

Decision Notice



Decision 138/2011 Mr Mark Irvine and South Lanarkshire Council

Single status implementation

Reference No: 201100784
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Summary

Mr Irvine asked South Lanarkshire Council (the Council) for information from certain reports and minutes. The Council initially withheld the information, but following a review released all of it with the exception of information in part of one report, which it considered to be exempt from disclosure under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Irvine remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner did not accept that disclosure of the withheld information would or would be likely to (as the Council had argued) substantially inhibit either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Consequently, he ordered its disclosure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 30(b)(i) and (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 17 February 2011, Mr Irvine wrote to the Council to request information from minutes and reports which the Council had submitted to the Commissioner's office in connection with an earlier application for a decision from the Commissioner (this application related to a request for information about the development and adoption of the Council's 555 Job Evaluation Scheme and is now the subject of *Decision 057/2011 Mr Mark Irvine and South Lanarkshire Council*¹).

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201002079.asp>



2. On 16 March 2011 the Council responded to Mr Irvine's request, withholding all information under the exemptions in section 25 and section 30(b) and (c) of FOISA. It advised Mr Irvine that reports and papers of the Council's committees were available to the public through the Council's publication scheme, and advised him where he could access the publication scheme.
3. On 23 March 2011, Mr Irvine wrote to the Council to request a review of its response. He pointed out that the withheld information related to decisions taken during the period 1999 to 2002, and argued that release of the information could not, given the passage of time, have the inhibiting effects claimed by the Council. On the other hand, he considered that disclosure would demonstrate whether the Council had acted properly at that time.
4. On 20 April 2011, the Council provided its response to Mr Irvine's request for review. Having reconsidered his request for information, the Council decided to release most of the information it had withheld, with the exception of information from paragraph 2.2.1 of a report from the Head of Personnel Services to the Corporate Management Team meeting of 18 November 1999. This information was withheld under section 30(b)(i) and (ii) of FOISA.
5. On 26 April 2011 Mr Irvine wrote to the Commissioner, stating that he was dissatisfied with the way in which the Council had dealt with his request 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 Irvine 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. The Commissioner was already in possession of the withheld information and the case was allocated to an investigating officer. On 12 May 2011, the Council was notified in writing that an application had been received from Mr Irvine.
8. In this letter, the investigating officer gave the Council an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA), asking it to respond to certain specific questions. In particular, the Council was invited to provide any further comments or submissions in relation to the exemptions in section 30(b); to explain further its view that it would face some legal and commercial risk if the information were disclosed; and to explain why disclosure would affect the Council's ability to keep its records in good order, as argued in its review response of 20 April 2011.
9. On 20 May 2011, the Council provided the Commissioner with its submission in relation to Mr Irvine's application for a decision. It advised that its position was primarily set out in the review response of 20 April 2011, but provided some additional comments for the Commissioner's consideration.



10. The Council's arguments and comments on Mr Irvine's application are considered in the next section of this decision, insofar as they have relevance to the decision.

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 him by both Mr Irvine and the Council, and is satisfied that no matter of relevance has been overlooked.

Section 30(b)(i) and (ii) – free and frank advice or exchange of views

12. The Council withheld certain information from paragraph 2.2.1 of a report to its Corporate Management Team meeting of 18 November 1999, citing the exemptions in section 30(b)(i) and (ii) of FOISA.
13. Under section 30(b) of FOISA, information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). Public authorities must assess whether officials or others would (or would be likely to) be deterred to a significant extent from providing advice or views for deliberation in future, if the information were disclosed. Although it may be difficult to judge how likely it is that disclosure would cause officials or other to be so inhibited, the exemption cannot be applied unless there are reasonable grounds for anticipating that disclosure would, or would be likely to, have these effects.
14. In assessing the sensitivity of information and the likelihood that disclosure would (or would be likely to) cause substantial inhibition, the Commissioner takes account of matters such as the subject matter; the content of the information; the manner in which advice or an opinion is expressed, and the timing of the disclosure. The Commissioner recognises, for example, that releasing advice or opinions while a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than after a decision had been taken.
15. Both of the exemptions in section 30(b) are subject to the public interest test in section 2(1)(b) of FOISA.



