

Decision Notice

Decision 185/2016: ABW Consultants Ltd and West Lothian Council

Complaints/Investigations concerning a named Councillor

Reference No: 201600163

Decision Date: 25 August 2016



Scottish Information
Commissioner

Summary

On 25 November 2016, ABW Consultants Ltd (ABW) asked West Lothian Council (the Council) for details of complaints made against a named councillor and for details of any subsequent investigations into the complaints.

The Council refused to disclose any of the information it held. Following a review, ABW applied to the Commissioner for a decision.

During the investigation, the Council disclosed some information, but withheld the remaining information under a number of different exemptions in FOISA. The Commissioner found that the remainder of the information was exempt under section 30(c) of FOISA on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) (Effect of exemptions); 15 Duty to provide advice and assistance; 25(1) (Information otherwise accessible) and 30(c) (Prejudice to effective conduct of public affairs)

Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act) sections 5(1) (Duties of councils and devolved public bodies); 12(2) (Conduct of Commissioner's investigations); 15 (Publication of reports) and 17(9) (Hearings before Commission)

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 November 2015, ABW made a request for information to the Council. The information requested was:

"Details of complaints made against Councillor [name]. Please provide details of any investigations, and all correspondence related thereto including between councillors, officers and council solicitors."
2. The Council responded on 22 December 2015. It withheld the information on the basis that it was the personal data of the councillor and disclosure would be contrary to the data protection principles in the DPA (section 38(1)(b) of FOISA). It gave public interest arguments for applying this exemption.
3. On 30 December 2015, ABW wrote to the Council requesting a review of its decision. It did not agree that section 38 applied and complained that the Council had failed to specify how disclosure would breach the DPA.
4. The Council notified ABW of the outcome of its review on 14 January 2016. It confirmed its original decision, clarifying that it considered that disclosure of the information would breach the first data protection principle in the DPA. It also clarified that, since the exemption was absolute, it did not need to consider the public interest.

5. On 26 January 2016, ABW wrote to the Commissioner. ABW applied to the Commissioner for a decision in terms of section 47(1) of FOISA. It believed the information should be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that ABW made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 2 February 2016, the Council was notified in writing that ABW had made a valid application. The Council was asked to send the Commissioner the information withheld from ABW, which it did. At this point, it became clear that the Council wished to apply additional exemptions to the information. The case was then allocated to an investigating officer.
8. 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 and answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council supplied submissions, including on the new exemptions. ABW was invited to comment further during the investigation, and did so.

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 ABW and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 25(1) of FOISA – Information otherwise accessible

11. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.
12. On 12 February 2016, the Council wrote to ABW advising it that reports and minutes of the Council meeting which fell within the scope of his request could be viewed on the Council's website at www.westlothian.gov.uk/meetings.
13. During the investigation, the investigating officer clarified that, although the Council considered eight documents to be exempt under section 25(1), it had not told ABW the names of the documents or where to find them on the website.
14. Subsequently, on 14 April 2016, the Council provided ABW with hard copies of the minutes and reports in question.
15. The Commissioner accepts that the minutes and reports were published on the Council's website. The documents were otherwise accessible to ABW and were exempt from disclosure under section 25(1) of FOISA. However, she is critical of the Council's approach towards ABW.

16. When a public authority directs a requester to a place where information is accessible, it is critical that it gives the requester sufficient information to enable them to find it. To this end, the authority's duty to provide advice and assistance is vital.
17. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty if it conforms with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code).
18. Section 9.4 of the Section 60 Code states:

Where a public authority refuses a request on the grounds that the information is otherwise accessible, it must send the applicant a refusal notice which acknowledges that it holds the information and explains why the exemption at section 25(1) of FOISA ... applies.

The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases the authority should bear in mind its general duty to provide advice and assistance to applicants.
19. The Council initially failed to tell ABW which information it considered to be otherwise available to it, or where the information could be found. Consequently, the Commissioner finds that the Council failed to comply with section 15(1) of FOISA.
20. The Commissioner is satisfied that the Council did go on to provide advice and assistance during her investigation by providing ABW with hard copies of the documents in question. Consequently, the Commissioner does not require the Council to take any action in relation to this breach.
21. The Council continued to withhold the remaining information under various exemptions in FOISA. All of the information was withheld under section 30(c) of FOISA.

