

Decision Notice 056/2022

Short life working group considering NASSO Environmental Risk Assessments

Applicant: The Applicant

Public authority: Fife Council

Case Ref: 202100333



Scottish Information
Commissioner

Summary

The Council was asked about the short life working group set up to consider local implications of the National Accommodation Strategy for Sex Offenders Environmental Risk Assessments. The Council disclosed some information, but withheld meeting papers and minutes as it considered these to be exempt from disclosure under the exemption in section 36(2) of FOISA. During the investigation, further information was disclosed to the Applicant. The Commissioner investigated and found that, with the exception of an email address, the Council was not entitled to rely on the exemptions claimed for the remaining information. He ordered the Council to disclose the information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs); 35(1)(a) and (b) (Law enforcement); 36(2) (Confidentiality); 39(1) (Health, safety and the environment)

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 15 January 2021, the Applicant made a request for information to Fife Council (the Council). The Applicant referred to an entry in the Fife MAPPAs (Multi Agency Public Protection Arrangements) Annual Report from 2019/20, which mentioned the establishment of a short-life working group to consider local implications and a risk-based approach to implementing Environmental Risk Assessments (ERAs) as set out in the National Accommodation Strategy for Sex Offenders (NASSO). The Applicant requested all information held regarding this short-life working group, including its membership, meeting papers and minutes.
2. The Council responded on 9 February 2021. The Council provided the Applicant with the names and job roles of the individual members of the short-life working group. However, it explained that it was withholding the meeting papers and minutes as it considered these to be exempt from disclosure under section 36(2) of FOISA. No explanation was given by the Council as to why it considered this exemption to apply to the withheld information.
3. On the same day, the Applicant wrote to the Council, requesting a review of its decision. The Applicant noted that the Council's own officers played an integral role in the short-life working group and so he considered the Council's decision to apply section 36(2) of FOISA, and suggest that it was somehow a third party receiving information in confidence from the information's owner, to be disingenuous.
4. The Council notified the Applicant of the outcome of its review on 9 March 2021. The Council upheld its original response and provided an explanation detailing why it continued to rely on the exemption in section 36(2) of FOISA for the withheld information.
5. On 15 March 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review for the following reasons:
 - The Council was wrong to claim that MAPPAs was a public body.

- The Council's claim that the working group's paperwork belonged to a third party was disingenuous.
- No advice and assistance was given to him to assist him in contacting the "owner" of the withheld information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 16 March 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council 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. The Council was invited to comment on this application and to answer specific questions. These related to the Council's reliance on the exemptions in sections 36(2) and – as indicated in the schedule accompanying the withheld information – 39(1) of FOISA. Clarity was sought as to whether any other recorded information was held falling within scope of the Applicant's request. Comment was also invited from the Council on the Applicant's view that MAPPA was not, and never had been, a public body.
9. During the investigation, the Council disclosed information to the Applicant in four documents which had previously been withheld (subject to the redaction of certain information for which it was continuing to rely on exemptions). The Council also notified the Commissioner that it was now no longer seeking to rely on the exemption in section 36(2) for some of the information it continued to withhold, but was additionally relying on the exemptions in sections 30(c), 35(1)(a) and 35(1)(b) of FOISA.
10. The Applicant confirmed that he had received the information disclosed by the Council but remained dissatisfied due to the amount of information (which he considered to be of relevance to his request) that had been redacted.
11. Submissions were received from the Council outlining why it considered the exemptions in sections 30(c), 35(1)(a) and 35(1)(b) to be applicable to information it continued to withhold.
12. The Council confirmed that it continued to rely on the exemption in section 36(2) in respect of certain information. It also confirmed that it was relying on the exemption in section 39(1) for all of the information it was withholding from the Applicant.
13. The Council's application of all of the exemptions it is continuing to rely on will be considered in full below.