The Council's submission

16. The Council explained that it was currently defending a number of claims in respect of equal pay; at the time of writing, these claims were at a pre-hearing stage, with the Tribunal considering whether the Job Evaluation Scheme adopted by the Council satisfied certain provisions in the relevant legislation (the Equality Act). While noting that the withheld information related to alternative approaches to Single Status rather than the Job Evaluation Scheme itself, it anticipated that the issues covered might come to be considered at the Tribunal. The implementation of Single Status (to which the adoption of the Job Evaluation Scheme related) was clearly, in any event, the subject of strong ongoing controversy.
17. The Council argued that the information comprised advice and views on a sensitive matter, expressed in a very frank manner, and revealed internal thinking processes, disclosure of which would be detrimental to the ultimate quality of decision-making within the Council.
18. The Council considered that the sensitivity of the information had not yet diminished, in light of ongoing claims in relation to equal pay. It took the view that disclosure would inhibit substantially the full and frank provision of advice and the exchange of views by personnel professionals in relation to the adoption of Single Status and equal pay matters, including ongoing claims.
19. In particular, the Council suggested that disclosure would be likely to inhibit the provision of such advice or views in writing, to avoid the possibility of disclosure at a sensitive time. It considered that written material "was important to the resolution of this issue, to allow issues to be absorbed and reflected upon".
20. The Council took the view that some of the withheld information could not be disclosed without some degree of legal and commercial risk to the Council. As a result, disclosure would have a substantial negative effect on the terms in which advice on the subject could continue to be conveyed to the Council.
21. The Council acknowledged that some of the withheld information was factual, but argued that it would be difficult to redact the non-factual information and thus provide the factual information in isolation.
22. The Council referred to a previous decision of the Commissioner (*Decision 016/2008 Mr Tom Gordon and the Scottish Parliamentary Corporate Body*²) and suggested that the Commissioner should adopt a similar approach in this case.

Mr Irvine's view

23. In his application to the Commissioner, Mr Irvine contended that the Council had produced no evidence to show that the release of the information in question would be prejudicial to the conduct of public affairs. On the contrary, he believed that disclosure would have the opposite effect, in holding senior officials and elected members of the Council to account.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200700785.asp>



The Commissioner's conclusions

24. The Commissioner notes that only part of the report in question has been withheld. The remaining part, which also consists of advice and views for deliberation, has already been disclosed to Mr Irvine. From this, the Commissioner concludes that the Council does not consider disclosure of the advice and views expressed in that remaining information would, or would be likely to, cause officials or others to be substantially inhibited from providing similar advice or views in future. The Commissioner considers that in order to reach a decision on this case, he must seek to understand why the Council believed that some advice and views could safely be disclosed, while the disclosure of the advice and views in the withheld information would (or would be likely to) have a substantially inhibiting effect.
25. The information already disclosed sets out the approach to Single Status implementation recommended to the Corporate Management Team by the Head of Personnel, who describes it in the report as “a positive, pro-active approach”. The information already disclosed shows that paragraph 2.2.1 presented an alternative approach, in which Single Status could be achieved through the existing organisational structure, but “without embracing the potential for change or making significant alterations to the workforce and the delivery of service.”
26. The Council has not explained why disclosure of information about the approach not recommended to the Corporate Management Team would be more likely to cause substantial inhibition in future than the disclosure of advice and views about the alternative, recommended approach; however, this was clearly the view it took in deciding to release part of the report. It has referred to the “strong controversy” regarding the implementation of Single Status, and the legal challenges which the Council currently faces, but has not explained why disclosure of information about an option not taken, in 1999, would now cause personnel professionals to be substantially inhibited from providing advice and views in relation to the adoption of Single Status and equal pay matters, including ongoing claims.
27. The Commissioner has carefully considered the information withheld, which cannot be discussed in any detail in this decision. He must consider the likely effects of disclosure in the circumstances existing at the time the Council dealt with Mr Irvine’s request for review, rather than at the time the report was written and presented to the Corporate Management Team.
28. The Commissioner has first considered the argument that disclosure of the information would reveal internal thinking processes, disclosure of which would be detrimental to the ultimate quality of decision-making within the Council. The Commissioner accepts that disclosure would provide more information about the approach not recommended to, or adopted by, senior management, and the reasons why it was not recommended. To this limited extent, he accepts that it would reveal the Council’s internal thinking processes, by making clearer the choice of options presented to senior management as part of the adoption process.



