

Decision Notice



Decision 133/2010 Mr Chris Millar and Transport Initiatives Edinburgh Ltd

Board meeting reports

Reference No: 200902120
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Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Millar requested from Transport Initiatives Edinburgh Ltd (TIE Ltd) information as to the Class 3 Board reports for seven months in 2009. TIE Ltd provided copies of some of these reports, subject to redaction of information which it considered to be exempt in terms of the exemptions in sections 33(1)(b) and 36 of the Freedom of Information (Scotland) Act 2002 (FOISA). TIE Ltd also withheld full copies of the Board reports for one month under the same exemptions. Following a review, during which further information was released to him, Mr Millar remained dissatisfied and applied to the Commissioner for a decision. Further information was released to Mr Millar by TIE Ltd during the course of the investigation. At this stage, TIE Ltd indicated that it considered the remaining information (a single sentence within one of the reports) to be exempt from disclosure in terms of sections 30(b) and (c) of FOISA.

Following an investigation, the Commissioner found that TIE Ltd was entitled to withhold the information in terms of section 30(c) of FOISA, and so, by withholding that information, it had dealt with Mr Millar's request for information in accordance with Part 1 of FOISA. However, he concluded that TIE Ltd had failed to issue a refusal notice in line with the technical requirements of section 16(1) and (2) of FOISA. The Commissioner did not require TIE Ltd 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) (Effect of exemptions); 16(1) and (2) (Refusal of request); 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 30 September 2009, Mr Millar wrote to TIE Ltd requesting information in the following terms:

As an interested member of the public I would like to see the Class 3 Board reports kept up to date. There appear to have been only two meetings this year. Can you provide the reports for February, April, May, June, July, August and September 2009?



2. TIE Ltd responded on 30 October 2009, providing copies of the Board reports for April, May, June, July (x2) and September 2009. TIE Ltd explained that some information had been redacted from these reports on the basis that it was exempt from disclosure in terms of sections 33(1)(b) and 36 of FOISA. TIE Ltd also explained the Board reports for February 2009 had been withheld in their entirety, also on the basis that these were exempt under sections 33(1)(b) and 36 of FOISA. Although TIE Ltd did not say so in their response to Mr Millar, a redacted copy of the board report for August 2009 was also released to Mr Millar.
3. On 3 November 2009, Mr Millar sent an email to TIE Ltd requesting a review of its decision. In particular, Mr Millar argued that it was in the public interest for information in the reports relating to the cost of the Edinburgh tram project to be released due to the use of public monies to finance the project. Mr Millar also set out his view that the information redacted from the reports in relation to the running and management of the project would not cause any actionable breach of confidence if released.
4. TIE Ltd notified Mr Millar of the outcome of its review on 7 December 2009. It advised Mr Millar that it had decided to release some information to him that had previously been withheld. However it upheld its original decision in relation to other information that it had previously withheld. Revised copies of Board reports for April, June, July (x2), August and September 2009 were provided to Mr Millar.
5. On 14 December 2009, Mr Millar wrote to the Commissioner, stating that he was dissatisfied with the outcome of TIE Ltd's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Millar 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 14 January 2010, TIE Ltd was notified in writing that an application had been received from Mr Millar and was asked to provide the Commissioner with any information withheld from him. TIE Ltd responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted TIE Ltd, 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. In particular, TIE Ltd was asked whether it had considered whether the information requested by Mr Millar should have been dealt with under the EIRs rather than FOISA. Where TIE Ltd considered that the information should have been considered under the EIRs, it was asked to provide submissions regarding any exceptions it considered to be applicable to the withheld information. TIE Ltd was also asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. A response was received from TIE Ltd. Within this response TIE Ltd explained that it considered the exemptions in sections 30(b), 30(c), 33(1)(b) and 36 to apply to certain information withheld from Mr Millar. TIE Ltd also explained that as it was of the view that certain of the withheld information was environmental information, and for this information it considered the information to be exempt from disclosure in terms of section 39(2) of FOISA and the exception in regulation 10(4)(e) of the EIRs.
11. Further correspondence was entered into with TIE Ltd during the course of the investigation in order to clarify the grounds upon which each piece of redacted information had been withheld, and TIE Ltd's reasoning in applying the relevant exemptions and exceptions.
12. TIE Ltd subsequently advised that it was willing to release further information to Mr Millar, which had previously been withheld. It made further disclosures to Mr Millar which meant that the following information had been provided to him by the end of the investigation:
 - All information contained in the board reports for 11th February, 19 February, 15 April, 6 May, 8 July, 26 August and 23 September 2009
 - Further information from the board report of 3 June 2009
13. The Commissioner understands that this additional information has been received by Mr Millar, and that he is satisfied with it. He will therefore not consider the information disclosed during the investigation any further in the decision notice.
14. These additional disclosures mean that the only information that TIE Ltd still wished to withhold at the end of the investigation was a single sentence within the board report of 3 June 2009. TIE Ltd provided detailed submissions on its reasons for considering this particular information to be exempt from disclosure. It maintained that sections 30(b) and (c) of FOISA were applicable to this information.
15. Mr Millar was also invited to provide comments as to why he considered that the public interest favoured release of this remaining information.
16. The Comments received from both Mr Millar and TIE Ltd are summarised, where relevant below.



