

Decision Notice



Decision 013/2009 Prestoungrange Arts Festival (2006) and Historic Scotland

Advice to a Minister concerning a listing application for a building

Reference No: 200801407

Decision Date: 13 February 2009

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Prestoungrange Arts Festival (2006) (PAF) wrote to Historic Scotland to request information relating to a listing application for the Coeval Building in Prestonpans. Historic Scotland responded by releasing some information, but it withheld three documents on the basis that they were exempt from disclosure under section 30(b)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review of this decision, Historic Scotland released the three documents but still withheld certain passages in one of these. PAF remained dissatisfied and applied to the Commissioner for a decision. During the investigation, Historic Scotland released all of the withheld information to PAF.

Following the investigation, the Commissioner found that Historic Scotland had failed to deal with PAF's request for information in accordance with Part 1 of FOISA by wrongly withholding some of the requested information. Since this information had subsequently been disclosed, he did not require Historic Scotland to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 30(b)(i) (Prejudice to effective conduct of public affairs)

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. PAF wrote to Historic Scotland on 20 June 2008 requesting the following information: (1) information concerning the powers delegated to Historic Scotland and (2) details of the advice given by Historic Scotland to the (then) Minister for Culture, Linda Fabiani MSP (the Minister), in relation to the listing application for the Coeval Building in Prestonpans.
2. Historic Scotland responded on 17 July 2008, providing links to a range of publicly accessible information concerning its delegated powers. It was noted that this information was otherwise accessible to PAF (and so exempt) in terms of section 25 of FOISA. Historic Scotland provided a copy of one briefing to the Minister, but it withheld three further briefing documents under section 30(b)(i) of FOISA. This exemption applies where disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice.



3. On 28 July 2008, PAF wrote to Historic Scotland requesting a review of its decision. PAF queried the application of the exemption in section 30(b)(i) and reiterated the request for all relevant documentation to be released. PAF expressed no dissatisfaction with the response to the first part of its request (concerning Historic Scotland's delegated powers) and so this part of the request is not considered in this decision.
4. On 26 September 2008, Historic Scotland notified PAF of the outcome of its review. It released the three documents that had been withheld, but several passages within one of these documents were redacted on the basis that they were exempt under section 30(b)(i) of FOISA.
5. On 29 September 2008, PAF wrote to the Commissioner, stating that it was dissatisfied with the outcome of Historic Scotland'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 PAF 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

7. Historic Scotland is an Executive Agency of the Scottish Ministers and a letter was sent to the Scottish Ministers (the Ministers) on 7 October 2008 in line with agreed procedures, giving notice that an application had been received from PAF and that an investigation into the matter had commenced. The Ministers were asked to provide the Commissioner with the information withheld from the applicant. The Ministers sent a copy of the information that had been withheld, and the case was then allocated to an investigating officer.
8. On 19 November 2008, the investigating officer contacted the Ministers, giving them an opportunity to provide comments on the application on behalf of Historic Scotland (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. On 11 December 2008, the Ministers wrote to the Commissioner attaching a copy of a letter sent to PAF on 10 December 2008 which disclosed a complete copy of the document within which passages had previously been withheld.
10. The investigating officer subsequently contacted PAF to enquire as to whether it wished to continue with its application to the Commissioner. PAF's response confirmed that it wished to proceed to a formal decision on the grounds that it was in the public interest for the Commissioner to determine the validity or otherwise of Historic Scotland's decision to withhold the information until that point