Commissioner's analysis and findings

14. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Context

15. This information request relates to the implementation of Environmental Risk Assessments (ERA's).
16. "An Environmental Risk Assessment is carried out by the Responsible Authorities to identify whether there are any housing-related risks associated with a particular offender. This assessment brings together information on the offender, proposed property and location and nearby households. This informs the responsible authorities' decisions on housing the offender in a way that can be used in the risk management of that offender to minimise risks to the community."¹

Section 36(2) - Confidentiality

17. The Council continues to rely on the exemption in section 36(2) of FOISA for withholding information in four documents from the Applicant.
18. Section 36(2) of FOISA provides that information is exempt from disclosure if it is obtained by a Scottish public authority from another person (including another such authority) and its disclosure, by the authority obtaining it, to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain disclosure of information which is necessary in the public interest.

Information obtained from another person

19. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
20. In its submissions, the Council confirmed that the information in documents 1, 2 and 3 had been provided to the Fife MAPPA Co-ordinator by another Scottish public authority, Police Scotland.
21. The Council also confirmed that the information in document 4 had been provided to the Fife MAPPA Co-ordinator by another body, Edinburgh, Lothian and Scottish Borders Strategic Oversight Group. This group is made up of members from Police Scotland, the City of Edinburgh Council, East Lothian Council, Midlothian Council, Scottish Borders Council, West Lothian Council, NHS Borders and the Scottish Prison Service.
22. Having viewed the information, the Commissioner is satisfied that this information was obtained by the Council from another person (or group of persons) and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

23. The second part of the test is that disclosure of the information by a public authority must constitute a breach of confidence actionable either by the person who gave the information to

¹ [National Accommodation Strategy for Sex Offenders: guidance on environmental risk assessments - gov.scot \(www.gov.scot\)](https://www.gov.scot/national-accommodation-strategy-for-sex-offenders-guidance-on-environmental-risk-assessments)

the public authority or by any other person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.

24. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element of the test. These are:
 - (i) The information must have the necessary quality of confidence;
 - (ii) The public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) Unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

25. The Council submitted that the withheld information was provided for the sole purpose of assisting the short-life working group to create Fife MAPPA group’s Environmental Risk Assessment process only.
26. Having read the information withheld in documents 1, 2 and 3, the Commissioner notes that a lot of this is derived from, or influenced by, the content of the guidance document “National Accommodation Strategy for Sex Offenders: guidance on parameters and minimum standards for conducting environmental risk assessments”, which is readily available on the Scottish Government website. For that reason, the Commissioner cannot conclude that all of the information withheld in documents 1, 2 and 3 fulfils the criteria of having the necessary quality of confidence.
27. For the same reasons, the Commissioner is unable to accept that all of the information that has been withheld in document 4 has the necessary quality of confidence.
28. Consequently, the Commissioner cannot agree, in respect of the information derived from or influenced by other readily available information, that disclosure would constitute an actionable breach of confidence.

Obligation to maintain confidentiality

29. The Council considered that there was an explicit duty of confidence attached to the information in documents 1, 2 and 3. The Council submitted that this information was shared on the basis that assurances were given that it would only be used by the working group, and no consent had been given by the authors for the information to be disclosed.
30. With regard to the information in document 4, the Council stated that an implied obligation of confidentiality existed in relation to this information, with a verbal agreement being reached that it would be treated in the strictest confidence. The Council submitted that consent had not been given for disclosure of the information, and nor would it be.
31. Having considered the circumstances, and the source and content of the withheld information, the Commissioner is satisfied that the information withheld was received in circumstances which, in the case of documents 1, 2 and 3, included an explicit duty of confidence, and in the case of document 4 included an implied duty of confidence. He therefore accepts that there was an obligation to maintain confidentiality.

