

Decision Notice



Decision 147/2010 Mr Frank Plowright and Glasgow City Council

Golfhill Primary School

Reference No: 200901562

Decision Date: 23 August 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Plowright requested from Glasgow City Council (the Council) information on the calculation of figures relating to Golfhill Primary School. The Council responded by withholding the information requested under section 33(1)(b) of FOISA, which relates to commercial interests. Following a review, as a result of which some of the information was released to him, Mr Plowright remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which further information was released to Mr Plowright, the Commissioner found that the Council had partially failed to deal with Mr Plowright's request for information in accordance with Part 1 of FOISA, by incorrectly applying the exemption in section 33(1)(b) to certain of the information requested. In the circumstances, however, he did not require the Council to take any further action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority) and 33(1)(b) (Commercial interests and the economy).

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 21 May 2009, Mr Plowright wrote to the Council requesting the following information:
... copies of all documentation used in calculating the figures presented to parents in the consultation document with regard to Golfhill Primary School dated April 14th.
2. The Council responded on 10 June 2009. It refused to supply the information requested on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA.
3. On 15 June 2009 Mr Plowright emailed the Council requesting a review of its decision. His request was reiterated in a letter dated 29 July 2009. Mr Plowright indicated that he did not agree with the Council's arguments for withholding the information from him.



4. The Council wrote to Mr Plowright on 31 August 2009, referring to his letter of 29 July 2009 and indicating that it had conducted a review of its handling of his information request. However, this review appears to have related to a request other than the one set out in paragraph 1 above.
5. Mr Plowright subsequently made an application for a decision by the Commissioner in relation to this request. However, once it was established that the Council had not conducted a review in relation to the request, no investigation could be taken forward. Instead, the Council was contacted and asked to conduct a review in respect of the request set out at paragraph 1 above.
6. The Council wrote again to Mr Plowright on 2 October 2009 explaining it had now undertaken a review in respect of his request of 21 May 2009. At this stage the Council released information it had previously withheld, but upheld its previous decision to withhold the remaining information under the exemption in section 33(1)(b) of FOISA.
7. Mr Plowright wrote the Commissioner again on 2 October 2009, applying for a decision in terms of section 47(1) of FOISA. Mr Plowright expressed dissatisfaction with the Council's application of the exemption in section 33(1)(b).
8. 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

9. On 28 October 2009, the Council was notified in writing that an application had been received from Mr Plowright 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.
10. 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.
11. During the investigation, additional information was released to Mr Plowright. Mr Plowright advised that he no longer required any further information from the Council, but still required a decision on whether the Council had been correct to apply the exemption in section 33(1)(b) of FOISA in dealing with his request. In any event, the Commissioner notes (having considered the information along with the Council's submissions) that the information eventually provided to Mr Plowright appears to be such information falling within the within the scope of his request as the Council would reasonably be expected to hold.



Commissioner's analysis and findings

12. 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 Plowright and the Council and is satisfied that no matter of relevance has been overlooked.
13. The information requested relates to a consultation on the future of Golfhill Primary School, and in particular to the appraisal of options. Mr Plowright took the view that the information he requested should have been provided from the outset, when he considered it to be of most relevance to concerned parents and before Councillors had considered and reached a conclusion on the options. He complained in his original application that the Council wished to “conceal the figures” for the six months he understood his application to the Commissioner was likely to take, noting that the future of the school would have been determined by then.
14. In particular, Mr Plowright did not agree with the Council's application of section 33(1)(b) to the information he requested. The Commissioner will now consider the reasons for Mr Plowright's dissatisfaction in this decision as to whether the Council was correct to withhold the information at the time of its review and whether the Council's handling of Mr Plowright's request was in accordance with FOISA.

Consideration of section 33(1)(b) (Commercial interests and the economy)

15. When responding to Mr Plowright's request for information, the Council indicated it was applying the exemption in section 33(1)(b) of FOISA to the information he sought. In its review, it partially upheld this position by continuing to withhold certain information (some of which was subsequently released) under the same exemption.
16. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
17. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced. Generally, it assists matters if the third party has been consulted on these points.



