

Decision Notice



Decision 217/2013 Howling Events and VisitScotland

Scoping survey report

Reference No: 201301121
Decision Date: 3 October 2013

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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Summary

On 4 March 2013, Howling Events asked VisitScotland for a copy of a report featuring information about Howling Events. VisitScotland responded that the recommendations from the report were due to be published and therefore were exempt from disclosure.

Following an investigation, the Commissioner found that VisitScotland had been wrong to withhold the information on the basis that elements were due to be published. She accepted that certain information could be withheld, given the prejudice disclosure would be likely to cause to the effective conduct of public affairs, but also found that VisitScotland failed to respond to Howling Events' request within the required timescale. Given that the remaining information had been disclosed to Howling Events during the investigation, she did not require VisitScotland to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1)(a) (Time for compliance); 27(1) (Information intended for future publication); 30(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 4 March 2013, Howling Events wrote to VisitScotland requesting a copy of a particular report featuring information about Howling Events and their activities. This was reiterated in an email of 8 March 2013.
2. On 11 March 2013, VisitScotland acknowledged the request as having been received on 8 March 2013 and confirmed that a response would be issued by 5 April 2013. By return, Howling Events provided further details of the report, to aid its identification.
3. VisitScotland responded on 5 April 2013. It stated that the recommendations from the report were due to be published in May 2013. In view of this, VisitScotland withheld the information, citing section 17 of FOISA.



4. On 11 April 2013, Howling Events wrote to VisitScotland, stating that they were dissatisfied with the decision to withhold the information and asking for a review.
5. VisitScotland notified Howling Events of the outcome of its review on 2 May 2013. It upheld its original decision to withhold the information as information intended for future publication, this time citing the exemption in section 27(1) of FOISA.
6. On 9 May 2013, Howling Events wrote to the Commissioner, stating that they were dissatisfied with the outcome of VisitScotland'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 Howling Events made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request requests. The case was then allocated to an investigating officer.

Investigation

8. On 1 July 2103, the investigating officer notified VisitScotland in writing that an application had been received from Howling Events, 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, VisitScotland was asked to justify its reliance on section 27(1) of FOISA.
9. VisitScotland confirmed that it had reviewed its earlier application of section 27(1) of FOISA, which it was no longer seeking to apply to the information in the report. It provided Howling Events with a copy of the report, with information redacted under a number of other exemptions in FOISA.
10. Following further communication with the investigating officer, VisitScotland provided Howling Events with a further copy of the requested report with a reduced number of redactions, in terms of section 30(c) of FOISA only.
11. Howling Events acknowledged receipt of the redacted information and provided submissions to the effect that all of the information should be disclosed.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the remaining withheld information and the relevant submissions, or parts of submissions, made to her by both Howling Events and VistScotland. She is satisfied that no matter of relevance has been overlooked.



Section 27(1) – Information intended for future publication

13. Section 27(1) of FOISA provides that information is exempt from disclosure where the following tests are met:
 - a. the information is held with a view to its being published, by a Scottish public authority or any other person, at a date not later than twelve weeks after that on which the request for the information is made;
 - b. when the request is made, the information is already being held with that view; and
 - c. it is reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.
14. Section 27(1) recognises that, where it is intended to make information available, public authorities should, within reason, have space to be able to determine their own publication timetables and deal with the necessary preparation, administration and context of publication. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
15. Under this exemption, information intended for publication within twelve weeks is exempt from disclosure where it is “reasonable in all the circumstances” to withhold the information until the planned publication date. The authority should be able to demonstrate that a publication timetable has already been decided and that it is not simply delaying the release of information for twelve weeks.
16. In order for section 27(1) to be upheld, the Commissioner must consider whether all of the tests required by this exemption can be met in the circumstances of a particular case.
17. The first requirement of section 27(1) is that the information in question must be held “with a view to its being published” within twelve weeks. In this case, VisitScotland informed the Commissioner that, at the time of the request, it intended to publish an executive summary of the report only. It had not appreciated that section 27(1) only applied when all of the information withheld was intended for future publication.
18. Given that VisitScotland has acknowledged that it did not intend to publish all of the information it withheld, the Commissioner finds that the exemption in section 27(1) of FOISA was wrongly applied to the information.
19. The Commissioner will now consider whether VisitScotland was entitled to rely upon section 30(c) of FOISA to withhold the information redacted from that version of the report provided to Howling Events.



