

Decision Notice

Decision 046/2018: Mr Graham Allison and the Keeper of the Registers of Scotland

Changes to INSPIRE Licence Agreement

Reference No: 201701521
Decision Date: 9 April 2018



Summary

RoS was asked for correspondence regarding changes to its INSPIRE Licence Agreement. It disclosed some of the information sought.

Further information was disclosed during the investigation.

Having acknowledged that a substantial quantity of the information it had considered earlier did not in fact fall within the scope of the request, RoS continued to withhold the remainder of the information, which it believed would cause substantial prejudice to commercial interests and the effective conduct of public affairs if it were made public.

The Commissioner was not satisfied that there was sufficient evidence of substantial prejudice and ordered the information to be disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy)

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 19 July 2017, Mr Allison made a request for information to the Keeper of the Registers of Scotland (RoS), in which he asked for all correspondence in 2017 from or to RoS with regard to the April 2017 change to the terms of the Registers of Scotland INSPIRE Licence Agreement.
2. RoS responded to the request on 16 August 2018, disclosing some information. It also withheld some information it identified as third party personal data (section 38(1)(b) of FOISA) and withheld information it believed to be commercially sensitive (section 33(1)(b) of FOISA). Some information was also withheld on the grounds that it remained subject to legal privilege (section 36(1) of FOISA) and other information was withheld as RoS believed its disclosure would prejudice the effective conduct of public affairs (section 30(c) of FOISA).
3. On 17 August 2017, Mr Allison wrote to RoS requesting a review of its decision. He did not contest the withholding of third party personal data under section 38(1)(b) of FOISA, but he queried whether the other three exemptions cited by RoS applied here.
4. RoS notified Mr Allison of the outcome of its review on 24 August 2017, upholding the exemptions which it considered to apply to the withheld information.
5. On 1 September 2017, Mr Allison wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Allison stated he was dissatisfied with the outcome of RoS's review and explained why he did not agree with the application of sections 30(c), 33(1)(b) and 36(1) of FOISA. Mr Allison believed there was a

public interest in understanding the retrospective changes to the licence, which (in his view) was for open data.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Allison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 25 September 2017, RoS was notified in writing that Mr Allison had made a valid application. RoS was asked to send the Commissioner the information withheld from Mr Allison. RoS provided the information and the case was 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. RoS was invited to comment on this application and answer specific questions about the withheld information, with reference to the provisions of FOISA applied in correspondence with Mr Allison.
9. On 15 January 2018, RoS disclosed some information (Document10) which it no longer considered there was any reason to withhold. There was also further discussion during the investigation as to what information actually fell 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 him by both Mr Allison and RoS. He is satisfied that no matter of relevance has been overlooked.

Information covered by the request

11. RoS furnished the Commissioner with 57 numbered items of correspondence it considered fell within the scope of the request, together with a schedule. Some of the information listed by RoS had already been disclosed to Mr Allison. Mr Allison has not expressed dissatisfaction in respect of this disclosed information.
12. As explained above, RoS disclosed one item to Mr Allison during this investigation, as it no longer believed there was any basis for withholding its content. RoS did not explain why it was no longer considered to be exempt from disclosure. In failing to disclose this information earlier, the Commissioner finds that RoS failed to comply with section 1(1) of FOISA
13. In his application, Mr Allison stated that he accepted the position taken by RoS on the redaction of personal data from a number of documents, so this matter need not be investigated.
14. Also during the investigation, RoS concluded that a number of documents were internal emails, entirely between its own staff. As such, RoS submitted that this information did not fall within the scope of Mr Allison's request.
15. Having considered the terms of the request, the Commissioner is satisfied that RoS was correct in submitting that it did not extend to internal correspondence, as this was neither "to" nor "from" RoS. With some additions, he agrees with RoS's list of documents which should be excluded from further consideration on this basis.

16. RoS should have reached this conclusion earlier, however. In failing to do so, it failed to interpret the request properly and thus failed to deal with it in accordance with section 1(1) of FOISA.
17. The Commissioner will now consider the withheld information in the remaining items on the schedule. Documents 23-26 inclusive, 36-41 inclusive, 44-48 inclusive, 53 and 54 are all withheld under section 33(1)(b) of FOISA, while documents 20 and 43 are withheld under section 30(c).

Section 33(1)(b) of FOISA – Commercial interests and the economy

18. The exemption in section 33(1)(b) of FOISA applies to information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. "Person" must be interpreted widely, to include a legal person (such as a company) as well as an individual: specifically, in this context, it includes a Scottish public authority. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
19. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial: in other words, of real and demonstrable significance.

Mr Allison's submissions

20. Mr Allison submitted that, as the data under this licence was free, there could be no substantial prejudice to commercial interests of either RoS or its third party suppliers. He explained that he presumed his request would capture emails between RoS and its supplier of map products, the Ordnance Survey (OS). He could see no commercial sensitivity with the information he sought, given that both these organisations were government departments.

RoS's submissions

21. RoS acknowledged that it was required to comply with obligations under Directive 2007/2/EC establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) to make spatial data sets available to the public to both view and download. Some of this data was Ordnance Survey licensed data, licensed to RoS under an agreement known as the "One Scotland Mapping Agreement" or "OSMA". RoS contended that the withheld information here concerned its commercial relationship with OS as a licensee under the OSMA. RoS believed disclosing this information risked substantially prejudicing its own and OS's commercial interests.
22. RoS submitted that this withheld information related to the approach taken by OS and RoS for compliance with OS standard INSPIRE licences. RoS believed any disclosure of this information would substantially prejudice its ability to act commercially as a data provider in future, in terms of providing value added data sets deriving from OS base layer data.
23. RoS presented arguments in relation to OS's current commercial licencing model. It suggested that elements of the withheld information raised issues around intellectual property ownership and licensing, considered core to OS's current business model: disclosure, it submitted, would cause substantial prejudice to OS's commercial interests. RoS continued that it was likely such information could be used by existing customers and third parties to challenge OS's current licensing model.

