

Decision Notice



Decision 085/2008 Mr Frank Plowright and Glasgow City Council

Future Considerations Summary Tables

Reference No: 200701225
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Summary

Mr Plowright requested copies of Future Considerations Summary Tables from Glasgow City Council (the Council). The Council responded by providing some information, while withholding other information under section 30 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Plowright remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that while the Council had applied section 30(b) of FOISA correctly to certain of the information withheld (upholding on the whole its arguments as to substantial inhibition to the free and frank provision of advice and exchange of views), it had also however misapplied the exemptions in 30(b)(i), 30(b)(ii) and 30(c) to certain other information and therefore had withheld that information incorrectly. The Commissioner required the release of that information.

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), 30(b)(ii) and 30(c) (Prejudice to the 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 9 July 2007, Mr Plowright wrote to the Council requesting the following information:

"..please supply me with copies of Future Considerations Summary Tables similar to that already supplied dated August 2006. I'd like the documents pertaining to previous years and previous mid-terms of the Pre-12 strategy."



2. The Council responded on 6 August 2007. In its response the Council provided Mr Plowright with some of the information he had requested. The remaining information, however, was withheld on the basis of section 30 of FOISA. The Council went on to consider the public interest test and concluded that the public interest lay in not disclosing that remaining information.
3. On 9 August 2007, Mr Plowright wrote to the Council requesting a review of its decision. In particular, Mr Plowright drew the Council's attention to his concerns regarding the reasons given by it for certain information being withheld.
4. The Council notified Mr Plowright of the outcome of its review on 7 September 2007. The Council upheld its original decision to apply section 30 of FOISA to the information it had withheld.
5. On 8 September 2007, Mr Plowright wrote to the Commissioner's Office, 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. The reasons underlying his dissatisfaction were set out in the letter and will be considered further in the Commissioner's analysis and findings below.
6. The application was validated by establishing that Mr Plowright 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 28 September 2007, the Council was notified in writing that an application had been received from Mr Plowright and asked to provide the Commissioner's Office with any information withheld from the applicant. 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, providing it with 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, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. In its response the Council confirmed that it wished specifically to rely on the exemptions under section 30(b)(i), 30(b)(ii) and 30(c) of FOISA. Its submission detailed why it wished to rely on these exemptions and also provided its arguments with respect to the public interest test.



10. During the course of the investigation, additional information falling within the scope of Mr Plowright's request was identified by the Council. In its submissions, the Council confirmed that it wished to rely on the same exemptions with respect to the additional documents identified as those cited in connection with the first document withheld.
11. Although the format of the additional documents identified was different from that of the initial document withheld, analysis revealed that the subject matter of each of the documents was clearly very similar. These documents were compared with an example of a document Mr Plowright had received from a previous information request to the Council. The reason for doing this was because in Mr Plowright's initial request he asked for information, which was "similar" to that already supplied to him dated August 2006. This is important because the titles of the documents vary.

Submissions from Glasgow City Council

12. The Council submitted that in terms of section 30(b)(i) and 30(b)(ii) release of the documents would result in internal discussions of the Council being substantially inhibited. It went on to explain that the documents set out various options and proposals for consideration in relation to the regeneration of early and primary education, arguing that it was necessary to document these options and proposals in report form so that advice could be sought followed by an informed debate on the advantages and disadvantages of each.
13. The Council further argued that disclosure would act as a barrier to the establishment of a proper and meaningful discussion forum in which to put forward and explore options, which could then be discarded or applied as appropriate.
14. In terms of section 30(c), the Council argued that this informed and methodical process could only be gone through where the Council was able to carry out the discussions freely and frankly, without the fear that there would be routine release of such options and proposals. The Council referred to the decision making process as involving "private thinking space" and "blue sky thinking", arguing that to threaten to release such reports would substantially prejudice the quality of that private and blue sky thinking by inhibiting discussions and consequently the effective conduct of public affairs.
15. The Council added that because the schools referred to in the reports were still unaware of their content, release of the information in them would cause a very specific and definable harm directly linked to that release. The resultant and unnecessary anxiety and suffering caused to pupils, parents and guardians and teachers of the schools concerned would be very real and would occur on immediate release of the information, this being in addition to the inhibition and prejudice to the free and frank provision of advice, exchange of views and conduct of public affairs referred to above. It also pointed out that the matters covered by the reports had not been addressed by Councillors and asserted that disclosure in advance of such consideration would be inappropriate in terms of section 30(b) and 30(c), for the reasons set out above.