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

22. 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 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 applying it to show what specific harm would (or would be likely to) be caused to the effective conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
23. There is a high threshold to be crossed in applying section 30(c). The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice 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 account the actual content of the information and all other relevant circumstances (which may include the timing of the request).

24. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

Does the exemption in section 30(c) apply?

The Council's submissions

25. ABW's request relates to complaints made against a named councillor. Under section 5 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act), the Council is obliged to promote the observance by its councillors of high standards of conduct and to assist them to observe the Councillors' Code of Conduct (the Councillors' Code).
26. The Council has appointed a Monitoring Officer (the Council's Chief Legal Officer) for these purposes. The Council provided the Commissioner with a copy of the Monitoring Officer's role description. This makes it clear that one of the Monitoring Officer's duties is to investigate complaints made to the Council alleging a breach of the Councillors' Code.
27. The Monitoring Officer also acts as the Council's point of contact for the Commissioner for Ethical Standards in Public Life in Scotland (the Commissioner for Ethical Standards) regarding complaints made to him concerning alleged breaches of the Councillors' Code.
28. The Council argued that if details of investigations regarding complaints made about councillors were disclosed, it would be unable to guarantee that information from witnesses (Council employees and others) would, in future, be kept confidential. This would be likely to inhibit witnesses from providing evidence in future. The Council would then be unable to provide any guarantee that the case, as set out by either side, as well as the outcome of the investigation itself, would be kept confidential.
29. As such, in the Council's view, disclosure would, or would be likely to, prejudice substantially its investigations into these types of complaints.
30. The Council also referred the Commissioner to section 12(2) of the 2000 Act. This specifically refers to investigations carried out by the Commissioner for Ethical Standards and provides that his investigations shall, "so far as possible", be conducted confidentially. The Council commented that the Commissioner for Ethical Standards' correspondence makes it clear that he considers correspondence with him to be confidential. The Council argued that disclosing the information would prevent it from complying with section 12(2) of the 2000 Act and would, or would be likely to, restrict the future information exchanges between the Council and the Commissioner for Ethical Standards.

ABW's submissions

31. ABW argued that the Council had been unable to demonstrate that the harm envisaged by the Council would occur. It argued that:
 - (i) the Council's interpretation of section 12(2) of the 2000 Act was wrong. No one is "bound" to keep these investigations confidential. Section 12(2) only requires that investigations be conducted confidentially "so far as possible". This left it open to other regulatory authorities operating under other legislation to order the information to be disclosed.
 - (ii) the complaint had not in fact been taken to the Ethical Standards Commissioner, but had been dealt with by the Council internally.
 - (iii) the complainer and the councillor had agreed to the information being disclosed.

The Commissioners findings

32. The information which has been withheld comes not only from the complainers and the councillor, but from other parties including witnesses, the Council's Monitoring Officer and other Council employees. The Commissioner is satisfied that, if the information were disclosed, it is likely that witnesses would be unwilling, in future, to give evidence (or give evidence as fully as they have in this case) when an investigation of this nature is required. This would, or would be likely to cause, substantial prejudice to the Council's (and the Monitoring Officer's) ability to carry out such an investigation in future.
33. There is no evidence that witnesses expected their comments to be made public. Council employees were following an investigative process which required a high degree of confidentiality to ensure that the allegations which had been made could be investigated fairly and objectively.
34. Contrary to ABW's submissions, the Commissioner for Ethical Standards was involved in a complaint involving the named councillor. The Commissioner's correspondence makes it clear that he expects matters to be kept confidential. As ABW argued, section 12(2) does not preclude information about an investigation being disclosed. However, at the very least, it sets an expectation that information will not be disclosed. The Commissioner has taken section 12(2) into account in determining whether the exemption in section 30(c) applies in this case.
35. While the Commissioner accepts ABW's point that, given that the outcomes of the investigations have been determined, the complainer and the councillor might no longer object to elements of the investigations becoming known, theirs are not the only views she must take into account. ABW's request covers information the content of which is wider than simply the input from the complainers and the councillor. The Commissioner must consider future prejudice to this type of investigation, not merely the wishes of the complainers or the councillor after the event.
36. The Commissioner has considered the nature and content of the withheld information, and the submissions provided. She is satisfied that disclosure of the information would, or would be likely to, prejudice substantially the effective conduct of public affairs, in line with section 30(c) of FOISA.