Unauthorised disclosure would cause detriment

32. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In that respect, the test of detriment is different to establishing whether, for example, disclosure would *prejudice substantially* the commercial interests of any person when considering the exemption in section 30(c) of FOISA.
33. The Council explained that the authors of the withheld information in documents 1, 2, 3 and 4 had refused consent to release the information.
34. The Council also commented that disclosure of the withheld information, into the public domain, would have a high likelihood of causing harm to the current Environmental Risk Assessment process within Edinburgh and the Lothians MAPPA area.
35. The Commissioner accepts that the bodies who provided this information did so with an expectation that it would be treated confidentially, and used only for the purpose of the work of the short-life working group. This expectation did not extend to disclosure of the information into the public domain in response to an information request under FOISA.
36. However, from reading the withheld information, the Commissioner does not accept that the risk anticipated by the Council to the successful operation of the current Environmental Risk Assessment process within Edinburgh and the Lothians MAPPA area would, or would be likely to, occur as a result of disclosing the information not currently available in the public domain.
37. The Scottish Government produced a document entitled “National Accommodation Strategy for Sex Offenders: guidance on parameters and minimum standards for conducting environmental risk assessments” in 2017. This is publicly available on the Scottish Government website, and contains a lot of information as to how ERAs should be conducted, agencies and personnel involved, timescales for particular elements of the work, areas to be searched (including where an offender will be housed, as well as searches of information on electronic systems), and forms to be used.
38. While the withheld information reflects the specific measures and processes that would be implemented locally in the Edinburgh and Lothians MAPPA area, none of this information indicates where a person subject to an ERA would be housed. Furthermore, it provides only general instructions on the processes and procedures to be followed. Consequently, the Commissioner cannot accept that unauthorised disclosure of this information would cause detriment.
39. The Commissioner is therefore not satisfied that the tests for an actionable breach of confidence are met in this case, in relation to any of the information being withheld under section 36(2) of FOISA.
40. As he has found that all of the tests for the exemption in section 36(2) of FOISA have not been met, and the exemption is not therefore properly engaged, the Commissioner is not required to go on to consider whether disclosure of the information is necessary in the public interest.

Section 39(1) – Health, safety and the environment

41. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of

an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.

42. As the Commissioner notes in his briefing on this exemption², section 39(1) does not contain the usual harm test. Instead of the “substantial prejudice” test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to “endangerment” of health or safety. This test is less demanding than the “substantial prejudice” test.
43. The Council has relied on the exemption in section 39(1) for withholding all information in documents 1, 2, 3 and 4, and the information remaining redacted from documents 5, 6, 7, 8, 9 and 10.
44. In seeking to substantiate why it considered disclosure of the information would endanger the physical or mental health or the safety of an individual, the Council submitted that information in documents 1, 2, 3 and 4 was provided to it on the understanding that the content would not be shared. It is the Council’s view that understanding how the ERA process and housing of sex offenders is carried out would be likely to have a negative effect on those being housed and those in the related areas. The Council re-iterated that this information was provided to it for the sole purpose of assisting the short-term working group.
45. With regard to the remaining information withheld in documents 5 and 6, the Council explained that disclosure of this information would provide details of what searches would be carried out in the vicinity of the proposed address being assessed as part of the ERA process.
46. Disclosure of the remaining withheld information in documents 7, 8, 9 and 10 would, the Council asserted lead to understanding how the ERA process was carried out and this would, in the Council’s view, have a negative effect to both those being housed and those in the related areas.
47. The Council considered the subject matter of the withheld information to be highly contentious and outlined what it believed to be potential action or activities that would occur should that information be made public knowledge. It also detailed whose safety it considered would be endangered as a consequence of disclosure.
48. The Council was also of the view that, should this information become public knowledge, management of the ERA process would become difficult.
49. Having considered the information being withheld in all of the 10 documents, the Commissioner does not accept that disclosure of this information would cause the harm envisaged by the Council.
50. As noted in paragraph 37 above, the Scottish Government produced a document entitled “National Accommodation Strategy for Sex Offenders: guidance on parameters and minimum standards for conducting environmental risk assessments” in 2017. This is publicly available on the Scottish Government website, and contains a lot of information as to how ERAs should be conducted, agencies and personnel involved, timescales for particular elements of the work, areas to be searched (including where an offender will be housed, as well as searches of information on electronic systems), and forms to be used.
51. Having read the withheld information, in association with this guidance, it is clear that a lot of the information contained in documents 1, 2, 3, 8, 9 and 10 is derived from, or influenced by,

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

the information in this Scottish Government guidance note. None of this information indicates where a person subject to an ERA would be housed. It provides general instructions on the processes and procedures to be followed.