16. With respect to the public interest test, the Council stated that although it acknowledged the significant public interest in openness and transparency, it also believed that there was a significant public interest in allowing the Council to assess critically all factors involved in the future of early and primary education in Glasgow and to reach the best possible decision in relation to it.
17. The Council added that in its view the public interest in openness and transparency was satisfied by the release of all the relevant information concerning decisions ultimately reached and the reasons for these, without the need to disclose all the debate and thoughts which surrounded those decisions. Consequently, the Council asserted that the public interest in safeguarding the decision making process outweighed the general public interest in openness and transparency.
18. In a subsequent submission to this Office and by way of assistance, the Council provided a link to its *New 3Rs Strategy for Glasgow: Relocation, Reinvestment and Regeneration*, which is available on the Council's website as follows;
<http://www.glasgow.gov.uk/NR/rdonlyres/7A2CF1D2-39F9-43B2-9B79-87D32D07130F/0/SchoolEstatePlan2004.pdf>

It also advised that the document originally identified in dealing with Mr Plowright's request, dating from 2002, was no longer under active consideration by the Council and related to options which had not been taken forward (and had not been so at the time of Mr Plowright's request for information or request for review). While accepting that the introductory and background sections of this document could be released, it remained of the view that disclosure of the remainder would or would be likely to cause distress or suffering to the communities of the schools concerned.

Submissions from Mr Plowright

19. Mr Plowright asserted in his submissions that he did not agree with the Council that the free exchange of views from Council officials should be withheld from the public, whether or not that revelation would inhibit discussion. He went on to say that by being spoken or written, these views had already begun to influence decisions and should therefore be in the public domain.
20. Mr Plowright also outlined his concerns regarding the Council's apparently contradictory decision to apply the exemptions it had to the information requested in this case, when similar information had been sent to him in the past. He also queried the relevance of the information not having been considered by Councillors and provided some background information (which he suggested demonstrated a strong public interest in disclosure).



Commissioner's analysis and findings

21. In coming to a decision on this matter, the Commissioner has considered all the submissions and other information that have been presented by both Mr Plowright and the Council and he is satisfied, that no matter of relevance has been overlooked.
22. Following consideration of the information provided by the Council (see paragraph 11 above), the Commissioner has concluded that the following documents fall within the scope of Mr Plowright's request:
- Primary Vision Phase 2: A Mid term Strategy for First School Provision (document 1)
 - Mid Term Strategy Proposals DRS Projects March 2007 (document 2)
 - Mid Term Strategy Proposals LES Projects July 2007 (document 3).
- From the Council's submissions, he is satisfied that these comprise all the relevant information held by the Council.

Section 30(b)(i) & (ii)

23. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that 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.
24. The Council did not differentiate between section 30(b)(i) and 30(b)(ii) in respect of the information withheld. Consequently, the Commissioner has considered whether either or both of these exemptions apply to that information.
25. In order for the Council to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(ii) of FOISA, it would have to show that the disclosure of the information under the Act 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, respectively.
26. The Commissioner has in previous decisions made his views clear that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the principal consideration is not whether the information constitutes advice or opinion (although that may well be relevant), but whether the release of the information would inhibit substantially (as the case may be) the provision of advice or the exchange of views.



