

Decision Notice



Decision 202/2013 Oyne Community Association and Aberdeenshire Council

Archaeolink

Reference No: 201300787

Decision Date: 13 September 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
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Summary

Oyne Community Association (OCA) asked Aberdeenshire Council (the Council) for information about the former Archaeolink visitor attraction. The Council provided some information, but withheld information it considered commercially sensitive. Following an investigation, during which the Council disclosed further information to OCA, the Commissioner accepted that the information still withheld by the Council was exempt from disclosure under section 33(1)(b) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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 December 2012, OCA wrote to the Council requesting information pertinent to the Council's activities regarding Archaeolink, Oyne, including:
 - a. Documentation specifying all agreements between Archaeolink trustees and the Council when the lease on the property was terminated and assets passed to the Council, to include the date of the agreement.
 - b. All communication between the Council and OSCR (Office of the Scottish Charity Regulator) regarding Archaeolink and its "winding up", whether by letter or email, to include the Council's submission to OSCR requesting it be relinquished from the trust deed.
 - c. Minutes of the meeting(s) where the document detailed below was discussed and the decision made to issue it.
 - d. Copy of the document inviting marketing recommendations and quote for disposal of Archaeolink from Pam Singer to commercial property agents believed dated 5 June 2012.



- e. Copy of responses to the above from the shortlisted companies (not including any financial information or details of the companies, but to include the marketing recommendations and any reference to planning, development and types or number of properties).
 - f. Any additional correspondence between the above parties regarding Archaeolink.
 - g. Copy of the report prepared for Garioch Area Committee on Archaeolink referred to in the last paragraph of the briefing note produced by Pam Singer dated 06/12/12 and headed "Archaeolink, Oyne".
2. The Council responded on 20 February 2013. It confirmed that it held some, but not all, of the information requested. The Council supplied some information, but withheld other information in terms of sections 27 and 33 of FOISA. It stated that it held no information falling within the terms of point b. of the request.
 3. On 22 February 2013, OCA wrote to the Council requesting a review of its decision. In particular, OCA drew the Council's attention to the size and location of the Archaeolink site in the small village and OCA's view that whatever happened to Archaeolink would impact directly on most people who lived in Oyne. Consequently, OCA considered there was a strong public interest in matters associated with Archaeolink. OCA accepted that the Council held no information for point b., but requested reviews in respect of points a. and c. to f. (inclusive). It accepted the Council's reasoning for not providing the Garioch Area Committee report (point g.).
 4. On 21 March 2013, the Council notified OCA of the outcome of its review, which upheld its initial decision without modification.
 5. On 26 March 2013, OCA wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 6. The application was validated by establishing that OCA made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to those requests.

Investigation

7. On 10 April 2013, the Council was notified in writing that an application had been received from OCA and was asked to provide the Commissioner with any information withheld from it. 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. These focused largely on the Council's application of section 33(1)(b) of FOISA.
9. OCA confirmed that it was not asking the Commissioner to consider the Garioch Area Committee Report (point g.) or the Council's response to point b.
10. With regard to point c, the Council had provided OCA with a redacted copy of the relevant minute. Following the provision of information on those present at the meeting later in the investigation, OCA confirmed that it was happy with the level of detail provided and did not require any further consideration of this point.
11. Further information was disclosed to OCA during the investigation (and will not be considered further in this decision). The rest of the withheld information all fell within the scope of point e. of the request and was withheld under section 33(1)(b) of FOISA.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the remaining withheld information and the relevant submissions, or parts of submissions, made to her by OCA and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) of FOISA

13. Point e. of the request reads as follows:
Copy of responses to the above (point d.) from the shortlisted companies. We do not require any financial information or details of the companies, but the marketing recommendations and any reference to planning, development and types or number of properties are important.
14. The Council withheld all this information in terms of section 33(1)(b) of FOISA.
15. OCA requested the complete information (the responses), but qualified its request by reference to not seeking "financial information or details of the companies". Rather, OCA wished "the marketing recommendations and any reference to planning, development and types or number of properties". The implication of this was, as far as the Commissioner can see, that in OCA's view this latter information would not fall within the terms of section 33(1)(b).
16. The Council was asked if the information could be redacted so that "the marketing recommendations and any reference to planning, development and types or number of properties" could be disclosed.



17. The Council commented that it was unlikely that the documentation could be redacted to the extent required to protect the commercial interests of the Council and the companies and still leave any meaningful information.
18. The Commissioner has considered the Council's submission in this regard. In her view, the information identifying the tenderers could be removed, along with financial information, still leaving a considerable amount of information of substance from each response. The question is whether the remaining information should have been withheld under section 33(1)(b) of FOISA.
19. Section 33(1)(b) 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 and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
20. There are elements which an authority needs to demonstrate are present when relying on this exemption. It needs to indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would be (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.
21. The Council submitted that the withheld information related to the commercial interests of the Council and the tenderers. The Council explained that it wished to proceed with the sale of the property and had invited companies to tender for the disposal. The outcome of such a tender would be a contractual arrangement with a company, and would therefore be a commercial interest.
22. The Commissioner accepts this submission and, therefore, that the Council has identified commercial interests that fall within the terms of this exemption.
23. The Council submitted that disclosure of the information would be likely to prejudice these commercial interests substantially. The Council explained that it had a statutory duty to realise the best price if disposing of land. The responses contained commercially sensitive information that, if released, could have an adverse impact on its ability to meet this duty. Release of the information prior to the conclusion of the tender process would, the Council submitted, prejudice the Council's interests substantially and could make it less likely that companies would be willing to tender for such projects in the future.
24. The time-sensitivity of certain commercial information is recognised in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (at 4.3):



