

Decision Notice



Decision 202/2010 Councillor David Alexander and Falkirk Council

Park Gallery, Falkirk

Reference No: 200901671

Decision Date: 3 December 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle

Doubledykes Road

St Andrews KY16 9DS

Tel: 01334 464610



Summary

Councillor Alexander requested from Falkirk Council (the Council) information pertaining to the Park Gallery in Callendar Park, Falkirk. The Council responded by providing certain information but withholding the remainder under a number of exemptions in FOISA. Following a review, Councillor Alexander remained dissatisfied and, while accepting the withholding of certain personal data, applied to the Commissioner for a decision.

Following an investigation, in course of which further information was disclosed to Councillor Alexander, the Commissioner found that the Council had partially failed to deal with his request for information in accordance with Part 1 of FOISA, by withholding information under section 30(b) and 30(c). He did not accept that disclosure of the majority of the remaining withheld information would, or would be likely to, substantially prejudice the effective conduct of public affairs in the ways the Council had argued. However, he accepted that the Council was correct to withhold certain emails under section 30(b)(ii) of FOISA. He therefore required the Council to provide Councillor Alexander with the remainder of the withheld information which fell within the scope of his request, subject to the withholding of certain personal data and the information accepted by the Commissioner as exempt in terms of section 30(b)(ii) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) and (c) (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. On 29 June 2009, Councillor Alexander wrote to the Council requesting “all reports, correspondence including emails, letters and internal memos pertaining to the Park Gallery in Callendar Park”. Councillor Alexander asked that this cover any information from 1 April 2008 onwards, and that it should include any correspondence with the Convener or Depute Convener and other senior members of the Administration, as well as any correspondence to staff.



2. The Council responded on 28 July 2009 and provided certain information. It withheld the remainder of the information it considered to fall within the scope of Councillor Alexander's request, primarily under section 30 of FOISA. In relation to correspondence between councillors and officers, it referred to the confidentiality requirement of the Standards Commission's *Protocol for Relations between Councillors and Employees in Scottish Councils*¹ (the *Protocol*). The Council also withheld a draft committee report in terms of section 27 of FOISA, on the grounds that it intended to publish the report within 12 weeks. Personal data was also redacted from correspondence, in terms of section 38 of FOISA.
3. On 3 August 2009, Councillor Alexander wrote to the Council requesting a review of its decision to withhold information. He noted that the information he sought related to the development of policy on a public asset rather than being individual correspondence from a single councillor.
4. The Council notified Councillor Alexander of the outcome of its review, which upheld its original decision in full, on 11 September 2009.
5. On 21 September 2009 Councillor Alexander wrote to the Commissioner's Office, stating that he 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.
6. The application was validated by establishing that Councillor Alexander 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. On 25 September 2009, the Council was notified in writing that an application had been received from Councillor Alexander and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. Having considered the implications of the Commissioner's *Decision 102/2009 Councillor David Alexander and Falkirk Council*², which had been issued by the Commissioner on 27 August 2009, the Council disclosed further information to Councillor Alexander.
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 provide detailed arguments in support of its reliance on the exemptions stated in the schedule of documents it had supplied with the withheld information.

¹ <http://www.scotland.gov.uk/Publications/2002/04/14492/2559>

² <http://www.itspublicknowledge.info/UploadedFiles/Decision102-2009.pdf>



10. The Council continued to withhold information under section 30(b) and (c) of FOISA. It also withheld personal data from certain documents under section 38(1)(b) of FOISA. Councillor Alexander confirmed that he was not interested in the personal data of members of the public, and accordingly the decision will not consider this information further.
11. Although matters relating to the Park Gallery may have moved on since the Council dealt with Councillor Alexander's request, the Commissioner must still consider whether, as at the date of carrying out its review, i.e. 11 September 2009, the Council was entitled to withhold the information in terms of FOISA. The Council's submissions on this, insofar as relevant, will be considered in the Commissioner's analysis and findings below.

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 Councillor Alexander and the Council and is satisfied that no matter of relevance has been overlooked.

