

Decision Notice



Decision 082/2013 Mr David Fleming and Aberdeenshire Council

Risk assessment and procedures

Reference No: 201202199
Decision Date: 7 May 2013

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Summary

On 16 July 2012, Mr Fleming asked Aberdeenshire Council (the Council) for information about Stonehaven Open Air Pool. The Council refused to provide the information.

Following an investigation, the Commissioner found that the Council had not been entitled to withhold the information requested by Mr Fleming, concluding that disclosure would not substantially prejudice the exercise of the Health and Safety Executive's (HSE) functions to investigate an accident (section 35(1)(g) of FOISA). The Commissioner required the Council to provide the information to Mr Fleming.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 35(1)(g), (2)(a), (c), (e) and (j) (Law enforcement)

Health and Safety at Work etc. Act 1974 section 14(1) and (2) (Power of the Commission to direct investigations and inquiries)

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 July 2012, Mr Fleming wrote to the Council and requested the following information:
 - a) the Risk Assessment for the Stonehaven Open Air Pool (the Pool) operations valid as of 1 June 2012;
 - b) the Risk Assessment for the Pool operations valid as of 11 July 2012;
 - c) any Communications between the Council and the HSE regarding an incident at the Pool on 28 June 2012 and
 - d) the current operational procedures applicable to lifeguards at the Pool.



2. The Council responded on 14 August 2012, confirming that it held information falling within the scope of Mr Fleming's request. The Council informed Mr Fleming that it was withholding the information under section 35(1)(g): the Council considered disclosure would, or would be likely to, prejudice substantially the exercise of the functions of the HSE (addressed in more detail below).
3. Mr Fleming wrote to the Council on 6 September 2012, requesting a review of its decision to withhold the information requested at a) and d) above. Mr Fleming disputed that disclosure of the information would substantially prejudice the HSE's functions as claimed. (As Mr Fleming did not query the Council's response to b) and c), these are not addressed in this decision.)
4. The Council notified Mr Fleming of the outcome of its review on 2 October 2012 and upheld its original decision without modification.
5. On 25 October 2012, Mr Fleming 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.
6. The application was validated by establishing that Mr Fleming 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 15 November 2012, the Council was notified in writing that an application had been received from Mr Fleming and was asked to provide the Commissioner with the information withheld from him. 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.
9. The Council responded on 4 January 2013 and confirmed it was relying on section 35(1)(g) (as read with sections 35(2)(a), (c), (e) and (j)) to withhold the information. It drew attention to its letter to Mr Fleming of 2 October 2012 and provided submissions which it had received from the HSE.
10. The relevant submissions received from the Council, the HSE and Mr Fleming will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her. She is satisfied that no matter of relevance has been overlooked.

Section 35(1)(g) – Law enforcement

12. The Council submitted that the information withheld from Mr Fleming was exempt from disclosure in terms of section 35(1)(g) of FOISA.
13. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. The Council argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of the HSE's functions for four of the purposes specified in section 35(2):
- to ascertain whether a person has failed to comply with the law (section 35(2)(a));
 - to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 35(2)(c));
 - to ascertain the cause of an accident (section 35(2)(e)) and
 - to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work (section 35(2)(j)).
14. The HSE is a public authority for the purposes of the Freedom of Information Act 2000.
15. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner's view is that the harm in question must 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.
16. The Commissioner must therefore consider three separate matters to determine whether this exemption applies:
- does HSE have a function in relation to one or more of the purposes mentioned in section 35(2)?
 - if it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, HSE's ability to exercise one or more of these function(s)?