24. RoS also presented arguments on potential infringement of Crown Copyright, which it believed would follow from disclosure. It explained that this was a highly commercially sensitive area and that any disclosure of this information (in relation to changes to OS's position on Crown Copyright) would substantially harm OS's commercial interests.
25. In support of this view, RoS stated that there was an ongoing litigation process between OS and a third party. RoS stated that INSPIRE licensing was one of the issues raised in those proceedings, contending that disclosure of this information could substantially prejudice the outcome. It also noted that negotiations with OS were ongoing in relation to licensing.

The Commissioner's conclusions

Copyright

26. It may be helpful to address the situation regarding copyright and FOISA first, before looking at the tests for section 33(1)(b). Since 1 January 2005, public authorities in Scotland have been able to disclose information which is third party copyright in response to a FOI request without breaching the Copyright, Designs and Patents Act 1988 as a result of The Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004.
27. The Commissioner has taken full account of the submissions by both parties in this case and the exact nature and context of the withheld information under consideration here. In all the circumstances, he does not accept that copyright would be breached by disclosure of the withheld information.

Commercial interests

28. RoS identified itself as having commercial interests in terms of its ongoing relationship with OS, whom it identified as a third party with commercial interests under the OSMA agreement (which it believed would be adversely impacted by disclosure of this information). By contrast, Mr Allison has contended there can be no commercial interests here given that these are both government departments and the data was previously free.
29. While OS – and, by extension, RoS – are clearly operating in a commercial environment in relation to the information covered by OSMA, the Commissioner must always consider the actual information withheld by a Scottish public authority. He must also consider the submissions actually put forward by that authority, and be satisfied from these that the authority has provided sufficient evidence to persuade him that the requirements of the exemption in question are met.
30. From the submissions received on this point, even if the Commissioner accepts that RoS and OS are operating in a commercial market place here, the substance of the information withheld under this exemption is such that it is difficult to see what is so sensitive about it, and why it should be capable of causing the substantial prejudice claimed. Mostly, it is process-related, rather than saying anything of substance about licensing models, negotiating positions or reasoning. Even standard licensing conditions, which may be available to those taking them up rather than the public at large, are not documents which offer any particular advantage in undermining the licencing model to which they relate.
31. All of the information in question is relatively innocuous in nature, and the Commissioner is not satisfied from the submissions received that the context makes it any less so. In the circumstances, the Commissioner is not satisfied that the level of harm claimed by RoS would be likely, even in contexts where litigation and/or contractual negotiations are ongoing.

32. Equally, it is fair to say that neither is the withheld information particularly informative as to the reasons underlying changes in the licence, but that is not itself a reason why its disclosure should be considered prejudicial.
33. Consequently, the Commissioner finds that the information withheld under section 33(1)(b) of FOISA does not qualify for exemption under that provision. He requires RoS to disclose to Mr Allison the withheld information from documents 23-26 inclusive, 36-41 inclusive, 44-48 inclusive, 53 and 54, other than any personal data (names). As explained above, Mr Allison indicated in his application he has no issue with the redaction of personal data. The redaction of any names therein is in keeping with the approach taken to the other items disclosed.
34. For the information the Commissioner has found not to be exempt under section 33(1)(b) of FOISA, he need not consider the public interest test in section 2(1)(b) of FOISA. He still requires to consider the exemption in section 30(c), for documents 20 and 43.

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

35. 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 conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
36. As with the exemption in section 33(1)(b), the prejudice requires to be substantial and the exemption (if found to be engaged) is subject to the public interest test in section 2(1)(b) of FOISA.
37. RoS explained that it had been engaged in discussions with OS around identifying the appropriate licensing approach. The withheld information disclosed that the matter remained under discussion and disclosing the content of these discussions, before the issues were fully resolved, would be likely to substantially prejudice RoS's ability to meet its INSPIRE obligations. In particular, it identified the potential for premature challenges to any restrictions on the use of its dataset. It also highlighted the importance of communicating in confidence with its stakeholders, with a view to ensuring that they felt able to provide their views freely and frankly.
38. Again, as he must (and as a public authority considering any request should), the Commissioner has considered the content of the withheld information. Again, it is basically process-related and quite innocuous in nature. He can see no reason why stakeholders would be less willing to be forthcoming should communications of this nature be disclosed, or why such information should offer any opportunity for challenging restrictions on use. In other words, as with the information withheld under section 33(1)(b), the Commissioner is not satisfied that the arguments advanced are justified, given what has been withheld and the context in which it exists.
39. As with the information withheld under section 33(1)(b), therefore, the Commissioner finds that the information withheld under section 30(c) of FOISA does not qualify for exemption under that provision. He requires RoS to disclose to Mr Allison the withheld information from documents 20 and 43, again subject to the redaction of any personal data (names). He is not, in the circumstances, required to consider the public interest.

Decision

The Commissioner finds that the Keeper of the Registers of Scotland (RoS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Allison.

The Commissioner finds that by disclosing some information, RoS complied with Part 1 of FOISA.

However, he also finds that RoS incorrectly applied the exemptions under sections 30(c) and 33(1)(b) of FOISA to some information and in so doing, failed to comply with section 1(1) of FOISA. It also failed to comply with section 1(1) by not disclosing information earlier (item 10), and by interpreting the request to include internal communications.

The Commissioner therefore requires RoS to disclose the information it wrongly withheld (described in paragraphs 33 and 39) by **24 May 2018**.

Appeal

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

Margaret Keyse
Head of Enforcement

9 April 2018

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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