29. However, the Commissioner takes the view that a more extensive “thinking process” must have been involved, which is not reflected in the information withheld but which would include the thinking behind the decision to present certain options to senior management and to recommend one of them. Having considered the withheld information, he does not accept that disclosure of the information withheld would reveal enough about the internal thinking processes of the Council to be likely to cause substantial inhibition on the part of officials concerned to maintain a degree of privacy around such processes.
30. In relation to this point, the Commissioner also notes that although the consequences of the Council’s decisions on Single Status implementation are ongoing, the information withheld was presented to senior management as part of a proposal ready for their decision; in other words, the information related to thinking which was fully-developed, rather than (for example) part of an early-stage policy discussion.
31. The Commissioner has also considered whether disclosure would, or would be likely, to cause substantial inhibition because the Council is currently involved in Employment Tribunal hearings relating to its implementation of Single Status. In other words, he has considered whether the information remains sensitive notwithstanding the passage of time.
32. In its submission, the Council stressed the fact that there was ongoing controversy about its implementation of Single Status, and that Employment Tribunal hearings were ongoing. However, it did not explain to the Commissioner why its position in those hearings would, or could, be affected by disclosure of the withheld information.
33. The Council was also invited to explain a reference (in its letter of 20 April 2011) to the “legal and commercial risks” it believed it would incur if the information was disclosed, but has not taken the opportunity to provide such an explanation to the Commissioner.
34. In its submission of 20 May 2011, the Council stated that the withheld information “would have little or no relevance to whether the Council’s [Job Evaluation] Scheme satisfies the provisions set out by the Equality Act”, and confirmed that such matters were being assessed by the Employment Tribunal at the time of writing. The Council contended that the question of whether the Council acted appropriately at the time it adopted Single Status would not be advanced by consideration of the withheld information. The Council had earlier suggested that the subject matter of the withheld information might “become part of the issues surrounding the matters under consideration at the Tribunal”, but failed to expand upon this.
35. The Commissioner is therefore faced with an assertion from the Council that disclosure of the information would, or would be likely to, cause substantial inhibition, an assertion which has been presented within the context of ongoing legal action relating to the Council’s decisions on Single Status implementation, but which is not supported by any explanation of why the particular information withheld would have this effect when other information (which, it could be argued, also shows the Council’s thinking process) would not.



36. The Commissioner acknowledges that the withheld information expresses certain points fairly clearly, albeit in general terms and without elucidation. The points might be considered to be expressed frankly, although it would be difficult to accept the Council's characterisation of the manner of expression as "very frank". In any event, however, given that the information dates from 1999, and given that much has happened since in relation to the implementation of Single Status and general awareness of the issues raised, the Commissioner cannot accept that frankness of expression alone should be a reliable guide to the current effects of disclosure, in the absence of more compelling arguments as to why these effects should be expected to come about in this particular case.
37. The Commissioner finds that in this (as well as in other) respects, this case differs from the one cited by the Council (*Decision 016/2008 Mr Tom Gordon and the Scottish Corporate Parliamentary Body*), in which the public authority provided the Commissioner with considerably more information about how disclosure of the information would be likely to affect, and possibly prejudice its position in relation to, ongoing legal challenges. In the current case, no such information has been provided to the Commissioner.
38. The Commissioner therefore finds that the Council has failed to demonstrate that disclosure of the information withheld would, or would be likely, to cause substantial inhibition in relation to the provision of advice or the exchange of views for deliberation. Consequently, the Commissioner does not accept that the information should be withheld under either of the exemptions in section 30(b) of FOISA.
39. Because the Commissioner has found that the exemptions cited by the Council cannot be upheld, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

DECISION

The Commissioner finds that South Lanarkshire Council (the Council) failed to comply with Part 1 (and in particular section 1(1)) of FOISA in responding to the information request from Mr Irvine. He does not accept that the Council was justified in withholding information under the exemptions in section 30(b)(i) and (ii) of FOISA.

The Commissioner requires the Council to provide Mr Irvine with the information withheld, by 2 September 2011.



Appeal

Should either Mr Irvine or South Lanarkshire 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
12 July 2011



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.

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;

...