

Decision Notice

Decision 150/2018: Provincial Grand Black Chapter of Scotland and East Dunbartonshire Council

Source of allegation

Reference No: 201800035

Decision Date: 03 October 2018



Summary

The Council was asked for a copy of a report which contained the source of an allegation about lack of stewarding at a previous event. The Council withheld the report, considering it exempt from disclosure.

The Commissioner found that the Council was wrong to withhold the information. He required the Council to release the parts of the report in which the allegation was contained.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) and (c) (Prejudice to the effective conduct of public affairs)

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 24 July 2017, the Provincial Grand Black Chapter of Scotland (PGBCS) made a request for information to East Dunbartonshire Council (the Council). PGBCS referred to an email received from the Council's Chief Solicitor, which stated that information had been passed to the Council that there had been an inadequate provision of stewarding at a previous event organised by the PGBCS in Glasgow. PGBCS asked for a copy of the report which contained the source of this "allegation" as it had not previously been drawn to PGBCS's attention.
2. The Council responded on 22 August 2017. The Council considered that sections 30(b) and (c) of FOISA (Prejudice to effective conduct of public affairs) applied to the information in the report. The Council was concerned that disclosing the report would inhibit Police Scotland from providing this type of information to the Council in future.
3. On 7 September 2017, PGBCS wrote to the Council requesting a review of its decision. They made it clear that they wished the Council to review its decision to divulge the source of the allegation.
4. The Council notified PGBCS of the outcome of its review on 4 October 2017. The Council upheld the original response. The Council recommended that the PGBCS contact Police Scotland direct for further information.
5. On 3 January 2018, PGBCS applied to the Commissioner for a decision in terms of section 47(1) of FOISA, stating they were dissatisfied with the outcome of the Council's review because the Council had failed to identify the source of the allegation.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that PGBCS made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 1 May 2018, the Council was notified in writing that PGBCS had made a valid application. The Council was asked to send the Commissioner the information withheld from PGBCS. 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 including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council provided submissions to the investigating officer.
10. The investigating officer contacted PGBCS to determine the main source of their concern and to determine whether they would be content to limit the scope of the Commissioner's decision to information about the allegation, rather than the whole report.
11. PGBCS confirmed that they would be content for the Commissioner to consider only the information in the report which showed the source of the 'allegation'.
12. During the investigation, the Council was contacted on 12 June 2018, to explain the reduction in scope of the investigation and was asked if it would now reconsider withholding the information. PGBCS were informed of this approach.
13. The Council did not provide its further submission to the Commissioner until 23 August 2018, some two months after the date given for response.

Commissioner's analysis and findings

14. 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 him by both PGBCS and the Council. He is satisfied that no matter of relevance has been overlooked.
15. The Council applied the exemptions in section 30(b)(i) and (ii) and section 30(c) of FOISA to the whole of the report which contains the 'allegation' with regard to this case.
16. However, PGBCS are content to limit the appeal to information about the 'allegation'. Therefore, the Commissioner will consider only whether the exemptions in section 30(b)(i) and (ii) and section 30(c) apply to this information in the report.

Section 30(b)(i) and (ii) of FOISA

17. In order for the Council to rely on the exemptions in section 30(b)(i) and (ii), it must show that disclosure of the information 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)). The exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
18. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views.

The inhibition in question must be substantial and therefore of real and demonstrable significance.

19. As with other exemptions featuring a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring.
20. The Commissioner's guidance¹ states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day to day professional functions, for example, then the risk of substantial inhibition may well be diminished.
 - (ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken. The degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.
21. The Council explained that relationship of co-operation and trust with Police Scotland is essential to the effective delivery of public services and particularly relevant when considering the various statutory duties applicable to both organisations in relation to issues of public safety. It submitted that public safety requires that both parties can share information and views in a frank and secure environment. If this was not possible, it would result in a lack of confidence and trust which would restrict the flow of crucial information.
22. The Council submitted that the disclosure of the information would inhibit substantially the free and frank provision of advice insofar as the disclosure would inhibit Police Scotland from providing information to the Council. It submitted that such provision of advice is important when the Council undertakes its statutory duty to consider whether any proposed procession should be subject to an Order or a restriction.
23. For the same reasons, the Council considered that disclosure of the information would inhibit substantially the free and frank exchange of views between the Council and other public sector partners when dealing with statutory matters.
24. The Council stated that it was entirely appropriate and necessary for Police Scotland to share information in relation to previous similar events run by the same organisation. This enabled a full and detailed risk assessment to be carried out.

