

Decision Notice



Decision 110/2012 Ms Joan Allan and South Lanarkshire Council

Financial Challenge Review

Reference No: 201200530
Decision Date: 6 July 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Ms Allan requested from South Lanarkshire Council (the Council) a copy of the full final audit report on the South Lanarkshire Council Financial Challenge Review. The Council responded by withholding the information under the exemption in section 35(1)(g) of FOISA. Following a review, Ms Allan remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that the Council failed to deal with Ms Allan's request for information in accordance with Part 1 of FOISA, by incorrectly applying the exemption in section 35(1)(g) of FOISA to the withheld information. She required the Council to disclose the information to Ms Allan.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 35(1)(g) and (2)(a), (b) and (c) (Law enforcement)

Local Government (Scotland) Act 1973 (the 1973 Act) section 95 (Financial administration)

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 14 November 2011, Ms Allan emailed the Council requesting a copy of the full final audit report on the subject of the South Lanarkshire Council Financial Challenge Review (the audit report). Ms Allan also made a further information request that is not the subject of this decision.
2. The Council responded on 13 December 2011. In its response, the Council informed Ms Allan that it considered the audit report to be exempt from disclosure in terms of section 35(1)(g) of FOISA. This exemption applies where disclosure would, or would be likely, to prejudice substantially the exercise of a public authority's functions for one or more of a series of purposes listed in section 35(2).



3. The Council advised Ms Allan that it had a statutory function to ensure proper administration of its financial affairs and explained why it considered that disclosure of the audit report would be likely to cause substantial prejudice to the exercise of that function. It commented that the content included a candid investigation into certain matters in which views were expressed in a free and frank manner. The Council maintained that its ability to conduct such investigations and reports would be likely to be prejudiced in future if the audit report was disclosed. The Council also maintained that disclosure would prejudice relationships between the management of the Council, auditors, other regulators and inspectors and elected members of the Council, and so prejudice also the ability of auditors to carry out their functions.
4. On 20 December 2011, Ms Allan emailed the Council requesting a review of its decision. In particular, Ms Allan argued that it was unclear from the Council's initial response which of the purposes listed in section 35(2) of FOISA was relevant in this case. Additionally, she considered the public interest favoured disclosure of the information.
5. The Council notified Ms Allan of the outcome of its review on 27 January 2012, upholding its previous decision. In its response, the Council stated that the relevant purpose was that within section 35(2)(c) of FOISA – to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
6. On 8 March 2012, Ms Allan wrote to the Commissioner, stating that she 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.
7. The application was validated by establishing that Ms Allan had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 28 March 2012, the Council was notified in writing that an application had been received from Ms Allan and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. The Council subsequently responded, providing its submissions on the application of the exemption in section 35(1)(g) of FOISA including its views on the public interest test.



11. The investigating officer also contacted Ms Allan during the investigation, seeking her submissions on the matters to be considered in this case
12. The relevant submissions received from both the Council and Ms Allan will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the submissions made to her by both Ms Allan and the Council and is satisfied that no matter of relevance has been overlooked.

Background

14. In February 2010, the Council set out a range of key financial assumptions for producing its financial strategy for 2011-2014. At that time, a financial gap of £80 million was identified, presented in a strategy paper and approved by the Council's Executive Committee in May 2010.
15. Subsequent figures produced by the Council's Finance Services indicated that potential savings of around £120 million could be required. However, it subsequently emerged that these figures were based on an erroneous spreadsheet entry and misunderstandings over inconsistently used terminology. The true financial gap was forecast to be £80 million.
16. As a result of these calculations and inconsistencies in terminology, the Council undertook a savings identification exercise on a far more significant scale than was required, although the error was rectified before any irreversible action had been taken.
17. The Council subsequently asked PricewaterhouseCoopers (PwC), the Council's external auditors, to carry out a review of the way in which the financial gap had been calculated and of the communication process surrounding it.
18. PwC subsequently carried out a review and submitted its report to the Council on 30 November 2010. It is this report that is the subject of Ms Allan's request.