Scope of request

13. The Council submitted that the information in items 3, 5 and 9 did not fall within the scope of Councillor Alexander's request, as they did not pertain to the development of policy. The Council considered Councillor Alexander's statement in his request for review that he was seeking information regarding "the development of policy on a public asset rather than individual correspondence from a single Elected Member" to have the effect of narrowing the scope of his request for information.
14. Item 3 was disclosed with only the redaction of personal data of members of the public, which Councillor Alexander has accepted. It is therefore not necessary for the Commissioner to decide whether item 3 falls within the scope of Councillor Alexander's request.
15. Councillor Alexander's request was for "all reports, correspondence including e-mails, letters and internal memos pertaining to the Park Gallery in Callendar Park". He specified a timeframe for the request, commencing on 1 April 2008. In the Commissioner's view, his request for review questions the Council's reasoning for withholding the information, rather than rephrasing or narrowing the original request.
16. Item 5 is email correspondence which falls within the timeframe specified in the request. Having read item 5, the Commissioner is satisfied that all of the information in it relates to the Park Gallery. Consequently, he is satisfied that this information falls within the scope of Councillor Alexander's request. As the Council did not apply any exemption to item 5, the Commissioner requires the information in it to be disclosed to Councillor Alexander.



17. Turning to the majority of the information in item 9, this clearly relates to an event at the Park Gallery and, on any reasonable interpretation, falls within the scope of the request. However, the Commissioner also notes Councillor Alexander's confirmation that he was not interested in the personal data of members of the public: consequently, he takes the view that the email address in the email of 12 May 2009 [13:36] can be considered to fall outwith the scope of the request and further references to item 9 should be read accordingly.

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

18. Information is exempt under section 30(b) of FOISA if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)) respectively.
19. As the Commissioner has noted in previous decisions, the standard to be met in applying these tests is high. The chief consideration is not whether the information constitutes advice or opinion, but whether release of the information would, or would be likely to, have the effect of inhibiting substantially the free and frank provision of advice or exchange of views. The word "substantial" is important here: the degree to which a person is likely to be inhibited in expressing themselves must be of some real and demonstrable significance. The authority should also be able to demonstrate that substantial inhibition would, or would be likely to, occur: it must be at least probable, therefore, not simply a remote possibility.
20. When considering the application of these exemptions, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. It should not be presumed that substantial inhibition will follow from the release of information simply because it falls within a particular category. Relevant considerations will include:
- a. the nature of the information
 - b. the subject matter of the advice or exchange of views
 - c. the manner in which the advice or exchange of views are expressed, and
 - d. whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision was being considered, and for which further views were still being sought, is likely to be more substantially inhibiting than once advice has been taken.
21. According to its schedule of documents, the Council withheld the information in items 4, 7, 8, 9, 11 and 13 under section 30(b)(i) and (ii), although in its submissions to the Commissioner it referred specifically to items 7, 8 and 11 only in relation to these exemptions. As indicated above, the Commissioner considers the information in item 9 to fall within the scope of the request and he will consider the Council's arguments on section 30(b) in relation to all of items 4, 7, 8, 9, 11 and 13.



22. The Council submitted that councillors had the reasonable belief, in reliance on the *Protocol*, that they could take advice from officers on a confidential basis. The Council stated that this provision was in the *Protocol* for good reason: for local democracy to work efficiently and well, this level of confidentiality was required. The process of taking advice confidentially, the Council argued, allowed policies and strategies to be developed: releasing this type of information would seriously inhibit the exchange of information and the taking of advice, making it more difficult to develop policy and strategy.
23. The Council referred in particular to items 7 and 8 as containing information pertaining to the Administration's discussions and debate, and also to item 11 containing exchanges of views and advice on the committee process and the content of committee reports.
24. The *Protocol* forms Annex C to the *Code of Conduct for Councillors*. In *Decision 102/2009*, referred to in paragraph 8 above, the Commissioner considered similar arguments to the effect that requirements of confidentiality emanated from the *Protocol* (see in particular paragraphs 40-44). Briefly, he found that while the *Protocol* (and in particular paragraph 14) might be relevant in determining whether an obligation of confidentiality existed in certain circumstances, it did not create an independent statutory right to confidentiality, applicable to every communication between an officer and a councillor: if information was to be confidential in any given case, that would be under the common law of confidence. In this case, the Commissioner has received no arguments to support a contention that the particular information under consideration here should be considered the subject of a common law obligation of confidentiality.
25. Considering the requirements of the section 30(b) exemptions as discussed in paragraphs 19 and 20 above, the Commissioner has taken account of the subject matter and nature of the withheld information. With the exception of that in item 9 (and some of that in item 8), which relates to particular exhibitions, the information relates to the decision-making process in respect of the future of the Park Gallery. Advice on options is sought from, and provided to, members of the Administration. The outcomes of meetings of the Administration are summarised in the context of these requests for advice, although the content of discussion at these meetings is not conveyed in any detail. The advice provided is largely factual in its content: opinion, insofar as present, appears to reflect the professional expertise of those providing it.
26. Another relevant consideration, as stated in paragraph 20 above, is the manner in which the advice or exchange of views is expressed. The Commissioner has considered the level of candour contained within the information and, to the extent that options are discussed, the advice and views as recorded generally appear to be expressed in a measured and considered manner. Given the nature of the views and advice in the majority of the information withheld, it is difficult in the circumstances to imagine persons in the position of the authors refraining from providing full and adequate advice or views on similar questions in future, or that such advice or view would cease to be recorded adequately.



