

Decision Notice

Decision 169/2016: Councillor Peter Johnston and West Lothian Council

Revenue budget information

Reference No: 201501571
Decision Date: 28 July 2016



Scottish Information
Commissioner

Summary

On 25 February 2015, Councillor Peter Johnston asked West Lothian Council (the Council) how it intended to achieve revenue savings outlined in its Revenue Budget Plan.

The Council disclosed some information. Following a review, in which the Council withheld some information on the grounds that disclosure would prejudice the effective conduct of public affairs, Councillor Johnston remained dissatisfied and applied to the Commissioner for a decision. During the Commissioner's investigation the Council found it held further information.

The Commissioner found that the Council had been entitled to withhold some of the information, but that the remainder should be disclosed.

The Commissioner also found that the Council had failed to respond to Councillor Johnston's review request within the 20 working day time limit set by FOISA and that it had failed to timeously locate all of the information falling within the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 30(b) (Prejudice to 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 25 February 2015, Councillor Johnston asked the Council for information in response to questions he had about how the Council intended to achieve the revenue savings outlined in its Revenue Budget Plan agreed at a Council meeting on 29 January 2015. These included questions about posts which could be lost, the transfer of council services and consultation with staff and Trades Union.
2. The Council responded on 15 April 2015. The Council gave a detailed response to the questions, but Councillor Johnston was concerned that the information provided had not fully answered them. Later that same day (15 April), he wrote to the Council requesting a review of its response.
3. The Council notified Councillor Johnston of the outcome of its review on 20 August 2015. It withheld some information, citing the exemptions in section 30(b) of FOISA.
4. On 25 August 2015, Councillor Johnston wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Councillor Johnston stated he was dissatisfied with the outcome of the Council's review because he disagreed with the application of the exemptions applied. He was also unhappy with the time taken to respond to his review request.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Councillor Johnston made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision.
6. On 28 October 2015, the Council was notified in writing that Councillor Johnston had made a valid application. The Council was asked to send the Commissioner the information withheld from Councillor Johnson. The Council provided the information and the case was allocated to an investigating officer.
7. 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 including justifying its reliance on the exemptions at section 30(b) of FOISA, and explaining the searches it carried out to identify the relevant information.
8. The Council provided its submissions and Councillor Johnston was also asked for, and provided, his comments.
9. During the course of the investigation the Council was asked to carry out further searches as a result of which it located further information falling within the scope of the request.

Commissioner's analysis and findings

10. 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 her by both Councillor Johnston and the Council. She is satisfied that no matter of relevance has been overlooked.

Information held by the Council

11. Councillor Johnston was concerned that the Council's response had not fully answered his questions. While the Commissioner understands that it was answers Councillor Johnston was seeking, she has no remit to consider or take a view on the adequacy of the content of the Council's response. The Commissioner is limited to considering and deciding whether the Council had, on balance, identified what relevant information it held covered by those questions, and whether it had complied with FOISA in how it responded to Councillor Johnston.
12. The Council noted that Councillor Johnston had asked for information relating to proposals for the Council's revenue budget agreed at a meeting on 29 January 2015. Following this meeting, officers worked up detailed proposals at "Pre-Meeting for Administration Briefing" meetings. When considering Councillor Johnston's request, the Council reviewed minutes of these meetings and reports to these meetings as it was aware that this was where these proposals had been discussed.
13. In addition to reviewing these minutes and reports, the Council stated that each Head of Service in the Council was contacted to check if they held any information which was covered by the request. The Council stated that no other information had been found other than that contained within the minutes and reports.
14. The Commissioner is concerned that she had to direct the Council to carry out additional searches during the investigation, especially as they resulted in the Council locating

additional information falling within the scope of Councillor Johnston's request which, in her view, should reasonably have been located at request (or review).

15. It is clear that there were deficiencies in the Council's initial searches, and in those conducted at review stage. The Commissioner recommends that the Council reflects on what might be learned from its errors in this case, and takes appropriate steps to avoid similar occurrences in future.
16. The Commissioner has considered the terms of Councillor Johnston's request and the Council's explanation of the searches made. She notes that the searches identified information that pre- and post-dated the meeting of 29 January and on the balance of probabilities is satisfied that, after the Council carried out further searches during the investigation, all information falling within the scope of the request has been identified.

Section 1(1) of FOISA

17. Documents 15-21 contain the additional information located by the Council during the Commissioner's investigation. Initially, the Council stated that these documents were outwith the scope of Councillor Johnston's request. However, it later accepted that they fell within scope and sought to rely on the exemptions in section 30(b) of FOISA in respect of this information.
18. The Commissioner finds that the Council failed to comply with section 1(1) of FOISA in responding to Councillor Johnston's as it failed to locate all the information covered by the request until after the investigation had begun.

