

Decision Notice



Decision 057/2013 Mr John Cross and City of Edinburgh Council

Report by Deloitte LLP into allegations of impropriety in the awarding of contracts by Council Departments

Reference No: 201201706
Decision Date: 28 March 2013

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Summary

On 4 August 2012 Mr Cross asked the City of Edinburgh Council (the Council) for a copy of the report outlining the findings of the investigation by Deloitte LLP into allegations of impropriety in the awarding of contracts by specific Council departments (the Project Power report). The Council did not respond to Mr Cross's request. It carried out a review on 6 September 2012. The Council refused to disclose the Project Power report on the basis that (among other reasons) doing so would prejudice substantially the administration of justice. Mr Cross remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner accepted that the Council was entitled to withhold the majority of the Project Power report, given the situation at the time when the review response was issued to Mr Cross. In coming to this view she recognised the public interest in disclosure of the report but accepted that at the relevant point in time in this case, the balance lay in favour of withholding some of the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 35(1)(c) and (g) and (2)(b) (Law enforcement); 38(1)(b) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data")

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation) (definition of "environmental information")

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. The context of Mr Cross's request is the statutory notice system used in Edinburgh. Statutory notices require homeowners to carry out repairs using council-approved builders to protect the architecture of the city. The statutory notice means that if owners in tenement blocks cannot agree on the instruction of their own communal repair work the Council can commission repair work to be carried out on the buildings in order to stop them deteriorating, and then charge the owners for the work.
2. There was evidence of estimates of statutory notice charges issued by the Council to owner-occupiers in the city (including Mr Cross) increasing substantially from the initial quotes to the final bills. Following a BBC programme broadcast in September 2011 investigating this, the Council suspended several of its employees and instituted an independent investigation by Deloitte LLP while Lothian and Borders Police also instituted a fraud enquiry.
3. On 4 August 2012, Mr Cross wrote to the Council requesting a copy of a report of the investigation it commissioned from Deloitte LLP (the Project Power report). The Project Power report contained the findings of Deloitte LLP's investigation into allegations of impropriety regarding the award of contracts for building works by sections within the Council. Mr Cross's request (on the WDTK website here: http://www.whatdotheyknow.com/request/deloitte_report) asked for a copy of the information already requested by a third party on 16 April 2012. The effect of this was to make 16 April 2012 an important date in the consideration of this case. This was because the request of 4 August 2012 was effectively asking for information the authority still held, that it originally held at the time of the request of 16 April 2012.
4. The Council failed to respond to Mr Cross, so he wrote again on 5 September 2012 requesting a review of the Council's decision not to respond to his request.
5. The Council notified Mr Cross of the outcome of its review on 6 September 2012. It apologised for not responding to his request and withheld the Project Power report under section 35 of FOISA (Law enforcement).
6. On 10 September 2012, Mr Cross wrote to the Commissioner, stating that he 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.
7. The application was validated by establishing that Mr Cross 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

8. On 11 September 2012, the Commissioner notified the Council in writing that she had received an application from Mr Cross. The Council provided the Commissioner with a copy of the Project Power report and the case was allocated to an investigating officer.
9. 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.
10. The Council provided submissions to the investigating officer. The Council stated that it wished to rely on sections 35(1)(c) and (g) (Law enforcement), 30(b) and (c) (Prejudice to the effective conduct of public affairs) and 38(1)(b) (Personal information) of FOISA. Should the Commissioner consider the information to be environmental, it wished to rely on section 39(2) (Health, safety and the environment) of FOISA along with regulation 10(5)(b) of the EIRs (Substantial prejudice to the course of justice, etc.).
11. Submissions were also sought, and received, from Mr Cross on why he considered that the public interest lay in disclosure of the Project Power report.
12. For the reasons set out below, the Commissioner also sought comments from the Crown Office and Procurator Fiscal Service (COPFS) as to its view on the sensitivity of the withheld information.
13. The relevant submissions received from both the Council and Mr Cross, along with the views from COPFS, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information, the submissions made to her by both Mr Cross and the Council and the views from COPFS. She is satisfied that no matter of relevance has been overlooked.

Information falling within the scope of the appeal

15. The Commissioner notes that it was brought to her attention during the latter stages of this investigation that the Council had commissioned a second report by Deloitte LLP concerning statutory notice matters, entitled the Project Solar report. This came to light when mention was made of the second report in a BBC news article. Up until this point, the Commissioner was unaware of the existence of the report.