27. Finally, the Commissioner has also considered the timing of the request. From at least 11 February 2009, when the Council considered its budget for the financial year 2009/10, it was clear that the future of the Park Gallery was under review. A report to the Council's Leisure, Tourism & Community Committee held on 15 September 2009 presented options for the future of the Gallery, with advice on the implications of each of these. The report is dated 25 August 2009 and formed part of an agenda dated 11 September 2009, the date on which the Council issued its response to Councillor Alexander's request for review. While the report was withheld from Councillor Alexander under section 27(1) of FOISA (on the basis that it was intended for future publication), the Council does not appear to have considered its contents exempt for any other reason and there would appear to have been no reason for considering them to be other than public at the time the review was concluded.
28. However, there are certain emails within items 7 and 8 for which the Commissioner accepts from their content that the authors would have had no reasonable expectation that their views would be disclosed at the time the Council dealt with Councillor Alexander's request. These are the emails of 4 February 2009 [11:50] and [13:33] in item 7, and the emails of 3 March 2009 [08:58], 4 March 2009 [21:14], 24 March 2009 [09:27], [10:46] and [11:33] in item 8. For the information in these emails, the Commissioner accepts the Council's submission that disclosure would seriously inhibit the exchange of information, and therefore that the exemption in section 30(b)(ii) of FOISA was correctly applied in respect of this information.
29. Having read the withheld information and considered the submissions presented by the Council on the application of the exemptions in section 30(b), therefore, the Commissioner is not persuaded in all the circumstances that disclosure of the information in items 4, 7 (part), 8 (part), 9, 11 and 13 would have inhibited substantially, or would have been likely to inhibit substantially, either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Some of the information may have possessed a degree of sensitivity at the time it was expressed and recorded, but the Commissioner cannot accept that it follows that the requirements of either exemption were met in the context of Councillor Alexander's request for information or his subsequent request for review.
30. As the Commissioner does not accept that the information in items 4, 7 (part), 8 (part), 9, 11 and 13 is exempt under section 30(b)(i) or (ii), he is not required to go on to consider the public interest test under section 2(1)(b) in respect of that information.
31. However having accepted that certain emails in items 7 and 8 do fall within the terms of section 30(b)(ii), as detailed in paragraph 28 above, the Commissioner is required to go on to consider the public interest test under section 2(1)(b) in respect of that information.

Public interest test

32. As the Commissioner is satisfied that the exemption in section 30(b)(ii) has been correctly applied to certain information within items 7 and 8 (as specified in paragraph 28 above), he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to that information. He must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



33. Councillor Alexander submitted that information about a decision to close facilities partly paid for through public subscription and public funds, such as the Park Gallery, should be available to the public. This would allow scrutiny of the decision, and the evidence involved in the decision, and the decision-making process. In contrast, the Council argued that disclosure would seriously inhibit the exchange of information, making it more difficult to develop policy and strategy.
34. The Commissioner has considered all of the comments made by both Councillor Alexander and the Council and has balanced the public interest arguments made by both parties. While (in general terms) he acknowledges the strength of the public interest arguments in favour of disclosure, he also acknowledges that there is a strong public interest in the maintenance of effective working relationships between councillors and senior officials. He considers that disclosure of the information in question would be to the detriment of such relationships.
35. Having looked at the information disclosed by the Council, the Commissioner notes that there is information in the public domain which does permit scrutiny of the decision-making process in respect of the Park Gallery. Having considered the information he has found to be exempt under section 30(b)(ii), he does not believe it to add significantly to the understanding of that process.
36. On balance, therefore, the Commissioner has concluded that the public interest in favour of disclosing the information found to be exempt in terms of section 30(b)(ii) of FOISA is outweighed by the public interest in maintaining this exemption. The Commissioner has therefore decided that the Council was justified in withholding certain information from items 7 and 8 (as described in paragraph 28 above) under section 30(b)(ii).