¹ <http://itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

The Commissioner's findings

25. The Commissioner recognises that co-operation between Police Scotland and the Council is necessary in order to ensure events can be considered in full knowledge of any previous issues or likely risks to public safety. The sharing of candid information between these organisations enables the Council to fully understand issues and identify potential risks when considering licenses for such events. He accepts that the removal or obstruction of this free and frank exchange of advice and views would be likely to have a negative impact on the work of the Council, to some extent. The questions for the Commissioner are whether this is a likely consequence of disclosing the information which PGBCS asked for, and if so, whether it would be at the level of "substantial inhibition", as required for the exemptions in section 30(b)(i) and (ii) to apply.
26. The Commissioner has reviewed the limited information required by the PGBCS. On the basis of the arguments put forward by the Council, he cannot accept that the exemptions in section 30(b)(i) and (ii) of FOISA are engaged. The Commissioner is not satisfied that public disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
27. The Council submitted that it had contacted Police Scotland on receipt of the request and that it was Police Scotland's view that the information should not be disclosed. The Council has not informed the Commissioner whether Police Scotland expressed any view on how disclosure of the information might affect its relationship with the Council. However, the Council considered that disclosure of this information without the backing of Police Scotland would jeopardise the relationship of trust between the two bodies.
28. The information in question encompasses a few sentences giving a view of an issue identified following a previous event. The Commissioner cannot agree that the disclosure of this information would, or would be likely to, substantially inhibit Police Scotland from co-operating and working with the Council on matters of public safety. He can see no reason why Police Scotland would be less willing to be forthcoming with advice in future, should this information be disclosed, or why disclosure of such information should offer any opportunity for challenging restrictions on use. It also seems highly improbable that Police Scotland would potentially compromise public safety by withholding information from the Council in similar situations, if the information in this case were disclosed.
29. The Commissioner therefore finds that the Council was wrong to withhold the information in question under the exemptions in section 30(b)(i) and (ii) of FOISA. As the exemptions were wrongly applied, he is not required to consider the public interest test in section 2(1)(b) of FOISA.
30. As this information has also been withheld under s30(c), the Commissioner must now go on to consider whether that exemption applies.

Section 30(c) of FOISA

31. 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 word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). In his guidance on section 30(c), the Commissioner notes that this means the exemption cannot be used to withhold information where disclosure would inhibit the free and frank exchange of advice or views. In those cases, section 30(b) should be

applied instead. "The harm to the effective conduct of public affairs must come from something else for the exemption in section 30(c) to apply."

32. The Council argued that a relationship of co-operation and trust with Police Scotland is essential to the effective delivery of public services. It stated that this was "particularly relevant considering the various statutory duties applicable to both organisations in relation to issues of public safety and in a quasi-judicial / regulatory context such as licensing or the administration of public processions, where public safety requires that both parties can share information and views in a frank and secure environment."
33. The Council argued that its working relationship with the Police extends beyond the exchange of advice and views, and gave examples of other situations and relationships where information sharing is "essential to deliver services jointly and meet shared goals". It stated that the relationship with Police Scotland was fundamental to the Regional resilience partnership work (the local application of national Counter terrorism strategies) and in combatting serious crime.
34. The Commissioner does not find any significant differences between the arguments above, and the arguments already considered in relation to section 30(b). Both are based on the view that disclosure in this case would lead Police Scotland to withdraw co-operation with the Council in matters of such high public interest as ensuring public safety. The Commissioner finds that the Council was not entitled to rely on both section 30(b) and section 30(c) to withhold the same information.
35. Additionally, the Commissioner finds it unlikely that Police Scotland would act against the interests of the public in the way anticipated by the Council, if the withheld information in this case was disclosed. It would be a serious dereliction for Police Scotland to withhold their advice or co-operation where doing so could compromise public safety.
36. The Commissioner is satisfied that there is nothing in the withheld information which, in itself, would compromise public safety if disclosed.
37. For these reasons, the Commissioner finds that the information withheld under section 30(c) of FOISA does not qualify for exemption under that provision. The Council has not provided evidence or arguments to persuade him that the information, if disclosed, would cause substantial prejudice to the effective conduct of public affairs.
38. Given that the exemption in section 30(c) of FOISA was wrongly applied, the Commissioner is not obliged to consider the public interest test in section 2(1)(b) of FOISA.

Commissioner's conclusion

39. As the Commissioner has found that the information required by PGBCS was wrongly withheld under section 30(b) or (c) of FOISA, the Commissioner requires the Council to disclose it now. He will provide the Council with a marked up copy of the report, showing what information should be disclosed.

Decision

The Commissioner finds that East Dunbartonshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Provincial Grand Black Chapter of Scotland. The Council wrongly withheld information under sections 30(b) and (c) of FOISA.

The Commissioner therefore requires the Council to disclose the information, by **16 November 2018**.

Appeal

Should either the Provincial Grand Black Chapter of Scotland or East Dunbartonshire 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.

Enforcement

If East Dunbartonshire Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

03 October 2018

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.

...

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; or

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

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