

Decision Notice



Decision 097/2010 Mr Paul Nolan and City of Edinburgh Council

Jack Kane Community Centre Renewable Energy Project

Reference No: 200900908
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www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Nolan requested from City of Edinburgh Council (the Council) information relating to the Jack Kane Community Centre Renewable Energy Project and in particular records of meetings and correspondence between named individuals. The Council responded by stating that the information that he sought was exempt from disclosure under the terms of a number of exemptions in FOISA. Following a review, Mr Nolan remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council decided to disclose some of the information previously withheld to Mr Nolan. The Commissioner found that the Council had acted in accordance with Part 1 of FOISA by withholding the remaining information. He found that this was exempt from disclosure under the terms of section 30(b)(ii) of FOISA, on the grounds that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 8(1) (Requesting information) and 30(b)(ii) (Prejudice to 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 15 February 2009, Mr Nolan wrote to the Council requesting information relating to the Jack Kane Community Centre Renewable Energy Project. In particular, he requested
 - correspondence, including letters, memos, emails, telephone records, faxes or any other forms of communication between specified dates and involving named individuals and
 - copies of all records, minutes, notes of meetings between any of the named officers on the same matter, where and when these meetings took place, who attended, the matters discussed and what decisions were taken.



2. The Council responded on 31 March 2009. The Council advised Mr Nolan that it considered the information he sought to be exempt from disclosure under sections 30(b)(i), 26(a) and 40(b) of FOISA.
3. On 1 April 2009, Mr Nolan wrote to the Council requesting a review of its decision.
4. The Council notified Mr Nolan of the outcome of its review on 29 April 2009. It indicated that it no longer considered the exemption in section 26(a) of FOISA to be applicable, but it maintained its application of the exemptions in sections 30(b)(i) and 40(b) of FOISA to the requested information.
5. On 13 May 2009, Mr Nolan wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Nolan 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 5 June 2009, the Council was notified in writing that an application had been received from Mr Nolan and asked to provide the Commissioner with any 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. 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 had reviewed the information withheld, and considered certain items releasable. It disclosed these items to Mr Nolan. Some further items were disclosed to Mr Nolan later in the investigation after the investigating officer highlighted that attachments to some of the withheld documents had not been provided to the Commissioner. These documents were provided to Mr Nolan on 9 April 2010.
10. Having reviewed the information withheld, the Council indicated that it no longer wished to apply the exemptions in sections 30(b)(i) or 40(b) of FOISA to any of the information withheld. but it now wished to apply those in sections 30(b)(ii), 35(1)(g) (in conjunction with 35(2)(b) and 35(2)(f)) and 38(1)(b) of FOISA to withhold the remaining information.
11. In light of these changes to the Council's position, the investigating officer contacted Mr Nolan advise him of the exemptions now being applied, and to request his comments on the case.



12. In further correspondence, the Council was asked to provide further submissions on its reasons for applying the exemptions that had been cited during the investigation. Mr Nolan was again provided with an opportunity to comment on the Council's submissions after it became clear through correspondence with the investigating officer that the Council wished to apply the exemption in section 38(1)(b) of FOISA read in conjunction with both of sections 38(2)(a)(i) and (ii).
13. At a late stage in the investigation (on 4 March 2010), the Council also indicated that, in the light of a recent Opinion of the Court of Session and the Commissioner's guidance thereon, it no longer considered Mr Nolan's request for information to fulfil the requirements of section 8(1)(c) of FOISA.
14. In response, the Council was advised that the Commissioner's initial view was that Mr Nolan's information request did fulfil the requirements of section 8(1)(c) of FOISA, but it was given the opportunity to provide further comments on this point for the Commissioner's consideration. The Council's response did not provide any further comments on this matter.

Commissioner's analysis and findings

15. 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 Nolan and the Council and is satisfied that no matter of relevance has been overlooked.

Validity of request

16. The Commissioner has first of all considered whether Mr Nolan's request for information was valid in terms of section 8 of FOISA, since the Council's comments at a late stage in the investigation suggested that it was not.
17. Section 8 of FOISA specifies that a request for information for the purposes of FOISA is one which:
 - (a) is made in writing or another permanent form capable of subsequent reference,
 - (b) states the name of the applicant and an address for correspondence and
 - (c) describes the information requested.
18. The Council argued that the parts of the request made by Mr Nolan which referred to copies of specific document types (such as minutes, letters and reports) fell outside of the terms of section 8(1)(c) by failing to describe the information requested.



19. The Council indicated that it had reached this view in the light of the Opinion of the Court of Session (dated 30 September 2009) in the case of Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73 (the Opinion), and the Commissioner's guidance¹ on validity of information requests in the light of the Opinion, which was published on 27 January 2010.
20. In the Opinion, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant.
21. The Commissioner's guidance states at paragraphs 3.1, 3.4 and 3.5:

"FOISA provides a right to obtain information and not a right to obtain copies of specific documents. However, this does not mean that a request for a copy of a document is automatically invalid, as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants. If it is not reasonably clear, the public authority can contact the applicant to obtain clarification.