Section 30(c) - otherwise prejudicial to the proper conduct of public affairs

37. The Council also withheld the information in items 4, 7, 8, 9, 11 and 13 under section 30(c) of FOISA. In its submissions to the Commissioner the Council specifically mentioned items 4 and 11 in this context, although its schedule of documents referred to all of these items as being withheld under this exemption. As with the exemptions in section 30(b), however (see paragraph 21 above), the Commissioner will consider the information in all of these items in relation to section 30(c), except the information in items 7 and 8 which he has accepted was correctly withheld in terms of section 30(b)(ii).
38. 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 sections 30(a) and (b) of FOISA.



39. Section 30(c) is a broad exemption and 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 (as indicated above in the context of substantial inhibition) 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: as also indicate above in the context of substantial inhibition, it should therefore be at least probable, not simply a remote possibility.
40. The Council stated that the matter of the Park Gallery remained in transition, that the process continued and that the issue remained unsettling for the staff involved. Releasing information into the public domain concerning management of the process and potential options would, the Council claimed, tend to disrupt the process and worry and unsettle staff unnecessarily.
41. While the Commissioner acknowledges that concerns of the kind set out in the previous paragraph may, in certain circumstances, be relevant to determining whether disclosure of certain information would (or would be likely to) prejudice substantially the effective conduct of public affairs, in this particular case he is not satisfied that the Council has explained in sufficient detail why section 30(c) of FOISA should apply, or provided evidence to justify this assertion. In particular, it has not provided any detail of how release of the information under consideration here would, or would be likely to, either disrupt the process in relation to the Gallery or unsettle staff unnecessarily. Given the nature of the information and the timing of the request, as discussed above, he would not regard that harm as self-evident.
42. After examining the information withheld under section 30(c), therefore, the Commissioner is not persuaded that its disclosure, in response to Councillor Alexander's information request or his request for review, would have caused (or would have been likely to cause) substantial prejudice to the effective conduct of public affairs. He therefore does not accept the application of the exemption in section 30(c) of FOISA in relation to that information.
43. Because he is not satisfied that the Council was justified in applying the exemption in section 30(c) to the information withheld under that exemption, the Commissioner is not required to go on to consider the public interest test under section 2(1)(b) of FOISA.

Summary of decision

44. The Commissioner has accepted that the Council was entitled to withhold in terms of section 30(b)(ii) of FOISA the information contained in the following emails: in item 7, those of 4 February 2009 [11:50] and [13:33], and in item 8, those of 3 March 2009 [08:58], 4 March 2009 [21:14], 24 March 2009 [09:27], [10:46] and [11:33].
45. Having decided that the Council was not entitled to withhold the remaining information in items 4, 7, 8, 9 (subject to the redaction of the email address from the email of 12 May 2009 [13:36] – see paragraph 17 above), 11 and 13 under sections 30(b)(i), 30(b)(ii) or 30(c) of FOISA, the Commissioner requires the Council to disclose this information to Councillor Alexander.



46. The Commissioner also requires the Council to disclose the item which he has found to fall within the scope of Councillor Alexander's request, but to which the Council did not apply any exemption – that is item 5 (see paragraph 16 above).

DECISION

The Commissioner finds that Falkirk Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Councillor Alexander. By incorrectly applying the exemptions in section 30(b)(i) and (ii), and section 30(c), to the majority of the information remaining withheld from Councillor Alexander, the Council failed to comply with Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner also finds, however, that the Council complied with Part 1 of FOISA by correctly applying the exemption in section 30(b)(ii) of FOISA to certain of the information withheld from Councillor Alexander.

The Commissioner therefore requires the Council to disclose the information described in paragraphs 45 and 46 above, by 19 January 2011.

Appeal

Should either Councillor Alexander or Falkirk 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.

Kevin Dunion
Scottish Information Commissioner
3 December 2010



Appendix

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-

...

- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.