16. From reading excerpts of the Project Solar report on the BBC news website, it appeared that some of the information in the second report might fall within the scope of Mr Cross's request. The Council was asked to supply the Commissioner with a copy of the Project Solar report. It became clear, however, that the report fell outwith the scope of Mr Cross's request.
17. Mr Cross's request was for information held by the Council on 16 April 2012. The Project Solar report was not produced until 8 June 2012, meaning it did not exist at the time of the third party's request (see paragraph 3), so could not fall within the scope of what the third party (and, by extension, Mr Cross) was asking for.
18. The Commissioner will therefore consider only the information contained in the Project Power report.

FOISA v EIRs?

19. The first matter for the Commissioner to consider is whether this case should be dealt with in terms of FOISA or the EIRs.
20. Environmental information is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
21. Having considered the subject matter of Mr Cross's request, the Commissioner is of the view that the requested information is not environmental information as defined in regulation 2(1) of the EIRs.
22. The information sought by Mr Cross consists of a report investigating allegations of impropriety in the awarding of contracts for building works by a number of sections within the Council. The alleged impropriety relates to building control matters. The actual report itself is a record of investigations carried out by Deloitte LLP, along with its conclusions and recommendations. It does not have a direct bearing on the elements of the environment as required by regulation 2(1) of the EIRs. As a consequence, the Commissioner concludes that Mr Cross's request is not one to which the EIRs apply.
23. This decision will therefore focus solely on the Council's handling of the request in line with the requirements of FOISA.
24. Having reached this conclusion, the Commissioner will go on to consider whether the Council was entitled to withhold the information in terms of the exemptions that were cited during the investigation. She will first consider the exemption in section 35(1)(c) of FOISA.
25. Dates and times are significant in the consideration of this case.
 - a. The request is effectively for information that was held on 16 April 2012.



- b. The Commissioner is required to consider the circumstances of the case as they were on 6 September 2012 (the date of the Council's review), albeit that circumstances may have changed by the time of writing this decision.¹ In other words, did the Council still hold the information it held on 16 April 2012 and if so did it apply FOISA to it correctly?

Section 35(1)(c) Substantial prejudice to administration of justice

26. Under section 35(1)(c), information is exempt information if its disclosure would, or would be likely to, prejudice substantially the administration of justice. The term "administration of justice" is not defined in FOISA, but the Commissioner considers that it refers widely to matters relating to the working of the courts and of tribunals. Examples might include principles such as the right to a fair trial and ensuring that individuals have access to justice.
27. This exemption is subject to the public interest test set down in section 2(1)(b) of FOISA.
28. The Council has applied this exemption to the entire Project Power report.
29. The Council commented that the Project Power report focuses on investigation into allegations of impropriety and fraud, and sets out the evidence gathered and the conclusions reached by Deloitte LLP in relation to each of these allegations. As a result of the Project Power report, and of other information obtained by the police, a number of individuals have been charged with criminal offences and have been the subject of reports to COPFS.
30. The Council commented that the consideration of criminal proceedings was an on-going matter at the time they dealt with Mr Cross's review request, and that prosecution was wholly within the discretion of COPFS. The Council asserted that COPFS was of the view that disclosure of the Project Power report would prejudice the criminal investigation and, in particular, any prosecution which may arise from the criminal investigation. The Council provided the Commissioner with a copy of an email from COPFS supporting its assertion, which was corroborated verbally by COPFS during a telephone discussion with the Commissioner's investigating officer.
31. The Council stated that it had no reason to take COPFS' concerns other than at face value and that it had independently come to the same conclusion, given that criminal proceedings could be compromised if substantial and prejudicial pre-trial publicity were to take place. In the Council's view there was a substantial risk of prejudicial pre-trial publicity in relation to the individuals who had been the subject of criminal charges at that date. This risk arose from the fact that release of the Project Power report would carry with it no specific reporting restrictions (disclosure under FOISA is deemed to be disclosure into the public domain).

¹ In the case of *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8 (<http://www.scotcourts.gov.uk/opinions/2007csih08.html>), the Court of Session made it clear that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of FOISA.)



