



Scottish Information
Commissioner
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Decision Notice 276/2024

Correspondence with a community council

Authority: Renfrewshire Council

Case Ref: 202400527

Summary

The Applicant asked the Authority for correspondence between the Authority and Lochwinnoch Community Council. The Authority withheld the information on the basis that disclosing it would prejudice an investigation that had not reached its conclusion.

The Commissioner investigated and found that the Authority was entitled to withhold the vast majority of the information, but was not entitled to withhold one document under the exemption cited.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 30(c) (Prejudice to the effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 28 January 2024, the Applicant made a request for information to the Authority. He asked for copies of all emails, or other written correspondence, between Lochwinnoch Community Council (the Community Council) and the Authority from 13 December [2023] to the date of the request. The Applicant asked that names were not redacted from the response.
2. The Authority did not respond to the request.

3. On 4 March 2024, the Applicant wrote to the Authority, requesting a review of its failure to respond to his information request.
4. The Authority notified the Applicant of the outcome of its review on 2 April 2024. The Authority informed him that the information he had asked for was exempt from disclosure under sections 30(b)(i) and (ii) of FOISA, and that the public interest lay in withholding the information.
5. On 5 April 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he had not been given an apology or explanation from the Authority regarding its failure to respond to his initial request, and that he was dissatisfied with the outcome of the Authority's review because the information he asked for had been withheld.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 2 May 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to its reasons for withholding the information.
9. During the investigation, the Authority withdrew its reliance on section 30(b) of FOISA and notified the Commissioner that it was now withholding the information under section 30(c) of FOISA. It provided arguments in support of its reliance on section 30(c).

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
11. As noted above, during the investigation the Authority withdrew its reliance on section 30(b) of FOISA, and instead argued that the information was exempt under section 30(c) of FOISA.

Withheld information

12. In this case, the Authority is withholding four documents under section 30(c) of FOISA. There are three emails (numbered 1, 2 and 3) and an attachment to the first email, which is numbered 1a.

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

13. Section 30(c) of FOISA provides that information is exempt information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective

conduct of public affairs". This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

14. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects a public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by the disclosure of the information, and how that harm would be expected to follow from disclosure.
15. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to occur, therefore the authority needs to establish a real risk of likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly foreseeable) future, not simply that the harm is a remote or hypothetical possibility.

The Authority's comments on Section 30(c)

16. The Authority explained that the request related to a dispute between the community and the Community Council on matters which were the subject of an ongoing investigation by Police Scotland and the Authority. The Authority explained that various individuals (including the Applicant) have lodged complaints against the Community Council. It stressed that this was a live matter, which had not been concluded by the Authority (at the time of the application to the Commissioner).
17. The Authority submitted that, given the role being discharged by it in relation to the Community Council and complaints received from members of the public, disclosure of the withheld information would substantially prejudice its ability to investigate these complaints and carry out its role effectively and, by extension, it would prejudice substantially the effective conduct of public affairs.
18. The Authority argued that the process of investigation relied on both the complainants and the subject of the complaints engaging with the Authority in a fair and honest manner, and that this could only be achieved if the Authority maintained the confidence of all parties involved. The Authority submitted that the parties involved in the investigation had a legitimate expectation that their communications would not be made publicly available, particularly while the process is ongoing.
19. The Authority submitted that disclosure of the information would be likely to undermine the process, as well as the confidence of individuals involved in the process, and any future investigative process that may be necessary in relation to other complaints or incidents. It argued that disclosure of information provided to it during a formal investigation would negatively impact on the discharging of its duties and would deter both complainers and subjects of complaint from engaging positively. The Authority argued that this met the threshold of substantial prejudice required.

The Applicant's comments on section 30(c)

20. The Applicant submitted that his request was based on the assumption that, after several months of investigation having been carried out by the Authority, the exchange of information and discussions between parties had concluded.
21. The Applicant also expressed his concern that the Authority, in changing its position from relying on section 30(b) to section 30(c) of FOISA, was employing deliberate delaying tactics. He argued that, if the investigation was not complete (as the Authority had stated), then application of the exemptions originally applied could not have been correct.
22. He submitted that the Authority had a duty to competently investigate allegations made to it and to report the results of those investigations to the parties involved in a timely manner, and he argued that, if the Authority did not do so, then it would not be conducting its public affairs effectively.
23. The Applicant also explained his personal interest in the Authority's investigation to the Commissioner and commented that the Authority told him he would be informed of the results. He submitted that the Authority had not told him (prior to his request) that information would be withheld.

The Commissioner's view on section 30(c)

24. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
25. The Commissioner has considered the submissions from both parties. He has also taken into account the content of the withheld information.
26. The Commissioner acknowledges the Applicant's dissatisfaction with the Authority's change of position (withdrawing its reliance on section 30(b) and instead withholding the information under section 30(c) of FOISA) and his comments that if the Authority's investigation was not complete (at the time of his request) then it had clearly applied the wrong exemptions originally, and could not have relied on section 30(b) to withhold the information.
27. The Commissioner would note that in his [briefing on section 30\(b\) of FOISA](https://www.foi.scot/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf)¹, the key factors he sets out as being relevant to the consideration of whether or not substantial inhibition would follow disclosure of the information, are the identity/status of the author and/or recipient, the circumstances in which the advice or views were given and the sensitivity of any advice or views. There is nothing within his guidance that suggests that if an investigative process is complete, the exemptions in section 30(b) cannot apply.
28. The Commissioner would also note that while authorities are required (by sections 16(4) and 21(4) of FOISA) to give requesters notice of the exemption(s) they are relying on to withhold information, they are also entitled to amend their position and withdraw or apply new exemptions once his investigation has commenced. The Commissioner does not consider this to be good practice, but it is permitted by the legislation.