27. In considering either of these exemptions, the Commissioner must look at the actual information withheld, not the category of information to which it belongs or the type of situation in which the request has arisen. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that information of that general variety will require to be disclosed routinely in the future. As such, the Commissioner looks for 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 and/or views 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.
28. The Council referred to education services suffering as a direct result of disclosure, which would act as a barrier to proper and meaningful discussion of the options for primary and early education, noting that the information in question had not yet been considered by Councillors. It also argued that specific and definable harm would follow in the form of unnecessary anxiety and suffering to pupils, parents and guardians and teachers, who were unaware of the content of these documents. While the Commissioner accepts that in some cases the harm of releasing information of this nature could be substantial, and could be of the kind envisaged by section 30(b)(i) and/or (ii), he does not think it follows that the release of all of the information withheld in this case would necessarily have that effect.
29. In coming to this conclusion, the Commissioner has taken into account the time which has elapsed since the documents in question were created and whether the content of the documents is still under consideration and as such whether the documents contain live and current options and proposals (or did so at the time of Mr Plowright's request for information and request for review).
30. Having considered the content of the information withheld under section 30(b), the Commissioner accepts that the documents represent the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. However, whether release of the information would inhibit substantially either of these depends on the specific content of the documents and the circumstances surrounding each of them.
31. The Commissioner accepts that officers preparing documents of this kind might be substantially inhibited from full and frank expression by the prospect of disclosure at a time when the matters under consideration were still current (and that their reasons for being so inhibited might include a desire to avoid raising unnecessary concerns in relation to something which may or may not come to pass). It could also be argued that more generally disclosure might inhibit officials from conducting similar discussions in the future, simply for fear that information may be disclosed at some point. However officials must by now be aware that section 30(b) is not intended to protect a class of information and that matters such as the nature and age of the information requested will be taken into account when determining whether the exemption applies. So for instance a degree of protection may be afforded to live discussions but the need for this may well diminish once a decision has been taken or the material is no longer under consideration.



32. Looking at each of the documents in turn, the Council confirmed in its submissions that document 1, which was produced in February 2002, contained and considered options and proposals which were no longer current (and were not current at the time of Mr Plowright's request for information or request for review). On this basis, the Commissioner does not accept that substantial harm could be caused by the release of what is in essence an historical document containing no live options or proposals.
33. Therefore the Commissioner is unable to uphold the application of either exemption in section 30(b) with respect to document 1. As the Commissioner has not upheld the application of this exemption to document 1, there is no need for him to consider the public interest test.
34. Turning to documents 2 and 3, the key difference between these documents and document 1 is that the options and proposals contained within these documents are currently under consideration and may, at least in part, be presented to Councillors for approval at some point in the future. The documents contain proposals which if implemented could have a significant impact on Glasgow's early and primary education services. The Commissioner also notes the level of detail in these documents, in particular compared to the content of document 1. In the circumstances, he accepts that there is a real prospect of disclosure of these documents at this stage in their life cycle (and at the time of Mr Plowright's request for information and request for review) resulting in the expression in equivalent documents being substantially inhibited in future. While he would consider the use of the word "suffering" somewhat extreme in the circumstances, he accepts that disclosure of this information at this stage could cause perhaps undue concern (and possibly anxiety) to the pupils, parents and guardians and teachers of the schools affected by the proposals, and that this (while not itself substantial inhibition of the kind envisaged by section 30(b)) would be a significant inhibiting factor in the minds of those engaged on exercises of this kind. The Commissioner is therefore satisfied that the information in documents 2 and 3 would be exempt under the exemptions in section 30(b) of FOISA. On this basis, he is required to consider the application of the public interest test as outlined in section 2(1)(b) of FOISA.

Public interest test – section 30(b)

35. In considering the public interest test in relation to documents 2 and 3, 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, but 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).
36. The public interest arguments in favour of disclosure include making the decision making process more transparent and open to scrutiny, particularly in relation to a key public service such as school education. Mr Plowright put forward a number of arguments which he considered relevant to the public interest in disclosure, but all of these rested on the assumption that the documents in question considered the future of a specific school (and were specific to the future of that school). Given that the future of that particular school is not in fact considered in the documents in question, there is really no basis for considering these more case-specific arguments further.



37. The public interest arguments against disclosure include maintaining the integrity of these relatively early stages of the deliberative process and thus allowing all relevant factors and options to be considered fully, in the interests of an effective education service and the most economic, efficient and effective use of public funds in its provision.
38. In giving consideration to the submissions of both the Council and Mr Plowright on the public interest, the Commissioner has balanced the desirability of making information available to the public along with the general need for transparency and accountability in decision making, especially where the decisions involved have such potentially far reaching consequences for the provision of a key public service, with the need for officials to be able to exchange views and discuss matters of substance freely and openly without the fear of inappropriate disclosure. It is apparent that the Council does recognise that there is a public interest in this matter and it has sought to address this by way of the information which has been released to Mr Plowright. This is also demonstrated by the relevant information which is available to the public via the Council's website. On balance, taking due account of the public interest arguments in favour of disclosure, it is the Commissioner's view that the public interest is not served in this case by causing substantial harm of the kind he accepts would or would be likely to follow from that disclosure. Accordingly, the Commissioner has concluded that the public interest in disclosing documents 2 and 3 is outweighed by that in maintaining the exemption.
39. As the Commissioner has decided that the Council applied the exemption in section 30(b) of FOISA incorrectly to certain information withheld from Mr Plowright (i.e. document 1), he is required to go on to consider the other exemption claimed in relation that information (that in section 30(c)) with respect to document 1.