32. Furthermore, the Council submitted that section 35(1)(c) of FOISA relates to civil proceedings as well as criminal prosecutions, and advised that there were currently 18 live and on-going court cases between private homeowners and the Council at the date of Mr Cross's request. The Council also submitted that it is actively considering raising proceedings against certain other private parties and that disclosure of the Project Power report had the potential to prejudice the Council's ability to prepare thoroughly and in private, as it is entitled to do, in relation to raising such proceedings.
33. The Council also considered that the Project Power report was exempt from disclosure under section 35(1)(c) due to on-going internal investigations and disciplinary processes. The Council advised the Commissioner that there are a number of individuals whose employment had been terminated and who are subject to on-going disciplinary processes and appeals.
34. Mr Cross argued that the Council had failed to demonstrate that disclosure would substantially prejudice law enforcement. He questioned whether the Project Power report should be exempt in its entirety. He argued that disclosure of the front cover, page numbers, any statement of the terms of reference or terms of engagement or any general recommendations about internal controls would be unlikely to prejudice the administration of justice.
35. Having considered all of the Council's and Mr Cross's submissions, together with the content of the withheld information, the Commissioner accepts that the Project Power report, for the most part, is exempt from disclosure under section 35(1)(c) of FOISA, on the basis that its disclosure would, or would be likely to, prejudice substantially the administration of justice.
36. The Commissioner is of the view that the following parts of the Project Power report would not be prejudicial insofar as they do not reveal any information which could affect on-going proceedings:
 - Covering page of the Project Power report
 - Table of contents
 - Abbreviations and terms used
 - Glossary of contracting firms
 - Part 1, Introduction and terms of reference, paragraphs 1.1 to 1.2.11
37. The Commissioner therefore finds that the Council was incorrect to apply section 35(1)(c) of FOISA to this information and finds that it should be disclosed to Mr Cross thereby putting it into the public domain. She finds the remainder of the Project Power report was correctly withheld under section 35(1)(c) of FOISA.
38. In reaching her conclusion, the Commissioner recognises that, at the time the Council responded to Mr Cross's request for review, a criminal investigation was being conducted by Lothian and Borders Police, and that COPFS had not decided whether to proceed to a prosecution. The Commissioner also accepts that the Project Power report contains information, disclosure of which could have prejudiced the ability of certain persons to receive a fair trial unhampered by pre-trial publicity if disclosed into the public domain.



39. The Commissioner has also considered the arguments put forward by the Council in respect of section 35(1)(c) of FOISA in relation to civil proceedings. She finds these arguments less persuasive than those put forward in respect of the criminal proceedings. However, as she is upholding the application of 35(1)(c) with regard to the criminal proceedings, she is not required to address the submissions made with regard to the civil proceedings in further detail.

Public interest test

40. Section 35(1)(c) of FOISA is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the majority of the information in the Project Power report is exempt under section 35(1)(c), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the remainder of the Project Power report is outweighed by the public interest in maintaining the exemption
41. Mr Cross submitted that disclosure of the Project Power report could help public understanding as to whether:
- the Council commissioned a thorough, independent report into potential failings in respect of its Building Standards Department (and the relative importance the writers placed on the matters raised in the Project Power report)
 - the Council placed unreasonable restrictions or limitations on the scope of Deloitte LLP's work
 - Council staff/officers co-operated fully with the independent investigation by Deloitte LLP
 - the Council failed to put in place appropriate controls in respect of the work of the Building Standards Department
 - there were failures of management and/or governance at the Council
 - there were cultural problems at the Council
 - the Council was using public money appropriately
 - the Council was misusing its statutory powers
 - the Project Power report includes details of unlawful activities (which could include criminality or corruption)
 - commissioning the Project Power report was a good use of public funds
 - whether or not the Council have acted on the recommendations raised in the Project Power report



42. The Council acknowledged that there was a public interest in understanding the manner in which statutory repair notices were issued and that there was public concern regarding the investigations. It also acknowledged that the system should be open and transparent. However, the Council considered it contrary to the public interest for the Project Power report to be released prior to the completion of investigative procedures. It was of the firm opinion that the public interest is better served by enabling criminal and civil proceedings to take their course without potential prejudice which could be fatal to criminal proceedings if there is substantial pre-trial publicity. The Council considered that protecting the right to a fair trial, in both criminal and civil proceedings, carried greater weight than the public interest in disclosing the Project Power report and that the balance of public interest favoured the maintaining of the exemption in this case.

The Commissioner's findings on the public interest

43. Having taken into account both the submissions from Mr Cross and from the Council, the Commissioner recognises that there is a substantial public interest in the disclosure of information about the statutory repair notices scandal, particularly for Council Tax payers in the Lothian area. Disclosure of the Project Power report would assist people in understanding whether the administration of statutory notices and the associated works had been fair, honest and transparent, and whether concerns about the activity of Council staff were well-founded.
44. The Commissioner also accepts that it is in the public interest to allow better public understanding of whether, and if so how, any impropriety took place within the relevant Council departments. Given the importance of ensuring transparency and accountability in public authorities' use of public funds it is also in the public interest to understand whether value for money was obtained for the public purse in the monies spent on the building repair projects in Edinburgh.
45. However, there are also substantial public interest arguments which favour maintaining the exemption in section 35(1)(c) and in withholding the remainder of the Project Power report.
46. Where criminal investigations are undertaken which involve consideration of staff conduct, there is a significant public interest in ensuring that individuals whose actions are under scrutiny are treated with fairness and dignity. The potential identification of individuals who have been suspended, or whose actions are under investigation, could prompt speculation about the actions of those individuals prior to any investigation being concluded, or formal charges being placed. There is also a significant public interest in COPFS being able complete its investigations independently and objectively.
47. The Commissioner accepts that disclosure of the remainder of the Project Power report at the time the Council dealt with Mr Cross's review request would have compromised such investigations and unfairly prejudiced potential court proceedings and other conduct related investigations.