[...]

Therefore where an applicant has asked for a copy of a document and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA. A reference to a specific document is a commonplace way of describing the information sought and can be of assistance to an authority in identifying and locating the information. Such a reference can also benefit the authority by limiting the scope of the information request, e.g. to that contained in a minute of a certain date.

If it is not reasonably clear to a public authority what information the applicant wants, and the public authority reasonably needs further detail to identify and locate the information, the public authority must tell the applicant what other information it needs."

22. The Council was invited to provide further arguments with respect to the question of the validity of Mr Nolan's request, but no further comments on this matter were provided to the Commissioner.
23. The Commissioner has considered the terms of Mr Nolan's request and the content of both the Opinion and the guidance referred to by the Council.

¹ <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>



24. Notwithstanding its expression in terms of a request for a copy of particular documents, the Commissioner considers it to be clear that Mr Nolan's information request intended to seek all information that is contained in any of the document types listed, in relation to the specified topic, between specified dates, and exchanged between the named people. The request is worded in a very specific manner which allows the identification of the timing, subject matter, sender and recipients of relevant information, and the document types within which it is held.
25. The Commissioner is satisfied that Mr Nolan's information request describes the information requested, and so fulfils the requirements of section 8(1)(c) of FOISA.
26. In reaching this conclusion, the Commissioner has noted that the Council provided to the Commissioner a substantial number of documents identified as containing the information requested by Mr Nolan. The Council therefore does not appear to have encountered any difficulty in understanding and then locating the information sought by Mr Nolan when it responded to and conducted a review in relation to his information request.
27. The Council did not indicate in correspondence or discussion with Mr Nolan that it was uncertain as to the information he was seeking, and it raised its concerns with the Commissioner only at a very late stage in a prolonged investigation, some months after the withheld information had been supplied. When invited to do so, the Council offered no explanation as to why it felt that the request failed to adequately describe the information requested.
28. In the circumstances, the Commissioner has concluded that Mr Nolan's request to the Council adequately described the information he was seeking, and that it was a valid information request that fulfilled all of the requirements of regulation 8(1) of FOISA.
29. Having reached this conclusion, the Commissioner has gone on to consider whether the Council acted in accordance with FOISA by withholding information in response to Mr Nolan's information request.

Withheld information

30. The information withheld by the Council is a series of correspondence concerning matters relating to the Jack Kane Community Centre Renewable Energy Project, and documents recording the Council's internal deliberations and actions relating to these matters.
31. During the investigation, the Council revised its position on this information and disclosed some items to Mr Nolan. The Commissioner will not consider the information disclosed any further in this decision.
32. With respect to the remaining information, the Council maintained that a number of exemptions in Part 2 of FOISA (which differed from those identified to Mr Nolan following the Council's review) were applicable.
33. The Commissioner first considered the application of the exemption in section 30(b)(ii) of FOISA.



Section 30(b)(ii) - Prejudice to effective conduct of public affairs

34. Section 30(b)(ii) states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
35. As the Commissioner has said in previous decisions, e.g. *Decision 089/2007 Mr James Cannell and Historic Scotland* or *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*, the standard to be met in applying the test contained in section 30(b)(ii) is high. The chief consideration is not whether the information constitutes opinion or views, but whether the release of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
36. The word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive. In this connection, the Commissioner looks for authorities demonstrating a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote possibility. The inhibition must be substantial and therefore of real and demonstrable significance.
37. When considering the application of this exemption, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. It should not be presumed that substantial inhibition will follow from the release of information simply because it falls within a particular category. Relevant considerations will include:
 - the nature of the information
 - the subject matter of the advice or exchange of views
 - the manner in which the advice or exchange of views are expressed, and
 - whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision was being considered, and for which further views were still being sought, is likely to be more substantially inhibiting than once advice has been taken.
38. The Council's submissions noted that the information withheld from Mr Nolan focused on the probity of management practice with respect to the Jack Kane Community Centre Renewable Energy Project in relation to a number of matters. It stated that the communications under consideration were focussed on freely and frankly raising and expressing views, with the express intention of creating deliberation.



39. The Council maintained that it was essential that individual officers and other stakeholders are free to raise concerns in confidence. It submitted that it was not possible to redact the information in a way that would prevent the individual officials who raised their concerns from being identified, and release into the public domain would undermine the legitimate expectation of confidentiality, which it considered essential to ensuring that future concerns would be raised by officials or members of the public.
40. The Commissioner has considered the Council's submissions fully, although he is unable to summarise these fully in this decision.

Submissions from Mr Nolan

41. Mr Nolan argued that his request related to discussions and meetings regarding a specific community project and not a major policy matter, and therefore the Council's argument that disclosure of the information would be potentially inhibiting to future exchanges of ideas and the provision of advice was not valid.