Commissioner's analysis and findings

17. 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 Millar and TIE Ltd and is satisfied that no matter of relevance has been overlooked.
18. Following the additional disclosures made by TIE Ltd during the investigation, the Commissioner's decision will focus solely on the remaining withheld information. This is a single sentence within the board report of 3rd June 2009, which TIE Ltd considered to be exempt from disclosure in terms of sections 30(b)(ii) and (c) of FOISA.
19. The Commissioner first considered the exemption in section 30(c) of FOISA.

Section 30(c) – Prejudice to the effective conduct of public affairs

20. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b) of FOISA. This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
21. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to 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.
22. TIE provided background information to the Commissioner about the matters raised in the remaining withheld sentence. This related to ongoing work with respect to the future governance arrangements between TIE Ltd, City of Edinburgh Council and Lothian Buses. The Commissioner cannot fully summarise TIE Ltd's submissions on the sensitivities of the withheld information in this decision as doing so could have the effect of revealing the nature of the information under consideration. However, these submissions explained the background to this matter, and the effect it anticipated should the information be disclosed.
23. TIE Ltd explained that the matter of the future governance arrangements was at the time of Mr Millar's request, and still is subject to ongoing debate and discussion. TIE Ltd submitted that disclosure of the information in this sentence would undermine its efforts to work in conjunction with the Council and other stakeholders, with detrimental effects on the governance change process and its final product.



24. Having considered the withheld information, together with the submissions from TIE Ltd, the Commissioner accepts that release of this information in response to an FOI request would be likely to prejudice substantially the effective conduct of public affairs.
25. The Commissioner accepts that the matter of the future governance arrangements for the tram project is ongoing and subject to discussion and debate amongst relevant parties and stakeholders. The Commissioner is also satisfied that if the withheld information were to be released then this is likely to have a detrimental effect on that process and its likelihood of achieving a successful outcome. The Commissioner accepts the submissions of TIE Ltd in this case with respect to the application of the exemption in section 30(c) of FOISA.

Public interest test

26. As the Commissioner is satisfied that TIE Ltd was correct to apply the exemption in section 30(c) of FOISA to the remaining sentence withheld from Mr Millar within the board report of 3rd June 2009 he is now required to consider the application of the public interest test in section 2(1)(b) of FOISA.
27. TIE Ltd provided a submission setting out its consideration of the public interest test. It TIE Ltd expressed the view that the public interest lies in the final product of the work ongoing between TIE Ltd and other stakeholders regarding the future governance arrangements between the City of Edinburgh Council, TIE Ltd and Lothian Buses resulting in a saving to the public purse.
28. TIE Ltd considered that ultimately the public interest must be in the associated benefits which will be brought about by the integration of the Lothian bus service with the Edinburgh Trams and that the public interest would not be served by the disclosure of the information in the sentence. TIE Ltd argued that disclosure would ultimately have a detrimental impact on the ongoing change process, which has yet to be completed.
29. In his submissions to the Commissioner, Mr Millar explained that he considered that in the spirit of fair and open democracy the public, as primary stakeholders, have a right to know how organisations using public money are being run. Mr Millar considered this to be of particular importance in the run up to the general election in May 2010.
30. Mr Millar has also submitted that in more general terms, as the project is now forecast to overrun in both timescale and budget it is now more important than ever for TIE Ltd to be frank and honest with the public about any internal changes which may affect these factors.
31. In considering the public interest test, the Commissioner is aware of the high level of public interest that exists regarding the tram project, particularly in Edinburgh, but also across Scotland. Where such a major infrastructure programme of this type is taking place, it is inevitable and appropriate that the public will be keen to understand how public monies are being spent and whether it is value for money. The Commissioner also accepts Mr Millar's submission that there is a public interest in understanding more about the issues surrounding the delays affecting the project.