Public interest test

37. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
38. The Council acknowledged the public interest in transparency and openness. However, it believed this was outweighed by the public interest in ensuring that complaints can be made and investigated fully without the information generated being made public.
39. The Council explained that, in considering where the public interest lay, it had taken account of the fact that the 2000 Act allows the Commissioner for Ethical Standards to publish a report following a complaint and to hold hearings in public. In the Council's view, these two mechanisms ensure that the public interest is sufficiently met.
40. ABW disagreed with the Council's comments on the public interest. It questioned the Monitoring Officer's impartiality and argued that those central to the case have indicated their

agreement to the information being disclosed. ABW remained convinced that the public interest is best served by transparency.

41. The Commissioner is not convinced by ABW's arguments. As her finding on section 30(c) demonstrates, she is satisfied that disclosing the information would, or would be likely to, substantially prejudice future investigations, whether carried out by the Monitoring Officer or by the Commissioner for Ethical Standards. While she recognises the public interest in transparency and in ensuring that investigations are carried out fairly and objectively, she is satisfied, on balance, that the public interest in ensuring that complaints can be investigated fully and effectively outweighs the public interest in disclosure of the information.
42. As the Commissioner has determined that the Council was entitled to withhold the information under this exemption, she is not required to consider the application of other exemptions applied by the Council to the same information.

Other matters

43. In its application, ABW raised a number of concerns about the Council's responses and the handling of its request.
44. ABW highlighted an error in the Council's initial response where it incorrectly applied the public interest test to an absolute exemption in section 38(1)(b) of FOISA. The Commissioner recognises that, during its review, the Council corrected matters, as it is entitled to do in terms of section 21(4) of FOISA. There was, therefore, no breach of FOISA here.
45. ABW also questioned the "broad brush" approach adopted by the Council when characterising all of the withheld information as exempt under section 38(1)(b) of FOISA, citing the planning files and minutes which were published online (and which were subsequently provided to ABW in hard copy) as one example. Given the Commissioner has not found it necessary to consider the exemption in section 38(1)(b) in this decision, it would be inappropriate for her to make any findings on what is and is not personal data.
46. During the investigation, ABW commented negatively on the fact that the Council only applied a number of exemptions to the information in April 2016, five months after ABW made its request. This meant that it was only after April 2016 that ABW was able to comment on the additional exemptions.
47. The Commissioner understands why ABW commented in this way, but for natural justice purposes, she must allow public authorities to apply new exemptions after an application has been made to her.
48. The Commissioner would remind the Council (and other authorities) that it should aim to respond fully and properly at request, or where necessary review stage. As this case demonstrates, to introduce exemptions at such a late stage can lead to avoidable delays in giving an applicant a full response and impact negatively on the applicant's (and the general public's) perception of transparency. While there may be good reasons for applying new exemptions at a late stage, FOISA and the public are better served by an authority responding properly in the first place. In this case, the Commissioner can see no good reason as to why the Council did not apply the exemptions at request or review stage.

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 made by ABW Consultants Ltd (ABW).

The Commissioner finds that:

- (i) The Council complied with Part 1 of FOISA by withholding some information under section 25 of FOISA.
- (ii) The Council failed to comply with section 15(1) of FOISA by initially failing to give advice and assistance to ABW as to where that information could be accessed. Given that hard copies of the information were provided to ABW during the investigation, the Commissioner does not require the Council to take any action in relation to this breach.
- (iii) The Council complied with Part 1 of FOISA by withholding the remaining information because it was exempt from disclosure under section 30(c) of FOISA.

Appeal

Should either ABW 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.

Rosemary Agnew
Scottish Information Commissioner

25 August 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 –

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

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by section 15(1).

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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.

Ethical Standards in Public Life etc. (Scotland) Act 2000

5 Duties of councils and devolved public bodies

- (1) Every council shall, in accordance with any guidance issued for the purposes of this section by the Standards Commission for Scotland established by section 8 below –
 - (a) the provision does not confer absolute exemption; and
 - (b) assist them to observe the councillors' code.

...

12 Conduct of Commissioner's investigations

...

- (2) Investigations shall, so far as possible, be conducted confidentially.

15 Publication of reports

The Commission may publish a report submitted to it under section 14 above, and may do so in whatever way and send it to whomever it thinks fit.

17 Hearings before Commission

...

- (9) A hearing shall be held in public unless the members of the Commission conducting it determine that it is in the public interest that it, or such part of it as they specify for the purposes of this subsection, be not so held.

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