18. In responding to Mr Plowright's request for information, the Council argued that disclosure of the detailed financial analysis of the various options contained in the consultation paper could prejudice the due process of any subsequent tender process dependant on the Council's decision on the matter. While releasing some information following its review, it continued to argue at that point that the remaining information would form part of a tendering process it was required to conduct in procuring works relative to Golfhill Primary School. On both occasions, it pointed out that it was bound by the requirements of European Union public procurement legislation.
19. The Council also explained that the feasibility costs for each of the options in the Financial Information section of the appraisal document were not repeated in the consultation document, in order to ensure that when firms/companies were invited to tender for the work they would not be influenced by the feasibility costs. What had been stated in the consultation document, the Council advised, was what the estimated cost "would be in the region of", giving a lower and upper banded figure.
20. The Commissioner has firstly considered whether the Council could be considered to have relevant commercial interests. Commercial interests will generally relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of revenue generation. Such activity will commonly take place within a competitive environment. That said, there is no requirement that these activities are profit making before this exemption can be engaged, although it would be normal.
21. A public authority's commercial interests should generally be distinguished from its financial interests, which may relate more broadly to its financial resources and assets. Financial and commercial interests may coincide, but this will not always be the case. The procurement of resources (including services) required by an authority for the purposes of undertaking its core activities may involve engagement with commercial operators, but it is unlikely itself to represent a commercial activity.
22. In this case, having considered the withheld information and the arguments presented by the Council for withholding it, the Commissioner is unable to accept that the Council had commercial (as opposed to financial) interests in the activities it referred to. Whatever relevance the withheld information may have had to a future tendering process in relation to Golfhill Primary School, the Commissioner does not regard the engagement with commercial activity entailed in such a tendering exercise to be sufficient to give rise to a commercial interest on the part of the Council. No more specific commercial interest has been identified to the Commissioner and in the circumstances he cannot accept that the Council's commercial interests could have been engaged in this case. Consequently, he cannot accept that disclosure of the withheld information in response to Mr Plowright's request would have prejudiced those interests substantially, or would have been likely to prejudice them substantially. He must conclude, therefore, that the Council was not entitled to claim the exemption in section 33(1)(b) of FOISA in respect of that information.



23. The Commissioner has simply been asked to consider the application of the exemption in section 33(1)(b). In the circumstances, he is not in a position to comment on whether, at the time it dealt with the request, it would have been entitled to claim any other exemption in relation to the information.
24. As the Commissioner can find no justification for the Council applying section 33(1)(b) to the withheld information, there is no need to go on to consider the application of the public interest test in relation to this exemption. The Commissioner will now, therefore, consider Mr Plowright's concerns about the handling of his request.

Handling of Mr Plowright's request

25. In his application to the Commissioner, Mr Plowright expressed dissatisfaction with what he considered to be the late release of the information. In particular, he noted what he believed to be a late response to his request for review. He also considered the Council to have deliberately delayed the disclosure of any information until after the relevant committee decision.
26. In terms of section 21(1) of FOISA, a Scottish public authority receiving a requirement for review must (subject to certain qualifications which are not relevant in this case) comply promptly, and in any event, by not later than the twentieth working day after it receives the requirement. Even allowing for the Council only receiving Mr Plowright's second review request of 29 July 2009, it did not provide a response until 2 October 2009, some time after the expiry of the period specified in section 21(1). Consequently, it failed to comply with section 21(1).
27. It does not, of course, follow from a failure to meet the timescale in question that the failure was attributable to a particular motive. Nor does that necessarily follow from any further delay in releasing relevant information. In this case, the Council claimed prior to its disclosure that the withheld information was exempt under section 33(1)(b) of FOISA. The Commissioner has found that the Council was not entitled to claim this exemption, and he is not in a position to add to that finding.

DECISION

The Commissioner finds that Glasgow City Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Plowright. While it released certain information in response to Mr Plowright's request for review, in wrongly withholding information under section 33(1)(b) of FOISA it failed to comply with section 1(1) of FOISA.

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In the circumstances, given that the withheld information has now been released to Mr Plowright and he does not in any event wish to pursue the disclosure of any information further, the Commissioner does not require the Council to take any further action.

Appeal

Should either Mr Plowright 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
23 August 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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