

Decision Notice

Decision 259/2014: Mr Mark Irvine and North Lanarkshire Council

Email concerning equality impact assessment

Reference No: 201402455

Decision Date: 17 December 2014



Scottish Information
Commissioner

Summary

On 30 July 2014, Mr Irvine asked North Lanarkshire Council (the Council) for a specified email from the Council to Unison in 2006 concerning an equality impact assessment.

The Council withheld the information on the basis that it was exempt from disclosure in terms of section 30(c) (Prejudice to effective conduct of public affairs) of FOISA.

The Commissioner found that the Council was not entitled to withhold the information under the exemption in section 30(c) of FOISA. She required it to disclose the information to Mr Irvine.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to 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 30 July 2014, Mr Irvine made a request for information to the Council. The information requested was an email from the Council's Head of Personnel to Unison dated 7 March 2006, concerning an equality impact assessment relating to the Council's job evaluation scheme.
2. The Council responded on 28 August 2014. The Council informed Mr Irvine that it considered the information to be exempt from disclosure in terms of section 30(c) of FOISA. This was on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
3. On 2 September 2014, Mr Irvine emailed the Council requesting a review of its decision on the basis that he did not consider the exemption was engaged.
4. The Council notified Mr Irvine of the outcome of its review on 30 September 2014 upholding its original decision without modification.
5. On 20 October 2014, Mr Irvine wrote to the Commissioner. Mr Irvine applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Irvine stated he was dissatisfied with the outcome of the Council's review. He did not agree that the exemption applied and believed the public interest favoured disclosure of the information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Irvine made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 3 November 2014, the Council was notified in writing that Mr Irvine had made a valid application. The Council was asked to send the Commissioner the information withheld from him. 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.

Commissioner's analysis and findings

9. 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 her by both Mr Irvine and the Council. She is satisfied that no matter of relevance has been overlooked.

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

10. 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). 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 disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
11. The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
12. The information in this case comprised an email sent from the Council to Unison in 2006, regarding an equality impact assessment relating to the Council's job evaluation scheme.
13. In its submissions to the Commissioner, the Council referred to the equal pay claims it is currently defending at an Employment Tribunal. The Council stated that the value of the sums sought from it run to millions of pounds. The Council explained that it is currently involved in negotiations aimed at settling these claims and, in its view, the conduct and conclusion of these settlement negotiations represented a very considerable concern to the effective conduct of public affairs.
14. The Council was concerned to ensure that, insofar as information may enter the public domain, it did so in a manner that did not disrupt the context within which negotiations were taking place; in the Council's view, disclosure of the information into the public domain would be apt to have that disrupting effect. The Council argued that disclosure of the information could have the effect of undermining its negotiating position because Mr Irvine would be able to publicise the information on his blog, with the Council being restricted in its ability to respond.

15. The Council submitted that, given the financial implications for it of the proper management of the negotiations, any disruption to those negotiations would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs.
16. In Mr Irvine's view, the onus was on the Council to demonstrate what specific harm would occur by disclosure of the information. He considered it had failed to do so, beyond vague assertions which were not supported by any evidence.
17. Mr Irvine submitted that the Council had acted unreasonably by trying to use the Tribunal as a blanket defence for refusing to disclose historical information about an equality impact assessment conducted eight years ago.
18. Mr Irvine considered the Council had not demonstrated how disclosure of the information would impact adversely on the ongoing Tribunal, or any discussions taking place outside of the Tribunal. In his view, the two matters were entirely unconnected.
19. The Commissioner has considered the nature, content and context of the withheld information and the submissions of both parties. Having done so, she is unable to accept that disclosure of the information under consideration would, or would be likely to, have the prejudicial effect which the Council has asserted.
20. Whilst the Council stated that it anticipated disclosure of the information would disrupt the context within which ongoing negotiations are taking place, it has not provided any evidence explaining why disclosure would lead to such harm.
21. Furthermore, the Commissioner has been provided with no explanation of why the disclosure of the specific withheld information would undermine the Council's negotiating position and why disclosure would lead to that outcome. The Commissioner considers the Council's submissions in this respect to be essentially hypothetical and conjectural.
22. The Council has also indicated that it believes Mr Irvine would publicise the information on his blog, but has provided no evidence to show why this would undermine its negotiating position beyond opining that this could be the case.
23. The Commissioner has concluded therefore that the exemption in section 30(c) of FOISA is not engaged in relation to the information under consideration. As such, she is not required to consider the public interest test in section 2(1)(b).
24. The Commissioner now requires the Council to disclose the email under consideration to Mr Irvine.

Decision

The Commissioner finds that North Lanarkshire Council (the Council) failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Irvine. The Commissioner finds that the Council was not entitled to withhold the information under the exemption in section 30(c) of FOISA.

The Commissioner therefore requires the Council to disclose the withheld information to Mr Irvine by **2 February 2015**.

Appeal

Should either Mr Irvine or North Lanarkshire 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 North Lanarkshire Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that North Lanarkshire Council has failed to comply. The Court has the right to inquire into the matter and may deal with North Lanarkshire Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

17 December 2014

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-

...

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

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