Section 35(1)(g) – Law enforcement

19. Section 35(1)(g) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the ability of a Scottish public authority (or of a public authority which is subject to the Freedom of Information Act 2000) to carry out its functions for any of the purposes mentioned in section 35(2) of FOISA.



20. The exemptions contained within section 35 are all qualified exemptions in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. 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
21. The Commissioner must consider three fundamental points when considering whether the exemption in section 35(1)(g) applies:
- Does the Council have a function in relation to one or more of the purposes listed in section 35(2)?
 - If so, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Council's ability to carry out one or more of these functions?
 - Even if this is the case, is the public interest in maintaining the exemption outweighed by the public interest in disclosure of the information?

The Council's statutory functions

22. The Council submitted that the relevant function under consideration was its own audit function. It stated that it is required to make arrangements for the proper administration of its financial affairs in terms of section 95 of the Local Government (Scotland) Act 1973 (the 1973 Act).
23. The Council also referred to the Chartered Institute of Public Finance and Accountancy Code of Practice (the CIPFA Code of Practice). The Council noted that the CIPFA Code of Practice states in its introduction that "it applies equally to internal audit services which are provided by in-house audit teams and by external contractors who provide either partial services in support of an in-house team or the whole internal audit service". The Council stated that, in this case, PwC had been invited by the Council to provide external support to the internal audit function of the Council.
24. The Council argued that disclosure of the information would, or would be likely to, prejudice substantially the exercise of its functions for three of the purposes listed in section 35(2) of FOISA:
- a. to ascertain whether a person had failed to comply with the law (section 35(2)(a)),
 - b. to ascertain whether a person is responsible for conduct which is improper (section 35(2)(b), and
 - c. to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 35(2)(c)).



25. In relation to the purposes described in paragraphs (a) and (b) of section 35(2), the Council stated that internal audits can be carried out to ascertain whether there has been improper use of Council property, either assets or monies, and that such investigations can relate to very sensitive and serious material. It submitted that such outcomes which could arise from adverse findings can and have included disciplinary action including dismissal of employees and referrals to the police or other enforcement agencies.
26. In relation to the purpose described in section 35(2)(c), the Council argued that an adverse report from an internal or external auditor could result in the Council being reported as being in breach of section 95 of the 1973 Act. Any such breach could lead to action being taken against the Council by the Accounts Commission in terms of section 103F of the 1973 Act; potential sanctions including: censuring an officer or member of the authority, suspending a member from attending meetings, committees or sub-committees of the authority or disqualifying a member from being, or from being nominated as, a member.
27. In her submissions, Ms Allan argued that section 95 of the 1973 Act requires arrangements for the proper administration of financial affairs, but does not stipulate the requirement for an audit function. She argued that internal audit is not a statutory function and that external auditors are appointed by the Accounts Commission through Audit Scotland.
28. Ms Allan also stated that many local authorities in Scotland include audit reports in their publication schemes and disclose them on request and take audit reports to their audit committees for apt scrutiny.
29. Having considered the representations made by both Ms Allan and the Council, the Commissioner is satisfied that the Council has a function in relation to the purposes described in section 35(2)(a), (b) and (c), which arises by virtue of section 95 of the 1973 Act which (as noted above) requires local authorities to make arrangements for the proper administration of their financial affairs.
30. In the Commissioner's view, the word "arrangements" is capable of an extremely wide construction and would appear to show a legislative intention on the part of the drafter to use broad and loose language that can be contrasted with references to technical concepts such as contracts or to narrower words like "agreement".
31. Accordingly, the Commissioner accepts that the information requested by Ms Allan relates to the Council's duties under the 1973 Act to make arrangements for the proper administration of its financial affairs. The Commissioner considers that such arrangements would include the establishment and maintenance of appropriate risk management processes, control systems and accounting records. The Commissioner considers audit reports of the type under consideration in this case to fall within the scope of such arrangements, and the purposes for which they are prepared include those described in section 35(2)(a), (b) and (c) of FOISA.
32. The Commissioner is therefore satisfied that the information requested by Ms Allan concerns the exercise of a function of the Council and, as such, falls within the scope of section 35(1)(g) (as read with section 35(2)(a), (b) and (c)) of FOISA.