32. However, the Commissioner also notes that, recognising this public interest in its work, TIE Ltd has disclosed the vast majority of the information requested in response to Mr Millar's request. He notes that the remaining withheld sentence would provide very limited additional insight into the tram project, and its governance and progress.
33. The Commissioner appreciates that the public interest in understanding the tram project has to be balanced against that in ensuring that the parties involved in ongoing discussions around governance are able to work together effectively on ongoing matters. In this case, the Commissioner (having accepted that disclosure would be likely to have a detrimental effect on the ongoing process regarding future governance of the tram project) accepts that disclosure would be contrary to the public interest for the reasons set out by TIE Ltd.
34. In all the circumstances, and having balanced the public interest both for and against disclosing the information under consideration, the Commissioner concludes that the public interest in maintaining the exemption in section 30(c) outweighs that in disclosure of the information in this case.
35. He therefore also concludes that TIE Ltd was entitled to withhold the sentence under consideration within the Board Report of 3rd June 2009 from Mr Millar. Having reached this conclusion, the Commissioner has not gone on to consider whether the exemption in section 30(b)(ii) applies to this information.

Content of refusal notice

36. In his application to the Commissioner, Mr Miller indicated that he was dissatisfied with the response he received from TIE Ltd to his request, in that it did not provide any explanation as to why information was redacted under particular exemptions. Additionally no reference was made to the public interest test or the harm test to justify these redactions.
37. The Commissioner has noted the requirements of section 16(1) of FOISA. This states that where an authority seeks to withhold information by virtue of an exemption in Part 2 of FOISA, it must give the applicant a notice in writing confirming that it holds the information, specifying which exemption is being applied, and why (if it is not clear) the exemption applies.
38. Under section 16(2), a refusal notice must also state the authority's reason for concluding (for any non-absolute exemption) why, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
39. The Commissioner notes that TIE Ltd's refusal notice of 30 October 2009 gave no explanation as to why it considered that the exemptions in sections 33(1)(b) and 36 of FOISA applied to the withheld information. No reference was made to the public interest test, or the reasons for TIE Ltd's conclusion that this favoured the maintenance of the exemption in sections 33(1)(b) and 36 of FOISA.
40. Therefore, the Commissioner concludes that TIE Ltd's response to Mr Millar failed to comply with the requirements of section 16(1) and (2) of FOISA.



DECISION

The Commissioner finds that Transport Initiatives Edinburgh Ltd partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Millar.

The Commissioner has concluded that TIE Ltd was entitled to withhold the information considered in this decision under the terms of section 30(c) of FOISA. He therefore finds that TIE Ltd acted in accordance with Part 1 of FOISA by withholding this information.

However, by failing to specify within its refusal notice of 30 October 2009 the reason for its reliance on the exemptions in sections 33(1)(b) and 36 of FOISA and its conclusion that the public interest favoured the maintenance of the exemption(s), the Commissioner finds that TIE Ltd failed to comply with Part 1 of FOISA, and, in particular, with sections 16(1) and (2) of FOISA.

The Commissioner does not require Transport Initiatives Edinburgh Ltd to take any action in relation to this breach.

Appeal

Should either Mr Millar or TIE Ltd 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
21 July 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.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.