

Decision Notice

Decision 096/2016: Mr Alan Stewart and Argyll and Bute Council

Complaint Report

Reference No: 201600176
Decision Date: 3 May 2016



Scottish Information
Commissioner

Summary

On 17 November 2016, Mr Stewart asked Argyll and Bute Council (the Council) for the information contained in the response to a complaint made by two named councillors. The Council refused to provide the information requested, applying a number of exemptions contained in FOISA.

Following investigation, the Commissioner found that the Council was entitled to withhold the information.

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) and (2)(b) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 17 November 2015, Mr Stewart made a request for information to the Council. He asked for the information contained in the response to a complaint to internal audit lodged by two named councillors and dated 25 April 2015.
2. The Council responded on 15 December 2015. It refused to provide the information, which it considered exempt in terms of section 36(1) of FOISA (which relates to confidentiality of communications, including legal professional privilege).
3. On 15 December 2015, Mr Stewart wrote to the Council, requiring a review of its decision on the basis that, as a taxpayer, he was entitled to know whether the complaint was upheld and that it was unreasonable to consider the report to be legal advice.
4. The Council notified Mr Stewart of the outcome of its review on 19 January 2016. It concluded that, in addition to section 36(1) of FOISA, the information should be withheld under sections 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs), 35(1)(g) (Law enforcement) of FOISA and 38(1)(b) (Personal information). It explained why.
5. On 28 January 2016, Mr Stewart wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Stewart argued that the public interest favoured disclosure of the information and disagreed with the reasons provided for withholding it.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Stewart made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 22 February 2016, the Council was notified in writing that Mr Stewart had made a valid application. The Council was asked to send the Commissioner the information withheld from

him. The Council provided the information and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, focusing on the requirements of the exemptions applied by the Council on review.
9. The Council responded with submissions on all of the above exemptions, and also the exemption in section 30(c) of FOISA.
10. Mr Stewart also provided submissions on the public interest.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Stewart and the Council. She is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first consider the application of section 35(1)(g) of FOISA.

Section 35(1)(g) – Law enforcement

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). The Council argued that disclosure of any relevant information would, or would be likely to, prejudice substantially the exercise of its functions of the purposes specified in section 35(2)(b), i.e. to ascertain whether a person is responsible for conduct which is improper.
14. The Council is a Scottish public authority for the purposes of FOISA.
15. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test 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 would apply to the requested information, if it existed and was held:
 - does the Council have a function in relation to the purpose mentioned in section 35(2)(b)?
 - if it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Council's ability to exercise that function?
 - 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.

The functions of the Council

17. The report was prepared on behalf of the Council's monitoring officer. The Council referred to the functions of the monitoring officer under section 5 of the Local Government and Housing Act 1989¹ (LGHA). It also drew the Commissioner's attention to its own constitution², which expanded on the role of the monitoring officer within the authority (pages 325 – 328). It submitted that this gave the monitoring officer the authority to undertake investigations (paras 11(c) and 12(k)), including investigations to ascertain whether a person is responsible for conduct which is improper.
18. The Commissioner is satisfied that the investigation and resulting report related to alleged misconduct on the part of councillors, which could be considered to relate to compliance with the Councillors' Code of Conduct, made under the Ethical Standards in Public Life Etc. (Scotland) 2000³ (the Ethical Standards Act). While the investigation of complaints regarding compliance with this Code is strictly a matter for the Commissioner for Ethical Standards in Public Life in Scotland, the Commissioner accepts that the Council has a function, under section 5(1) of the Ethical Standards Act, to promote the observance by its councillors of high standards of conduct. She accepts that this was being done on the monitoring officer's behalf in this particular case: even if it did not fall within the statutory role of the monitoring officer under section 5 of LGHA, the Commissioner is satisfied that it was being done in pursuance of a function of the Council.
19. The Commissioner is also satisfied that the exercise of the function in question, in this particular case, fell within the scope of section 35(2)(b) of FOISA. The issue under consideration was whether the councillors in question had acted improperly.
20. In this case, therefore, having considered the submissions provided by the Council, the Commissioner accepts that the information requested was held by the Council for the exercise of one of its functions, for the purpose mentioned in section 35(2)(b) of FOISA .

Would substantial prejudice occur, or be likely to occur?

21. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of the Council's functions for the purpose mentioned in section 35(2)(b).
22. The Council submitted that the monitoring officer must be able to undertake confidential investigations of misconduct and report where appropriate to the Council and/or the Commissioner for Ethical Standards in Public Life in Scotland. It explained that this statutory role would be undermined if witnesses knew there was a risk of what they said, in the course of such investigations, being put into the public domain.
23. The Council explained that in this case the witnesses were, in the main, Council officers, who would expect some protection from public scrutiny of the information they provided to the investigation. The Council considered it likely that if the information was released, these officers personally would be the subject of criticism: the Council did not consider this appropriate.

¹ <http://www.legislation.gov.uk/ukpga/1989/42/section/5>

² https://www.argyll-bute.gov.uk/sites/default/files/part_f_code_of_conduct_for_councillors_and_employees.pdf

³ <http://www.legislation.gov.uk/asp/2000/7/contents>

24. In the Council's view, it followed that disclosure of the information would put at risk the willingness of witnesses to co-operate in investigations and be open in providing information in the future. This would in turn impact adversely on the quality of evidence available to the monitoring officer and have the effect of impeding the thoroughness of the investigation, and consequently his ability to reach a decision and take any further action he thought appropriate in the circumstances.
25. The Commissioner acknowledges that complaint investigations of this kind rely upon the cooperation of witnesses coming forward and providing evidence: they would expect their identities to be revealed only in the context of the investigation and any subsequent action which would follow that investigation. The Commissioner accepts that disclosure outwith that context would be likely to have a serious negative impact on the investigative process, inhibiting individuals who might otherwise have done so from coming forward and providing full and frank statements. She has borne in mind that investigations of this kind will always have a degree of political sensitivity attached to them.
26. The Commissioner is satisfied, in the circumstances, that disclosure of the information requested in this case would make it much less likely that those participating in such an investigation, such as complainers and witnesses, would be willing to provide information about concerns, to the substantial prejudice of the Council's ability to investigate matters concerning the conduct of elected members. This would, in turn, be to the substantial prejudice of the Council's function to promote the observance of high standards of conduct by its councillors.
27. Having considered all of the submissions made by the Council, the Commissioner is satisfied that disclosure of the requested information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise of the Council's functions for the purpose mentioned in section 35(2)(b) of FOISA. Consequently, she accepts that that the Council was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.

The public interest test

28. As noted above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means, although the Commissioner has accepted that the information is exempt from disclosure under section 35(1)(g) of FOISA, she must still order the information to be disclosed unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.
29. The Council acknowledged the public interest in ensuring that allegations of misconduct by a councillor were investigated properly. Disclosure of the report would allow scrutiny of the process undertaken by the monitoring officer.
30. However, the Council went on to argue that there was a strong public interest in ensuring that the monitoring officer's ability to fulfil his statutory role was not hindered, as detailed above. It submitted that the public interest lay with ensuring that allegations of misconduct by a councillor were investigated appropriately, and this outweighed the public interest in disclosing the report.
31. Mr Stewart provided the Commissioner with a background to the complaint. He noted that the report related to possible serious misconduct by a councillor, and submitted that the public interest lay in the report being disclosed.

32. Mr Stewart accepted that any investigation into potential misconduct by a member of Council staff needed to remain confidential. However, he submitted that this report did not relate to a member of Council staff, who could be subject to disciplinary action, but to an elected councillor: it was up to the electorate to decide if he or she has breached acceptable standards. As such, he considered that it was in the public interest that the content of the report be made public.
33. The Commissioner acknowledges the strong public interest in the accountability of elected councillors, which disclosure of the report would go some way towards meeting. She also acknowledges the general public interest in councils being open and transparent. She also notes, however, that the proper conduct of councillors is the subject of scrutiny by the Commissioner for Ethical Standards in Public Life in Scotland (and the Standards Commission for Scotland), with statutory sanctions under the Ethical Standards Act, in addition to that of the electorate.
34. The Commissioner also accepts the Council's submission that there is a strong public interest in maintaining the exemption in section 35(1)(g) in this case, in order to maintain the effectiveness of the Council's investigative processes. In the circumstances, she considers there would need to be a compelling public interest in disclosure to outweigh that in maintaining the exemption. It is important, with a view to ensuring high standards of conduct are observed, that the Council can perform these investigative functions effectively.
35. Taking account of all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. Consequently, she finds that the Council was entitled to withhold the information under section 35(1)(g) of FOISA. Having reached this conclusion, she is not required to, and will not, go on to consider whether the other exemptions claimed by the Council also apply.

Decision

The Commissioner finds that Argyll and Bute Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Stewart.

Appeal

Should either Mr Stewart or Argyll and Bute Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

3 May 2016

Appendix 1: 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-

...

- (b) to ascertain whether a person is responsible for conduct which is improper;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info