48. The Commissioner weighed the significant public interest in ensuring the right to a fair trial and in ensuring that potential proceedings are not prejudiced against the public interest in disclosure. She concluded, on balance, that the public interest in maintaining the exemption in section 35(1)(c) of FOISA was not outweighed by the public interest in disclosure of the withheld information at the time when the Council notified Mr Cross of the outcome of its review.

The additional exemptions

49. As noted in paragraph 10, the Council also relied on the exemptions in sections 35(1)(g), 30(b) and (c) and 38(1)(b) to withhold the Project Power report from Mr Cross. These exemptions are set out in full in the Appendix.
50. Given that the Commissioner has come to the conclusion that the information described in paragraph 36 (covering page, table of contents, etc.) is not exempt from disclosure under section 35(1)(c), she must consider whether the information is exempt under one or more of these additional exemptions.
51. Submissions were received from the Council on each of these exemptions. For obvious reasons, the submissions focussed on the report as a whole and not on the information described in paragraph 36. As such, the Commissioner does not consider it necessary to repeat the submissions here.
52. Clearly, the information described in paragraph 36 is much less sensitive than the remainder of the report; it is factual and does not contain information such as allegations about specific individuals. As such, the Commissioner does not consider that disclosure of this particular information would, or would be likely to:
- prejudice substantially the exercise by the Council of any function it has in relation to ascertaining whether a person is responsible for conduct which is improper (section 35(1)(g) as read with section 35(2)(b)); or
 - inhibit substantially the free and frank provision of advice (section 30(b)(i)), the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)) or otherwise prejudice substantially the effective conduct of public affairs (section 30(c)).
53. All of these exemptions are subject to the public interest test set out in section 2(1)(b). However, given that the Commissioner is satisfied that none of these exemptions can be met, she is not required to consider the public interest test.
54. The Commissioner also notes that the information described in paragraph 36 does not contain any personal data, as defined in section 1(1) of the Data Protection Act 1998. Although the "glossary of contractors" lists a number of contractors, they are all limited companies. As such, the exemption in section 38(1)(b) of FOISA (third party personal data) cannot apply.



Comment

55. As has been noted throughout this decision, the Commissioner has been required to take account of circumstances as they existed as at 6 September 2012 in relation to information held at 16 April 2012. Events since then mean that the Commissioner may not necessarily come to (or be able to come to) the same conclusion in any future case. For example:
- on 23 November 2012, Lothian & Borders Police announced that no criminal charges were to proceed in respect of Council owner-occupied properties (albeit that the criminal investigation appears to be on-going in respect of Council owned properties); and
 - on 24 December 2012, Lothian & Borders Police disclosed a redacted copy of a progress report it had compiled in relation to allegations of corruption within the Council's Property Conservation Service in response to an information request made to it on 20 December 2012.²
55. The Council will no doubt wish to take account of these matters when dealing with any future requests for the Project Power report.

DECISION

The Commissioner finds that the City of Edinburgh 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 Mr Cross.

She finds that the Council was entitled to withhold the majority of the Project Power report on the basis that disclosure would, or would be likely to, prejudice substantially the administration of justice.

However, the Commissioner also finds that the Council wrongly withheld some information in the Project Power report under Part 2 of FOISA. In withholding this information, the Council breached Part 1 (and in particular section 1(1)) of FOISA. The Commissioner requires the Council to provide Mr Cross with this information (as described in paragraph 36) by Tuesday 14 May 2013.

² http://www.whatdotheyknow.com/request/police_investigation_property_co#incoming-344878

Decision 057/2013
Mr John Cross
and City of Edinburgh Council



Appeal

Should either Mr Cross or City of Edinburgh Council 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.

Rosemary Agnew
Scottish Information Commissioner
28 March 2013



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 –

- (a) the provision does not confer absolute exemption; and
- (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
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



35 Law Enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially –
- ...
- (c) the administration of justice;
- ...
- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- ...
- (2) The purposes are –
- ...
- (b) to ascertain whether a person is responsible for conduct which is improper;
- ...

38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

"personal data" means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...