

Decision Notice 043/2021

Condition survey: Comet replica

Applicant: The Applicant

Public authority: Inverclyde Council

Case Ref: 202001080



Scottish Information
Commissioner

Summary

The Council was asked for a report into the current state of the Comet paddle steamer replica in Port Glasgow. The report was withheld on the grounds that the Council considered disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.

During the investigation, the Council disclosed the report.

The Commissioner found that the Council should have disclosed the report at an earlier stage.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 30(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 27 April 2020, the Applicant made a request for information to Inverclyde Council (the Council). The information requested was the full report by a marine architect into the current state of the Comet paddle steamer replica in Port Glasgow.
2. The Council responded on 1 July 2020, withholding the information under section 30(b) and (c) of FOISA. The Council argued that disclosure would result in substantial harm as discussions were ongoing and decisions had not yet been taken.
3. On 19 August 2020, the Applicant emailed the Council requesting a review of its decision on the basis that he did not consider that the exemptions applied. He argued that time had passed since the report was commissioned and produced for the Council, and that the public interest favoured disclosure of the information.
4. The Council notified the Applicant of the outcome of its review on 14 September 2020. It modified its response, relying solely on section 30(c) of FOISA. It stated that the report contains comments and recommendations which do not necessarily reflect the final position which will be reached in determining a solution for the future of the Comet. (The arguments from the Council are set out in more detail below.)
5. On 19 September 2020, the Applicant applied for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review. He did not consider that the Council was justified in withholding report, noting that the report had been provided to the Council in November 2019.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 29 September 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant.
8. On 16 October 2020, the Council provided the Applicant with a weblink to the published report¹, which was due to be discussed by Council's Environment & Regeneration Committee on 29 October 2020.
9. Later that day, the Applicant confirmed that he still required a decision from the Commissioner as to whether the Council had been entitled to withhold the report.
10. The case was allocated to an investigating officer.
11. 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 to answer specific questions. These related to the reasons for withholding the report under section 30(c) of FOISA, and whether they applied at the date of the review response. The Council responded on 2 December 2020.
12. During the investigation, the Council was asked for further submissions on the harm in disclosure of the report at the date of review (14 September 2020) and what had changed between this date and the date the report was published on 16 October 2020. The Council responded on 12 January 2021.

Commissioner's analysis and findings

13. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Timing

14. When the Commissioner receives an application and comes to a decision as to whether the public authority complied with Part 1 of FOISA in responding to the request, he must consider the position as at the time the public authority issued its response to the request for review – see the opinion of the Lord President in *Scottish Ministers v Scottish Information Commissioner*². In this instance, the Applicant was notified of the outcome of the review on 14 September 2020, four weeks before the report was published on the Council's website on 16 October 2020. The Commissioner must therefore consider whether the exemption applied as at that date (14 September 2020), and not as at the date when the Council published the report (16 October 2020).

Section 30(c) of FOISA - Prejudice to the effective conduct of public affairs

15. 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 use of 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

¹<https://www.inverclyde.gov.uk/meetings/documents/13673/12%20Comet%20Replica%20Condition%20Survey.pdf>

² <https://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.

16. This exemption applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, 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 and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
17. It is important for public authorities to treat each request on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.

The Council's submissions

18. The Council explained that, in April 2019, £50,000 was set aside in its budget to explore and implement a strategy to try and secure the long-term future of the Comet replica. As part of this, a feasibility study was commissioned to investigate a strategy for ongoing maintenance and anticipated costs for repair options. It was recognised that much more significant expenditure would be required.
19. The Council submitted that, if the report was disclosed at the date of request or review, this would have been likely to inhibit the Council's ability to conduct its decision-making process in an effective manner. The Council considered that placing the information in the public domain at that time, without context and without allowing officers and Elected Members an opportunity to consider its implications or private space in which to discuss its contents fully and frankly, free from external interference and distraction (e.g. articles in the local press and the resultant social media/public response and enquiries together with the resources needed to manage that response and those enquiries), would have been prejudicial to the exercise of the Council's functions.
20. The Council considered that officers required time and space to consider the report's findings, assess available options and discuss these with Elected Members before proposing recommendations for the Committee to consider. The Council considered it was vital that this should be done without interference from third parties. Putting the report into public domain without context would, it argued, have resulted in articles within the local press which would have diverted resources away from dealing with both COVID and the development of a strategy for the future of the Comet replica.
21. The Council acknowledged that the report is mostly factual and, in itself, is not sensitive in nature, but needs to be considered in relation to Council's committee and decision-making process.
22. The Council confirmed that the report had been provided in November 2019, but that consideration of the report had been delayed due to the COVID pandemic.
23. The Council told the Commissioner that the following internal processes needed to take place before the report could be made public:

- discussion among relevant officers at the Directorate Management Team (DMT);
 - followed by discussion at the Corporate Management Team (CMT);
 - followed by a briefing of Elected Members;
 - before a report with recommendations was prepared for the Environment & Regeneration Committee.
24. The Council explained that the report was discussed at DMT in early March 2020. The plan was to publish in the following month or so, then COVID hit, and only emergency business took place between mid-March and September 2020.
 25. The steps set out in paragraph 23 were completed when the agenda for the meeting was made public on 16 October 2020. Therefore, at the date of review (14 September 2020), the internal processes were still ongoing and the exemption still applied.
 26. The Council considered the timing of the request was critical and that harm would have been caused if the information was released before officers were given time and space to properly consider the options available to be presented to the appropriate Committee.
 27. It is a fundamental principle of proper governance, the Council submitted, that such feasibility reports are private documents, until such time that a proper and systematic appraisal of options is completed flowing from the content of the report and the Council is then in a position to make the findings of such reports public.
 28. The Council argued that, if the report was put into the public domain “prematurely”, it would not produce or commission such reports in future. It is imperative, the Council argued, that it is able to commission such reports in future, so can properly consider its options. It must be able to follow a proper governance process.

The Commissioner’s findings

29. In reaching a finding on this matter, the Commissioner has considered the submissions put forward to him by both the Council and the Applicant.
30. The Commissioner notes that the Council was provided with the report in November 2019. He also notes and accepts that the Council has a process in which external reports are considered and discussed prior to being considered by a committee. This is not disputed.
31. The Commissioner has considered the content of the report in detail. The report is a general condition survey of the Comet, which, by its very nature, is factual, making professional observations on the current state of repair of the replica. Although recommendations are set out in this document, these do not correlate with the potential options available to the Council in relation to long term strategy for the Comet replica, but rather recommendations as to immediate safeguarding works. The option of restoration of the current boat is essentially taken off the table due to its current state of repair and, therefore, the options available for debate were limited.
32. Given the narrow array of options available to the Council as a result of this report, the Commissioner fails to see what additional context would need to be provided alongside its disclosure, or indeed the impact disclosure would have on the decision-making process at the time of the request (or review).
33. The Commissioner accepts that public authorities should be permitted a private space to discuss and consider options for a proposal in private, without the concern that such

discussions would be disclosed prior to a decision being taken. However, in this case, he is not satisfied that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs as suggested by the Council.

34. The submissions received from the Council on the application of section 30(c) are generic in nature, focussing on the protective space for decision-makers as opposed to the impact of disclosure of the information in question. The Council's submission do not explain why disclosure of this particular information would, or would be likely to, cause the substantial prejudice required for section 30(c) of FOISA to be engaged.
35. In the absence of any submissions or evidence supporting harm of the kind of harm described by the Council, the Commissioner cannot accept that disclosure of the information, at the time the Council issued its review response, would have prejudiced substantially, or have been likely to prejudice substantially, the effective conduct of public affairs. The Commissioner cannot accept, as the Council has argued, that disclosure of the report in question a matter of weeks before it was published would have caused so much harm to its procedures that it would be prevented from commissioning such reports in future. Despite concerns from the Council that dealing with media questions, etc., would have diverted resources to such an extent that its work would have been badly affected, it did not give the Commissioner any evidence of this being an issue in the weeks between the publication of the report and committee meeting.
36. In all the circumstances, therefore, the Commissioner does not accept that the Council was correct to withhold the information under the exemption in section 30(c) of FOISA.
37. Given that the Commissioner is satisfied that the section 30(c) exemption does not apply, he is not required to go on to consider the public interest. As the Council has already disclosed the report to the Applicant, he does not require the Council to take any further action in response to the finding in this decision.

Decision

Having concluded that the information is not exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA), the Commissioner finds that Inverclyde Council (the Council) failed to comply with Part 1 of FOISA (and, in particular, with section 1(1) of FOISA) in responding to the information request made by the Applicant.

Given that the Council has already disclosed a copy of the report, the Commissioner does not require the Council to take any action in response to this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the 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.

Margaret Keyse
Head of Enforcement

23 March 2021

Appendix 1: 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.

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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info