Section 30(c)

40. Section 30(c) of FOISA exempts from disclosure information which would otherwise (i.e. otherwise than as provided for in section 30(a) and (b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption, and as such is subject to the public interest test in section 2(1)(b) of FOISA.
41. Authorities seeking to rely on the exemption in section 30(c) of FOISA need to show that disclosure would (or would be likely to) prejudice substantially the way in which they conduct their business. They should be able to demonstrate that the risk of damage being caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance, not simply marginal, and would require to occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.



42. In this instance the effective conduct of public affairs has been identified by the Council as the ability of staff to carry out discussions about matters of concern freely and frankly, without fear of information about such options and proposals being routinely released into the public domain. The Council is of the opinion that the release of this information would substantially prejudice the quality of private and blue sky thinking (which it considers inherent in the relevant decision making process) by inhibiting discussions and consequently the effective conduct of public affairs. These are, however, essentially arguments supporting the application of section 30(b)(ii) rather than 30(c) and the Commissioner sees no reason why they should be any more applicable to the consideration of this latter exemption than they are to the former, the application of which is considered fully above.
43. The Commissioner also notes in relation to section 30(c) the arguments put forward by the Council as to the effect of disclosure on the pupils, parents and guardians and teachers of the schools potentially affected by the options and proposals under consideration in the relevant documents. As indicated above in relation to section 30(b), he accepts that disclosure may have such an effect in certain cases (although it is unlikely ever to be appropriate to talk of “suffering” in this context, as opposed to anxiety or concern) and would acknowledge that substantial prejudice to the effective conduct of public affairs might be caused by the spreading of perhaps unnecessary fears at a time when the matters in question were still subject to deliberation and not fully resolved.
44. In this case, however, it is the Commissioner’s view (having considered fully all relevant arguments put forward by the Council) that while certain of the points made in support of the section 30(c) exemption may be applicable in certain circumstances, the Council has failed in the present circumstances to demonstrate how they could appropriately be said to apply to a document which was drawn up in 2002 and contains proposals which are of no continuing relevance (and had none at the time of Mr Plowright's request for information or request for review). The Commissioner considers it unlikely that pupils, parents and guardians and teachers would have been much concerned by release of the information in response to Mr Plowright’s request, and would point out in this context that many of those potentially affected by options or proposals in 2002 would no longer have a direct connection with the relevant schools in any event. On this basis, the Commissioner is unable to accept that substantial prejudice to the effective conduct of public affairs would (or would be likely to) be caused by the release of document 1, which is in essence an historical document which no longer contains current options or proposals. Therefore, the Commissioner is unable to uphold the application of section 30(c) with respect to document 1. Consequently, there is no need for him to consider the public interest test in relation to the information in that document.



DECISION

The Commissioner finds that Glasgow City 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 Plowright.

The Commissioner finds that by withholding two of the documents requested by Mr Plowright (referred to above as documents 2 and 3) under section 30(b)(i) and 30(b)(ii) of FOISA, the Council complied with Part 1.

However, the Commissioner also finds that the Council misapplied the exemptions in section 30(b)(i), 30(b)(ii) and 30(c) of FOISA in withholding from the applicant the remaining document falling within the scope of his request (document 1) and therefore to that extent failed to deal with the request in accordance with section 1(1) of FOISA.

The Commissioner therefore requires the Council to release to Mr Plowright a full copy of document 1 i.e. Primary Vision Phase 2: A Mid term Strategy for First School Provision, by 4 September 2008.

Appeal

Should either Mr Plowright or Glasgow City 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 notice.

Margaret Keyse
Head of Investigations
21 July 2008



Appendix

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
 - (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.