant discussions and decisions. Much of the information in dispute falls outside of the parameters contained within such a description e.g. because it was considered by a Committee other than the Audit Committee and not by the Board.



13. Furthermore, during the investigation, it also became evident that certain information otherwise falling within the subject matter of the request had at the time of the request been identified but considered to be outwith the scope of the request as it was contained in minutes of meetings which had yet not been approved by the Board of Trustees. Having considered the information in question, the Commissioner is satisfied that it was held by NGS at the time the request was received and that in all other respects it fell within the scope of the request. NGS accepted this during the course of the investigation and subsequently provided the investigating officer with the information, identifying the redactions it wished to make to it and citing the exemptions it considered applicable to the redacted information.
14. Consequently, this decision will consider the withheld information described as “exemption 1” and “exemptions 43, 44, 45, 46 and 47” in NGS’s submission of January 2010. For ease of reference, the first set of withheld information will be referred to in this decision as document 1 and the second as document 2.

Section 33(1)(b) – Commercial interests and the economy

15. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). A public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely to, be substantially prejudiced by disclosure of the information. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.
16. In its submissions, NGS applied section 33(1)(b) to the redacted information contained in both documents 1 and 2. It argued that the redacted information was exempt from disclosure on the basis that NGS had commercial interests in its ability to raise funds and in the awarding of Best Value contracts to carry out certain work, adding that release of the information in question would have specific substantially prejudicial effects on those interests.
17. The interests as described might be regarded as largely financial interests rather than commercial interests. (A public authority’s financial interests may relate broadly to its financial resources and assets, whilst its commercial interests will specifically relate to any commercial activity it undertakes, for example, commercial transactions of goods and services, commonly for the purposes of revenue generation.)
18. While the Commissioner acknowledges that a public authority’s financial and commercial interests may coincide, this will not always be the case. In his view, for example, the utilisation of resources required by an authority to undertake its core activities is unlikely to represent a commercial activity. While the purchase of resources may entail activity which engages with commercial operators, it does not necessarily follow that the authority has commercial interests in relation to that activity.



19. In the circumstances of this case, the Commissioner has considered carefully whether NGS engages in commercial activity for the purposes under consideration. Although the bulk of fundraising activity could not be said to be commercial, there is clear evidence that the NGS engages in commercial activity and that such activity featured in its plans for the future in terms of retailing and engaging with commercial sponsors. In the circumstances of this case at least, the Commissioner accepts that NGS has commercial interests in relation to aspects of its fund raising activity.
20. In concluding what harm would be done to those commercial interests by the disclosure of the information now at issue in this case, the Commissioner has taken into consideration the views expressed in numerous previous decisions and reiterated in his briefing on the section 33(1)(b) exemption¹. In particular, the briefing says:

The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.

FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied.
21. The Commissioner has noted the arguments presented by NGS in relation to substantial prejudice, but is not persuaded that disclosure of the information under consideration in this case would result in the substantial prejudice alluded to. While he accepts that matters relating to the information requested remained ongoing at the time Mr Davidson's request was dealt with, he cannot accept that release of the relatively small amount of withheld information falling within the scope of the request would, or would be likely to, cause substantial prejudice. That information, if disclosed, would not have, or be likely to have, resulted in the harm to commercial interests as described by NGS, either by jeopardising the project overall or the commercial element of the fundraising effort.
22. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, he is not required to go on to consider the public interest test contained in section 2(1)(b) of FOISA
23. As this was the only exemption claimed in respect of the information described as "exemption 43" and "exemption 46", the Commissioner requires this information to be disclosed.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>