Most contractual and procurement-related information is only sensitive for a definable period of time. It is not, however, possible to be prescriptive about when the sensitivity will decrease; this time period will vary widely depending on the type of procurement information in question and the stage reached in the tender exercise. The sensitivity of price information may decrease after a relatively short period, whereas 'trade secret' information may be sensitive for much longer.

25. In this case, the contract is not concluded: this is confirmed within a Council Committee report¹ (of 4 June 2013) by the Council. The Council confirmed to the investigating officer that this remained the case, and had been so at the time of OCA's request and the Council's review.
26. The Commissioner accepts that there is a time-sensitivity to this information, given that there has been no concluded decision by the Council (and therefore there is no concluded contract). The responses contain the views (of the companies tendering) on the marketing of the property. Before the process was concluded, the Commissioner accepts that release of this information would have given significant (though not complete) insights into aspects of the commercial interests of the tenderers. Given the timing, she accepts that this would have been to the substantial prejudice of the integrity of the tendering process.
27. The Commissioner acknowledges that OCA attempted to assist the Council by wording the terms of its request: OCA stated that it did not wish financial information or information that would (in OCA's view) be exempt from disclosure. In all the circumstances, however, the Commissioner does not think there is any way to extract the information OCA wish to receive without including information falling within section 33(1)(b) of FOISA.
28. The Commissioner therefore accepts that disclosure of the withheld information would be likely to prejudice substantially the commercial interests of the tenderers, and that the exemption in section 33(1)(b) was correctly applied on that basis.

Public interest test

29. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
30. OCA drew the Council's attention to the size and location of the Archaeolink site in its small village. It took the view that that whatever happened to Archaeolink would impact directly on most people who lived in Oyne. Consequently, OCA was of the view that there was a strong public interest case with regard to matters associated with the disposal of the property.

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[http://aberdeenshire.gov.uk/committees/files_meta/802572870061668E80257B790031E74E%5C\(8\)%20Archaeolink%20report%20final.pdf](http://aberdeenshire.gov.uk/committees/files_meta/802572870061668E80257B790031E74E%5C(8)%20Archaeolink%20report%20final.pdf)



31. The Council acknowledged that OCA would have an interest in knowing what was to happen with the Archaeolink site, given the impact on the village. Whilst the Council also acknowledged that there would be an interest in understanding the agreements which resulted in the Council gaining control of the asset and any decisions made for its disposal, it considered that releasing the information when the tender process was still live would prejudice the tender process to the detriment of the Council and, therefore, to the public, and so would be contrary to the public interest.
32. The Council commented that OCA was not being denied information about this proposal and that there was an on-going dialogue with the Area Manager. OCA was, therefore, well informed about what was happening. OCA acknowledged that this dialogue was going on.
33. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She acknowledges that disclosure in this case would contribute to the public's understanding (in particular, the understanding of those resident in Oyne) of the Council's actions. The Commissioner agrees with OCA that there is a public interest in those living in Oyne being aware of the Council's intentions and decisions with respect to the Archaeolink site. She also recognises a public interest in ensuring that value for money is seen to be obtained, particularly where this involves the public purse.
34. On the other hand, the Commissioner accepts that there is a public interest in ensuring that there is fair competition for tenders of this nature. She also accepts that where a public authority is engaging in competitive tendering, it is in the public interest that it is able to do so without its status as a public body impacting significantly on its ability to purchase effectively in a competitive market – in particular, by securing best value through the widest possible responses from suitable persons.
35. The Commissioner has considered all of the factors set out above. She accepts the Council's submission that, as the information is current and subject to tender, there is (and was when the Council dealt with the request and request for review) a genuine risk of damage to the tendering process as a result of disclosure. While there may be some circumstances in which the public interest requires the disclosure of information even when substantial prejudice would (or would be likely to) result from the disclosure, the Commissioner does not, on balance, find this to be the case here.
36. After weighing up the competing interests in this case, the Commissioner has concluded that, in all the circumstances, the public interest in disclosing the information is outweighed by the public interest in maintaining that exemption. She is therefore satisfied that this information was correctly withheld by the Council under section 33(1)(b) of FOISA.



DECISION

The Commissioner finds that, in respect of the information still withheld at the close of the investigation, Aberdeenshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Oyne Community Association.

Appeal

Should either Oyne Community Association or Aberdeenshire 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.

Margaret Keyse
Head of Enforcement
13 September 2013



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.

...

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).