¹ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf>

29. Having considered the nature and content of the withheld information, together with the Authority's submissions, the Commissioner accepts that disclosure of documents 1a, 2 and 3 would be likely to cause substantial prejudice to the effective conduct of the investigation and also to all parties involved in the investigation.
30. He is satisfied that the disclosure of the correspondence in documents 1a, 2 and 3 would dissuade those involved in the investigation process from communicating honestly and openly with the Authority, in carrying out its public duties in relation to community councils. If this occurred, it would severely limit the Authority's ability to investigate complaints made about community councils and would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
31. The Commissioner is satisfied that the Authority was entitled to apply the exemption in section 30(c) of FOISA to the information in documents 1a, 2 and 3.
32. However, the Commissioner is not satisfied that disclosure of document 1 would result in any prejudice, substantial or otherwise, to the effective conduct of public affairs. Document 1 is a covering email which is administrative in nature and does not contain any content which would engage the exemption in section 30(c) or 30(b) of FOISA.
33. As document 1 was incorrectly withheld, the Commissioner must find that the Authority failed to comply with part 1 of FOISA in responding to the Applicant's requirement for review.
34. He requires the Authority to disclose document 1 to the Applicant, with any necessary personal data redactions.

The public interest test – section 30(c)

35. Section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(c) was correctly applied to documents 1a, 2 and 3, he is now required to consider whether, in all the circumstances of the case, the public interest in disclosing this withheld information is outweighed by the public interest in maintaining the exemption.

The Authority's comments on the public interest

36. The Authority submitted that, although the Applicant has expressed the view that he should be privy to the correspondence referred to in his request, the public interest extends beyond what is simply of interest to a member of the public.
37. The Authority recognised the public interest in openness and accountability in relation to how it conducts its business. However, the Authority did not consider this outweighed the substantial prejudice to the effective conduct of public affairs which would be caused by disclosing the information in this case.

The Applicant's comments on the public interest

38. The Applicant submitted that the respective reputations of the Community Council and the Authority had been seriously damaged by these matters, and it was not in the public interest to leave this unresolved.
39. He expressed his deep concern that serious allegations against a Community Council could not be publicly reported on, and he submitted his general view that the arguments in this case were similar to those made in other decisions where the Commissioner had determined that the public interest favoured disclosure.

The Commissioner's view on the public interest

40. The Commissioner recognises that there is always a general public interest in openness and accountability, particularly relating to the statutory functions of public authorities. Openness and accountability allow effective scrutiny and reassure the public, where appropriate.
41. On the other hand, the Commissioner has already acknowledged the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the negative impact that disclosure may have on the engagement of all parties in the investigation process, and thereby on the effectiveness of those investigations.
42. The Commissioner has previously considered cases involving public bodies' complaints processes in relation to the exemption contained in section 30(c) of FOISA, including [Decision 052/2024](#)², [Decision 185/2016](#)³ and [Decision 160/2020](#)⁴. While these are undoubtedly relevant in this case, the Commissioner would also emphasise that both the exemption and any related public interest must be applied on a case-by-case basis, considering the information in question and all other relevant circumstances, and not generically to a process.
43. The Commissioner understands and accepts that the Applicant has a personal interest in the information and a need to see these matters resolved promptly. Nonetheless, he must consider the wider public interest in allowing due process to take its natural course. For this reason, the Commissioner finds the Authority's submissions persuasive.
44. In all the circumstances, the Commissioner is satisfied that the public interest in disclosure is outweighed by that in maintaining the exemption and allowing the information to be withheld under section 30(c) of FOISA. The Commissioner therefore finds that the Authority was entitled to withhold the information in documents 1a, 2 and 3 under this exemption.

Handling of the request

45. The Applicant expressed dissatisfaction that the Authority did not respond to his request for information, and that it did not offer any apology for its failure to respond.
46. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
47. The Commissioner notes the Authority's explanation in the review outcome that it had overlooked the request because it was contained within correspondence about other matters.
48. However, it is a matter of fact that the Authority did not provide a response to the Applicant's information request within 20 working days.
49. The Commissioner must therefore find that the Authority failed to comply with section 10(1) of FOISA in this case.

² <https://www.foi.scot/decision-0522024>

³ <https://www.foi.scot/decision-1852016>

⁴ <https://www.foi.scot/decision-1602020>

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority was entitled to withhold documents 1a, 2 and 3 under section 30(c) of FOISA.

He also finds that the Authority failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA by wrongly withholding document 1 under section 30(c) of FOISA.

The Commissioner finds that the Authority failed to respond to the request within the timescales laid down by section 10(1) of FOISA.

Given that the Authority did respond to the Applicant's requirement for review, the Commissioner does not require the Authority to take any action in respect of the section 10(1) failure.

However, the Commissioner requires the Authority to provide the Applicant with the information contained in document 1, subject to the redaction of any personal data, by **16 January 2025**.

Appeal

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

Euan McCulloch
Head of Enforcement

27 November 2024