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

24. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of the exemption it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA. While referring to both of the exemptions in section 30(b) in responding to Mr Davidson's request for review, NGS narrowed this down to section 30(b)(i) in its submissions to the Commissioner.
25. In order for NGS to be able to rely on the exemption laid down in section 30(b)(i) of FOISA, it would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. The Commissioner's views on the application of this exemption (along with that contained in section 30(b)(ii)) have been set out at length in a number of decisions, most notably *Decision 089/2007 Mr James Cannell and Historic Scotland* and *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*.
26. While he will not repeat these views in full, the Commissioner would reiterate that, in coming to a decision on the application of these exemptions, he will consider the actual information withheld, not simply the category of information to which it belongs or the situation in which the request has arisen. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that such information will require to be disclosed routinely in the future. The Commissioner looks for public authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
27. The submissions presented to the investigating officer commented upon each piece of information being withheld on the basis of section 30(b)(i). NGS argued that awareness of the issues under consideration would have certain prejudicial effects which could jeopardise a particular project, creating undesirable speculation and rumours. It submitted that these damaging effects, as a result of disclosure at a critical time in the project, would be real, actual, significant and immediate, adding that to avoid a repeat of the same in future provision and/or minuting of advice would be substantially inhibited, leading to unsatisfactory consideration of options/risks etc related to high-level projects. NGS went on to add that this would potentially be very serious and damaging to the success of this and future projects.
28. The Commissioner has considered the submissions presented by NGS on the application of the exemption in section 30(b)(i), along with the content of the information withheld under this exemption. Noting that not all of the arguments in fact relate to future inhibition, he is not persuaded by NGS's arguments that disclosure would, or would be likely, to lead to substantial inhibition in the free and frank provision of advice.



29. While the information in question goes into some detail on certain financial questions, he does not believe that NGS has demonstrated why its disclosure would, or would be likely to, lead to substantial inhibition as required for the exemption to apply. The Commissioner has considered the level of candour contained within the information and, to the extent that options are discussed, the advice as recorded appears to have been expressed in a measured and considered manner. Given the nature of the advice, it is difficult to imagine responsible professional advisors refraining from providing full and adequate advice on similar questions in future, or that such advice would cease to be recorded. In short, the Commissioner cannot accept that this level of detail or candour would, or would be likely to be, inhibited substantially in the future by release of the information in question.
30. As the Commissioner finds that the Council was not justified in relying on section 30(b)(i) of FOISA to withhold certain of the information, and given that he has not accepted the application of the exemption in section 33(1)(b) in respect of the same information, he requires NGS to release the information it has described as “exemption 44” and “exemption 45”.

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

31. The exemption in section 30(c) applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" signifies that this exemption is to be used in situations other than those envisaged by the exemptions in section 30(a) and (b). However, section 30(c) remains a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information. The exemption in section 30(c) is subject to the public interest test.
32. NGS submitted that, at the time Mr Davidson's request was being dealt with, the withheld information from document 1 and the information described as “exemption 47” from document 2, was exempt in terms of section 30(c) of FOISA. NGS argued that, for certain specific reasons, release of the information at that time could have seriously harmed and undermined its relationship with another specified Scottish public authority. NGS went on to argue that disclosure would have an immediate effect and would jeopardise the project to which the information related, impacting also on its ability to raise funds for that project. The relationship with the other authority would be affected then and in the future, substantially prejudicing the effective conduct of public affairs between the two bodies.
33. The Commissioner has considered carefully NGS's arguments in relation to this exemption and the information to which those arguments relate. While he accepts that public disclosure of the matter in question before it had been fully dealt with could have led to a degree of awkwardness in the relationship between the two authorities, he is not persuaded that any consequent prejudice to the relationship between them would have been, or would have been likely to be, substantial. In this connection, he has taken account of the established relationship between the two authorities and the nature of the project in question. (Although it does not bear upon the decision, he notes that NGS does not consider the exemption in section 30(c) to remain applicable to the withheld information now.)



34. As the Commissioner does not accept that the information in question is exempt under section 30(c) of FOISA, he is not required to go on to consider the public interest test under section 2(1)(b).
35. The Commissioner therefore requires NGS to release the information withheld from document 1 and also that described as “exemption 47” from document 2.

DECISION

The Commissioner finds that the Board of Trustees for the National Galleries of Scotland (NGS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Davidson. By incorrectly applying the exemptions in sections 30(b)(i), 30(c) and 33(1)(b) to the withheld information, NGS failed to comply with Part 1, and in particular section 1(1), of FOISA.

The Commissioner therefore requires NGS to disclose the information described as “exemption 1” and “exemptions 43, 44, 45, 46 and 47” in its submission of January 2010 which it withheld from Mr Davidson and which falls within the scope of his request, by 3 May 2010.

Appeal

Should either Mr Davidson or the Board of Trustees for the National Galleries of Scotland wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
18 March 2010



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-

...

- (b) would, or would be likely to, inhibit substantially-

- (i) the free and frank provision of advice; or

...

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

33 Commercial interests and the economy

- (1) Information is exempt information if-



...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...