Substantial prejudice to this function

33. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of the Council's functions for the purposes listed at section 35(2)(a), (b) and (c) and therefore whether the information would be exempt under 35(1)(g) of FOISA.
34. The Council has submitted that it is essential that persons providing information to those carrying out audits should be able to give information in a free and frank manner without fear of public disclosure and that such individuals should feel able to give all relevant and appropriate information, including their own views, without the possibility of these being placed in the public domain.
35. Ms Allan submitted that the Council had not explained in what way the practice of auditing would be compromised. She considered it unlikely that the practices and principles of audits would be compromised in any significant way by the release of one report. Ms Allan also submitted that public attention on such reports would increase management oversight of the audit function, which could have a beneficial impact on the exercise of the audit function by increasing the status of the audit function within the authority.
36. The Commissioner considered the content and nature of the information contained within the report sought by Ms Allan. She notes that it primarily comprises factual information regarding the processes and methods employed by the Council in communicating its financial strategy, recording of discussions, preparing and presenting financial information, and its use of terminology. Additionally, the report contains the authors' conclusions and recommendations on agreed action to be undertaken by the Council. The salient points in this report have already been published by the Council on its website.
37. The Commissioner also notes that the report does not identify the views of any individual within the Council, nor does it contain criticism of any individual officer or member. Similarly, it does not apportion blame, but indicates where improvements could be made.
38. Having considered all of the above, and the information under consideration in this case, the Commissioner is unable to accept the Council's view that disclosure of the information would be likely to inhibit anyone from providing information to an auditor or from expressing an opinion to an auditor.
39. In this case, the audit process would essentially have involved individuals presenting the auditors with factual information with which to compile the report.
40. The Commissioner also notes that the audit was undertaken by the Council's external auditors following a request from the Council to undertake a specific, rather than a general review. The audit fee payable by the Council for the 2011 audit process included an allowance for specific reviews.



41. As this audit was undertaken by external auditors, the Commissioner considers it reasonable to assume that the external auditors would operate to the standards set out in Audit Scotland's Code of Audit Practice¹ (the Code). The Commissioner notes the Code states in its General Principles (at paragraph 25) that "auditors should report in public, where appropriate, without fear or favour, and enhance accountability by informing the public about the performance of public services". In her view, this sets an expectation on behalf of the auditors that their reports would normally be made public. There was no indication in this case that this report was considered by the auditors to warrant a different approach and so it is reasonable to conclude that they will not be inhibited in the way they carry out future audits should the report on this one be released.
42. The Commissioner is not persuaded that disclosure of the report would result in the effects suggested by the Council which would inhibit individuals from engaging and co-operating fully with an audit investigation of this nature. This level of prejudice is not, in the Commissioner's view, inevitable or even likely and she is unable to conclude therefore that disclosure of the information would, or would be likely to, prejudice substantially the exercise of the Council's functions in terms of section 35(1)(g) (as read with section 35(2)(a), (b) or (c)) of FOISA.
43. As the Commissioner is not satisfied that the exemption in section 35(1)(g) of FOISA applies to the information, she is not required to go on to consider the public interest test set out in section 2(1)(b) of FOISA.
44. The Commissioner now requires the Council to disclose the report to Ms Allan.

DECISION

The Commissioner finds that South Lanarkshire 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 Ms Allan. By wrongly withholding the report requested by Ms Allan under section 35(1)(g) of FOISA, the Council breached section 1(1).

The Commissioner therefore requires the Council to disclose the information withheld from Ms Allan by 21 August 2012.

¹ http://www.audit-scotland.gov.uk/docs/corp/2011/110520_codeofauditpractice.pdf



Appeal

Should either Ms Allan or South Lanarkshire 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 notice.

Rosemary Agnew
Scottish Information Commissioner
6 July 2012



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.

...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

...

- (2) The purposes are-

- (a) to ascertain whether a person has failed to comply with the law;



- (b) to ascertain whether a person is responsible for conduct which is improper;
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;

...

Local Government (Scotland) Act 1973

95 Financial administration

Without prejudice to section 69 of this Act, every local authority shall make arrangements for the proper administration of their financial affairs and shall secure that the proper officer of the authority has responsibility for the administration of those affairs.