- if such prejudice would, or would be likely to, occur, whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. (Unless she finds that it does, she must order the Council to disclose the information.)
17. The Commissioner is satisfied that the purposes described in section 35(2)(a), (c), (e) and (j) are functions of HSE when undertaking investigations under section 14 of the Health and Safety at Work etc. Act 1974.
 18. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of HSE's functions for the purposes listed at section 35(2)(a), (c), (e) or (j).
 19. The Council submitted that information gathered during the course of an investigation is used to establish the facts of particular incidents and constitutes evidence to support or negate a breach of health and safety legislation.
 20. The Commissioner notes that the information under consideration was created prior to the incident under investigation and, in all likelihood, the Council would not have withheld the information under section 35(1)(g) of FOISA, if the request had been made prior to the date of the incident. However, the Commissioner accepts that disclosing information created prior to an incident under investigation may at times cause substantial prejudice to an investigation.
 21. The Council submitted that information falling within the scope of the request may be relevant to issues being investigated by the HSE (but did not explain why). It stated that the extent to which this information may or may not be relevant to those investigations is a matter for the relevant authorities to determine. It was of the opinion that disclosure and publication of this information prior to the conclusion of the investigation and any subsequent proceedings (if any) would prejudice those investigations and the positions of those being investigated, particularly if the investigation led to criminal proceedings. The Council considered that premature publication of evidence could obstruct or prejudice the fairness of those proceedings and, consequently, the administration of justice.
 22. The Council also made submissions regarding the public interest test and the Commissioner has also considered whether those submissions carried any weight as to whether the functions of the HSE would be substantially prejudiced if the information was disclosed.
 23. On the question of "substantial prejudice", however, the Commissioner notes that the submissions provided by the Council (including those made by the HSE) are very general and are not specific to the information actually withheld in this case. Whilst the submissions made by the Council may be relevant to information gathered by the HSE or other authorities in specific circumstances (for example the taking of witness statements), the Commissioner is required to take a view on whether the Council has evidenced that the disclosure of the information under consideration here would, or would have been likely to, prejudice substantially the functions of the HSE.



24. Having considered all relevant submissions, in particular the information withheld in this case, the Commissioner is not satisfied that the submissions adequately explain how disclosure of the requested information would have, or would have been likely to (at the time the Council dealt with Mr Fleming's request) prejudice substantially the exercise by the HSE of its functions for the purposes listed in section 35(2)(a), (c), (e) or (j) of FOISA. The information was created prior to, and not as a result of the incident or subsequent investigation. The Commissioner accepts that the withheld information may have been broadly relevant to the subject matter of the HSE's investigation, but in relation to this information request the Council was required to do more than establish a general relevance and establish whether there would, or would be likely to be, actual substantial prejudice rather than a vague possibility of prejudice. The Council's submissions did not develop any of the general arguments it made to explain why the specific withheld information was relevant to the investigation being carried out by the HSE and, importantly, in what way disclosing the specific information would be substantially prejudicial to a fair investigation and outcome.
25. Based on the submissions provided by the Council, the Commissioner is not satisfied that in this case the information requested is exempt under section 35(1)(g) of FOISA.
26. The Commissioner therefore does not accept that the Council was entitled to withhold the information under the exemption in section 35(1)(g) of FOISA.
27. As the Commissioner is not satisfied that the information was correctly withheld under section 35(1)(g) of FOISA, she is not required to go on to consider the application of the public interest test in section 2(1)(b). As no other exemption has been claimed to justify this information being withheld, she requires the Council to disclose the information to Mr Fleming.

DECISION

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Fleming, by incorrectly withholding information in terms of section 35(1)(g) of FOISA.

The Commissioner therefore requires the Council to provide Mr Fleming with the information withheld by 21 June 2013.



Appeal

Should either Mr Fleming or Aberdeenshire 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
7 May 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 –

...

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

...



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- ...
- (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-
- (a) to ascertain whether a person has failed to comply with the law;
- ...
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- ...
- (e) to ascertain the cause of an accident;
- ... and
- (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

Health and Safety at Work etc. Act 1974

14 Power of the Commission to direct investigations and inquiries.

- (1) This section applies to the following matters, that is to say any accident, occurrence, situation or other matter whatsoever which the Executive thinks it necessary or expedient to investigate for any of the general purposes of this Part or with a view to the making of regulations for those purposes; and for the purposes of this subsection –
- (a) those general purposes shall be treated as not including the railway safety purposes; but



- (b) it is otherwise immaterial whether the Executive is or is not responsible for securing the enforcement of such (if any) of the relevant statutory provisions as relate to the matter in question.
- (2) The Executive may at any time—
- (a) investigate and make a special report on any matter to which this section applies; or
 - (b) authorise another person to investigate and make a special report into any such matter.
- ...