Conclusions on section 30(b)(ii)

42. The Commissioner has reviewed all of the information withheld in this case, and notes that it records a sequence of exchanges regarding concerns about the management of the Jack Kane Community Centre Renewable Energy Project. He considers that the withheld information as a whole can be seen as an ongoing exchange of views for the purposes of deliberation on the concerns identified with respect to this project, and the Council's response to these concerns.
43. The Commissioner has had regard to the subject matter of the exchanges in this case, and the nature of the concerns that were under discussion. He has taken into consideration the comments from the Council which highlighted the sensitivities and concerns surrounding the disclosure of the information under consideration.
44. The Commissioner has also had regard to the content and manner of expression of views contained within the withheld information. He considers it apparent, and has been provided with evidence by the Council in support of this conclusion, that the parties to these exchanges considered the content to be highly sensitive. In the circumstances, he accepts that these exchanges were undertaken in an expectation that the content would not be disclosed into the public domain.
45. In all the circumstances, the Commissioner accepts that disclosure of this information would make it less likely that Council officials would engage in discussions of this type with the same degree of frankness and candour. He consequently accepts that disclosure of this information would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. .
46. The Commissioner therefore accepts that all of the information under consideration is exempt from disclosure in terms of section 30(b)(ii) of FOISA (and was at the time of the Council's review of Mr Nolan's information request.



The public interest test

47. The exemption in section 30(b)(ii) of FOISA is subject to the public interest test contained in section 2(1)(b). Therefore, having found that the withheld information is exempt under section 30(b)(ii), the Commissioner is required to go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
48. The Council has explained that it is a major provider of grant funding to the voluntary and charity sectors, in excess of £40 million annually. The Council monitor and manages the process in compliance with the public sector finance legislation and as required under sections 1(1) and 12(1) of the Local Government in Scotland Act 2003, must secure best value and observe proper accounting practice.
49. The management committee of the Jack Kane Renewable Energy Project is a voluntary body and charitable trust which received grant funding from the Council. The Council noted that it is obliged to monitor the regularity and probity of management of the use of such funds, and must take action where these are compromised. The Council submitted that it was self evident that the monitoring of the spending of grant funding was in the public interest.
50. It went on to say that for this monitoring to be effective, it is essential individual officers and other interested stakeholders are free to raise serious concerns and express their views on the probity and regularity of funding usage in a free and frank manner with senior officer of the Council, free from fear of intimidation. It maintained that disclosure of the information under consideration would undermine the legitimate expectation of confidentiality and duty of care that with respect to its officers in order to protect the public purse.
51. Mr Nolan submitted that it is reasonable to expect that when the Council employees discuss a community project or any individuals associated with the project it does so in a professional and objective manner based on accurate and factual information. He argued that if this was the process that was followed there can be no reason for the Council to determine that it is not in the public interest to release the information.
52. Mr Nolan has indicated that he believes that the Council may have acted improperly in these matters and that this has a direct bearing on the Council's legal responsibility to properly disburse public funds. He considered that there would be a public interest in disclosure of information for this reason.
53. The Commissioner has considered the submissions made by both parties, and recognises that there is a strong public interest in ensuring the effective oversight of expenditure of public funds and the public to obtain value for money.
54. Mr Nolan has identified a real public interest in allowing scrutiny of the Council's actions in relation to the particular project to which this information relates. The Commissioner accepts that there is a public interest in ensuring that the any public authority with regulatory responsibilities is adequately discharging its functions, and that disclosure of the information under consideration would serve the public interest by allowing scrutiny of the Council's actions in a particular case.



55. However, the Commissioner also accepts the Council's submission that the public interest would be served by non-disclosure in this case. In particular, having concluded that disclosure would be likely to inhibit future discussions of concerns about the management of such projects, he accepts that disclosure could be detrimental to the effectiveness of the Council's monitoring processes, which would in turn be contrary to the public interest.
56. Having considered the information, and all the circumstances of the case, the Commissioner has concluded that the public interest maintaining the exemption outweighs the public interest in disclosing the information in this case. He considers there to be greater benefit to the public interest in avoiding harm to the effectiveness of the Council's procedures for ensuring grant funding is properly used and managed than would in enabling complete scrutiny of the actions of the Council in relation to one particular case.
57. The Commissioner therefore concludes that the Council acted in accordance with Part 1 of FOISA, because the information was exempt from disclosure in terms of section 30(b)(ii) of FOISA.

DECISION

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

Appeal

Should either Mr Nolan or the 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.

Kevin Dunion
Scottish Information Commissioner
15 June 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 –

- (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.

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-
- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) states the name of the applicant and an address for correspondence; and...
- (c) describes the information requested.

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-

...

(ii) the free and frank exchange of views for the purposes of deliberation; or