Documents outwith the scope of the request - document 14

19. Document 14 is out of scope as it was created after Councillor Johnston made his request on 25 February 2015. This means it was not held by the Council when it received his request and that Councillor Johnston does not have a right to be given it in response to this request. The Commissioner has not considered document 14 further in this decision.

Section 30(b)(i) and (ii) - Prejudice to effective conduct of public affairs

20. The Council applied these exemptions to all of the information withheld from Councillor Johnston.
21. In order for the Council to rely on these exemptions, it must show that the disclosure of the information would (or would be likely to) inhibit: substantially:
 - (i) the free and frank provision of advice for section 30(b)(i) to apply
 - (ii) the free and frank exchange of views for the purposes of deliberation for section 30(b)(ii) to apply.
22. Both exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
23. There is a high standard to be met in applying the tests in the section 30(b) exemptions. In applying the exemptions, the chief consideration is not whether the information constitutes advice or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice or (as the case may be) the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

24. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring. Each request must be considered individually, on its own circumstances.
25. The Commissioner's guidance¹ states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.
 - (ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken.

The Council's submissions

26. The Council considered that there will always be an inherent sensitivity in discussions where services and staffing may be reduced. Officers needed to feel free to consider any options when considering proposals for budget savings, and would be reluctant to speak openly and offer advice or discuss their views if they knew that their contributions were likely to be publicly disclosed.
27. This, the Council stated, could result in reluctance by officers to identify potential pitfalls or to suggest alternative ways in which savings could be made. It was important that the Council could rely on the knowledge and input of officers involved in the day to day operation of the service in question.
28. Officers would be concerned about the impact on other employees, on the public and indeed on themselves if details of the advice they had given or the views they had discussed were publicised. The Council was of the view that it would be harmful to policy development if its officers became unwilling to provide input to, or engage in discussion about, the pros and cons of various proposals because they felt that any negative impact from the proposals would reflect on them. This was particularly significant in the circumstances of this request because officers had to discuss proposals which related to potential staffing and service cuts.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

The Commissioner's views

29. The Commissioner has scrutinised the documents in question. The content generally consists of:
- (i) information containing details of proposals being put forward, with suggested implications;
 - (ii) reports containing information on draft proposals; and
 - (iii) reports containing information on proposals already approved and, in some cases, finalised.

Documents 1,2, parts of documents 5 and 10 and documents 15-21

30. At the time of Councillor Johnston's request, discussions/deliberations as to how to achieve the budget savings arising from the Revenue Budget Plan were still ongoing, and the Council's policy position on the matter was developing and not yet finalised. Proposals were still at the draft stages for many of the recommendations.
31. The Commissioner accepts that disclosure of the recommendations and draft proposals, as contained in documents 1, 2, parts of 5 and 10 and 15-21 could have resulted in the inhibition claimed. Given the sensitivity of some of the proposals (at that time) she accepts that disclosure of information relating to the planning and discussion of the budget cuts could have resulted in the Council having to defend or debate the merits proposals that were not its final considered conclusions. This in turn could lead to it being likely to inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, in any similar situation arising in future. Accordingly, the Commissioner accepts that the exemptions in section 30(b) of FOISA apply.

Documents 3, 4, 6, 7, 8, 9, 11, 12, 13 and other parts of documents 5 and 10

32. These documents contain factual updates and progress reports on savings targets and budget proposals already underway, and documents reporting on the end of individual projects. The information is at summary level. It provides, in general, position statements reflecting progress against plans already discussed and agreed. The information does not contain advice or views that can be attributed to particular individuals, nor does the information contain draft proposals under consideration.
33. The Commissioner notes the Council's arguments that the staff involved in providing advice or offering views would be reluctant to do so in future if their views or suggestions were made public, but is not persuaded by this in relation to the information under consideration here, given its general and summary nature.
34. The Commissioner also notes the Council's argument that because the documents were marked "protect" and/or "private and confidential" it showed they were not intended to be released publically. The Commissioner would remind the Council that merely marking a document as confidential does not make it exempt from disclosure under FOISA. What the Council must consider and argue to the Commissioner, is whether disclosing the information would, or would be likely to, have the prejudicial effect envisaged by the exemptions in section 30(b).
35. The Commissioner is not satisfied, from the submissions put forward by the Council, that disclosing the information in question would, or would be likely to, have the prejudicial effect claimed by the Council.