11. Following this, the investigation officer wrote again to the Ministers reiterating the invitation to submit comments on the case and inviting them to explain their reasoning for disclosing the withheld information. On 5 February 2009, the Ministers responded with their comments which will be discussed below in the Commissioner's analysis and findings.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both PAF and Historic Scotland and is satisfied that no matter of relevance has been overlooked.
13. This decision is unusual, in that the information under consideration in what follows had been disclosed to PAF by the time of its writing. Before continuing, the Commissioner would note that he has considered (as he is required to do in any decision) the application of exemptions to the information under consideration and (where this test is relevant) the balance of public interest in the circumstances that existed at the time when the Historic Scotland notified PAF of the outcome of its review, and disregarding any developments since that time (including the disclosure of the remaining withheld information to PAF).
14. The information under consideration is a number of passages that were withheld within advice given to the Minister by Historic Scotland in relation to the listing application for the Coeval Building in Prestonpans. As noted above, this information was withheld by Historic Scotland under section 30(b)(i) of FOISA, but was disclosed during the Commissioner's investigation.
15. When invited to comment during the investigation, the Ministers stated that they had taken the opportunity to assess the information again and that, while they considered that an argument could be made in terms of applying section 30(b)(i) of FOISA, they concluded it unlikely that any inhibition would be substantial. They stated that while they saw little public interest in release, in the interests of openness and transparency - and with a presumption in favour of release - they had released the information.
16. The Ministers made no further comments in support of the earlier responses which had maintained that this information was exempt.

Application of section 30(b)(i) of FOISA

17. In order for the Ministers to be able to rely on the exemption laid down in section 30(b)(i) of FOISA, they would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice.



18. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the test contained in sections 30(b)(i) is high. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice. The Ministers' own guidance to their staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.
19. In their notice specifying the outcome of its review, Historic Scotland stated that the information withheld constituted free and frank advice and that Ministers and officials need to take decisions on the best possible advice and need to be confident that advice is given without reserve or inhibition.

Conclusions on section 30(b)(i)

20. Having considered the withheld information and the Ministers' submissions, the Commissioner has concluded that the exemption in section 30(b)(i) was applied wrongly in this case.
21. The information under consideration does include advice to a Minister, which is expressed in frank (but measured) terms. However, the primary consideration is not whether information contains advice, but whether its disclosure would have, or would be likely to have, the substantially inhibiting effect specified in section 30(b)(i) of FOISA.
22. The issue is whether the effect would be adverse by way of causing, or likely to cause, officials to be substantially inhibited in the provision of advice or the exchange of views. If, on the other hand, the effect of disclosure was to increase the care given when offering advice and views to ensure they are justifiable and measured, and provide an accurate representation of the issues being addressed, then this is unlikely to be adverse and would not represent substantial inhibition.
23. It should be clear from previous decisions that the Commissioner does not, as a rule, accept the application of the exemptions in section 30(b) to the information in an entire class of documents (for example, advice to Ministers) simply because they belong to that particular class. A full assessment of the nature and content of the information will be necessary to determine whether an exemption applies, along with due consideration of all other relevant circumstances, and it cannot necessarily follow from the Commissioner's requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in future.
24. In the absence of submissions regarding the effect of disclosure of this particular information, the Commissioner has seen no evidence to suggest that the specific officials concerned, or officials generally would, or would be likely to, be inhibited substantially in giving future advice, as a result of disclosure.
25. The Commissioner therefore finds that the exemption in section 30(b)(i) of FOISA was wrongly applied in this case. Consequently, there is no need for him to consider the public interest test contained in section 2(1)(b) of FOISA in relation to the information under consideration.

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DECISION

The Commissioner finds that Historic Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Prestoungrange Arts Festival (2006). By withholding the information under consideration on the grounds that it was exempt in terms of sections 30(b)(i) of FOISA, the Commissioner finds that Historic Scotland did not comply with section 1(1) of FOISA.

Given that Historic Scotland disclosed the information under consideration during the investigation, the Commissioner does not require Historic Scotland to take any action in response to these failures.

Appeal

Should either PAF or Historic Scotland 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.

Margaret Keyse
Head of Enforcement
13 February 2009



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 –

(a) the provision does not confer absolute exemption; and

(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-

...

(b) would, or would be likely to, inhibit substantially-

(i) the free and frank provision of advice