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

20. 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 expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
21. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood that actual substantial prejudice will occur at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
22. VisitScotland provided submissions which explained the nature and context of the withheld information, and why it believed disclosure would be likely to prejudice the effective conduct of public affairs substantially. Given that these submissions focused on the actual content of the withheld information, the Commissioner cannot describe them in detail in this decision.
23. It is, however, evident to the Commissioner (having considered the nature and content of the withheld information, together with VisitScotland's submissions) why disclosure of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs, and specifically to the effective discharge of VisitScotland's core functions (particularly in its relationships with stakeholders). She must bear in mind that disclosure would be to the world at large and not simply to Howling Events. Consequently, she is satisfied in the circumstances that VisitScotland was correct to withhold the information under the exemption in section 30(c) of FOISA.
24. As noted above, however, this exemption is subject to the public interest test in section 2(1)(b) of FOISA. Consequently, unless the Commissioner is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order the information to be disclosed.

Public Interest test

25. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.



26. When applying the public interest test, VisitScotland acknowledged that transparency and openness favoured disclosure of the information. However, it did not believe there to be anything of serious public concern or benefit in the remaining withheld information, noting that in any event the report was now historical and had been overtaken by subsequent developments.
27. VisitScotland referred again to the substantial prejudice it had identified as a likely consequence of disclosure, stating that it did not consider this outcome to be in the public interest.
28. On balance, VisitScotland concluded that disclosure of the redacted information would not serve the interests of the public.
29. Howling Events made a number of submissions speculating on what each of the redactions might refer to and why they considered it to be in the public interest to disclose the information. They noted that the report had been paid for from public funds and identified what they considered to be strong economic arguments for disclosure. They also referred to the accountability of Ministers, Local Councillors, Charitable Trustees and the Office of the Scottish Charity Regulator.
30. The Commissioner recognises that there is a general public interest in improving transparency and accountability in Scottish public authorities. However, in relation to this particular information, while acknowledging Howling Events' particular interest in the matter, the Commissioner accepts VisitScotland's submission that disclosure would serve no public interest of any substance.
31. On the other hand, the Commissioner does accept that there is a strong public interest in maintaining the section 30(c) exemption in this case, with a view to maintaining the effectiveness of VisitScotland's interaction with its stakeholders. In the circumstances, she considers there would require to be a compelling public interest in disclosure to outweigh that in maintaining the exemption. She has been unable to identify such a public interest.
32. In all the circumstances, therefore, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. She therefore finds that VisitScotland was entitled to withhold the redacted information under section 30(c) of FOISA.

Technical issue

33. In their application to the Commissioner, Howling Events stated that they were dissatisfied that VisitScotland did not respond to the request for information within the time required by FOISA.
34. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information. This is subject to certain qualifications which are not relevant in this case.



35. VisitScotland apologised for the failure to respond within the time allowed. It explained that Howling Events' request for information was not treated as such initially, leading to a delay in it being dealt with. The Commissioner notes VisitScotland's comments on this matter, but must find that it failed to respond to Howling Events' request within the 20 working days allowed by section 10(1) of FOISA.

DECISION

The Commissioner finds that VisitScotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Howling Events, by incorrectly withholding the information in terms of section 27(1) of FOISA (a breach of section 1(1)) and by failing to respond to Howling Events' request for information within the timescale laid down by section 10(1) of FOISA.

The Commissioner also finds that VisitScotland was entitled to withhold certain information from Howling Events under section 30(c) of FOISA. Given that this was the only information remaining withheld at the close of the investigation, the Commissioner does not require VisitScotland to take any action in this case.

Appeal

Should either Howling Events or VisitScotland 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
3 October 2013



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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) ... the receipt by the authority of the request; or

...



27 Information intended for future publication

(1) Information is exempt information if-

(a) it is held with a view to its being published by-

(i) a Scottish public authority; or

(ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

(b) when that request is made the information is already being held with that view; and

(c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...

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.