36. She therefore finds that the Council has failed to demonstrate that disclosure of the information would, or would be likely, to cause substantial inhibition in relation to the provision of advice or the exchange of views for deliberation. Consequently, the Commissioner does not accept that the information should be withheld under either of the exemptions in section 30(b) of FOISA.
37. Because the Commissioner has found that the exemptions cited by the Council cannot be upheld, she is not required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to this information.
38. The Commissioner requires the Council to disclose to Councillor Johnston the content of documents 3, 4, 6, 7, 8, 9, 11, 12, 13 and the specified parts of documents 5 and 10. **The Council may redact personal data** contained in these documents which would otherwise be exempt from disclosure under section 38(1)(b) of FOISA.

The public interest test

39. The Commissioner will now go on to consider the public interest test in relation to documents 1 and 2, parts of documents 5 and 10 and documents 15-21.

Public interest submissions from Councillor Johnston

40. Councillor Johnston submitted that he required the information to be disclosed so that he could judge whether or not the Council's budget reductions were in the public interest. He stated that he had not been advised how the budget reductions were to be achieved and that, in order to reach an informed view, he needed to know the detail of the measures being proposed.
41. He stated that the public interest would be served by information on service withdrawals being made available to those service users who would be affected. He stated that effective local democracy required communities to have the information they needed to play an active role in shaping the policies and services of their local Council.

Submissions from the Council

42. While the Council acknowledged that there was always a public interest in transparency and accountability, particularly in areas involving public money and services provided to the public, it did not consider that it would be in the interests of the public to disclose details of plans which were not fully formed.
43. The Council submitted that the discussions and draft proposals under consideration related to service changes and to potential staffing reductions and that the details, if made available at an early stage, might cause alarm to members of the public and to employees. The Council argued that there was no advantage to members of the public in disclosing details of discussions surrounding proposals which had not yet been implemented and that the appropriate time for proposals to be released was when they had been fully considered, discussed and planned. The Council considered that the public interest in disclosing this information was outweighed by the public interest in withholding it.

The Commissioner's conclusions

44. The Commissioner accepts that there is a public interest in transparency in relation to the development of the Council's decision-making budgetary processes, including any contribution to that process by officers of the Council (particularly for the residents of West Lothian). The Commissioner accepts that the withheld information would shed some light on

the process, thereby assisting the public in understanding the Council's internal consideration process.

45. However, the information contains proposals which, at the time of Councillor Johnston's information request, were at the draft stage and had not been approved or implemented. The Commissioner is concerned that disclosing the information at such an early stage could cause unnecessary distress to a range of stakeholders, should the draft proposals not come to fruition.
46. The Commissioner also recognises the extent to which the Council's decision-making structure will, in any event, be subject to public scrutiny. Information relating to the early development of options and to draft proposals will be open to wider public scrutiny once that information has been developed into concrete measures and brought before the Council for approval.
47. The Commissioner has considered carefully the submissions from both the Council and Councillor Johnston, and the content of the withheld information, in balancing the potential benefits of disclosure against the potential harm. In all the circumstances, she is not satisfied that the public interest in disclosure of this particular information is strong enough to outweigh the public interest in maintaining the exemptions claimed.
48. On balance, therefore, the Commissioner finds that the public interest in disclosing the information is outweighed by that in maintaining the exemptions in section 30(b) of FOISA. Consequently, she is satisfied that the Council correctly withheld this information under these exemptions.

Timescales

49. Councillor Johnston also raised concerns with the time taken by the Council to respond to his review request.
50. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the review request to comply, again subject to exemptions which are not relevant in this case.
51. The Council received the review request on 15 April 2015, and notified Councillor Johnston of the outcome of its review on 20 August 2015. This was well in excess of the 20 working days in statute.
52. The Commissioner finds that the Council failed to respond to Councillor Johnston's requirement for review of 15 April 2015 within the 20 working days allowed under section 21(1) of FOISA.

Decision

The Commissioner finds that West Lothian Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request by Councillor Johnson.

She finds that the Council:

- (i) complied with section 1(1) of FOISA by withholding the documents 1 and 2, parts of documents 5 and 10 and documents 15-21. (The Commissioner will specify separately to the Council which information in documents 5 and 10 can be withheld and which must be disclosed.);
- (ii) failed to comply with section 1(1) of FOISA by withholding the remainder of the information from Councillor Johnston and by failing to locate all of the information falling within the scope of his request until after her investigation had begun; and
- (iii) failed to respond to Councillor Johnston's review requirement within the time limit set down by section 21(1) of FOISA. The Commissioner does not require any action to be taken in relation to this breach.

The Commissioner requires the Council to disclose the incorrectly withheld information to Councillor Johnston by **13 September 2016**. As stated in paragraph 38, the Council may withhold any personal data in the documents, disclosure of which would otherwise be exempt under section 38(1)(b) of FOISA.

Appeal

Should either Councillor Johnston 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

28 July 2016

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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

...

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