52. Furthermore, as other parts of the withheld information do not provide definitive instructions on how an ERA will be carried out, the Commissioner does not accept that disclosure would cause harm to the management or efficacy of the process, or lead to the possible actions or activities highlighted by the Council.
53. Overall, the Commissioner accepts that disclosure of the information would give an insight into the ERA process and how it is carried out, together with who is involved. However, he does not agree that this would then allow for the identification of an individual who might be subject to an ERA, which might in turn lead to the negative actions or activities noted by the Council. Nor does he accept that the safety of the individuals referred to by the Council would be endangered as a result of disclosure. Furthermore, given that the process to be followed, together with the individuals involved in it, timescales and matters to be taken into account in doing so, is, largely publicly available via guidance on the Scottish Government website, the Commissioner cannot agree that disclosure of the withheld information would cause harm to the management or efficacy of the process.
54. As the Commissioner is not satisfied that disclosure of the information that continues to be withheld in the 10 documents covered by the Applicant's request would engage the exemption in section 39(1) of FOISA, he is not required to go on to consider the application of the public interest test in section 2(1)(b).

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

55. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
56. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 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.
57. There is no definition of "substantial prejudice" in FOISA, but 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: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
58. The Council submitted that the exemption in section 30(c) applied to information that it was continuing to withhold in documents 5, 6, 7, 8, 9 and 10.
59. The Council argued that releasing the withheld information, in relation to the ERA process, was highly likely to have a negative impact on the required process being carried out effectively and with the security required.
60. The Council commented that the Short-Life Working Group required to discuss all aspects of their business and record decisions that would ensure an effective process could be carried

out to protect their clients and others within the local environment, without being concerned that details of this sensitive subject would be released into the public domain. The Council asserted that the group being unable to review processes and discuss sensitive matters would impact on the safety and well-being of their clients and the local environment.

61. In his submissions, the Applicant commented that he considered the Council's argument, that providing this information to him would lead to it falling down in its duty to properly assess accommodation for registered sex offenders, to be illogical.
62. Even if this was somehow the case, the Applicant commented, he queried whether the prejudice would be substantial, as demanded by FOISA.
63. Having considered all of the submissions on this matter, the Commissioner does not agree that disclosure of all of the information that continues to be withheld in documents 5, 6, 7, 8, 9 and 10 would have an effect which could reasonably be concluded to amount to substantial prejudice to the effective conduct of public affairs, as claimed by the Council.
64. The Commissioner accepts that the withheld information concerns the process that would be followed in undertaking an ERA and concerns discussions between relevant parties over the most efficient way to do this, but he does not agree that disclosure of the information would inhibit those parties from carrying out these assessments. Nor does he agree that such disclosure would lead to disruption or manipulation of the process. From the submissions provided, and the information itself, it is not clear to the Commissioner what specific harm would be caused through disclosure of this information.
65. The Council has provided no evidence to substantiate its claim that disclosure of the specific information that is being withheld would, or would be likely to, impact on the safety and well-being of their clients and the local environment.
66. However, the Commissioner does accept that disclosure of an email address on page 3 of document 7 could affect the Council's ability to follow due process if it was widely known and used by individuals not involved in undertaking work associated with ERAs. This would be likely to lead to disruption to the process.
67. For the reasons set out above, the Commissioner is not satisfied that disclosure of all of the information that continues to be withheld in documents 5, 6, 7, 8, 9 and 10 would, or would be likely to prejudice substantially the effective conduct of public affairs. Therefore, the Commissioner finds that the Council was not entitled to rely on the exemption in section 30(c) of FOISA for this information.
68. Because the Commissioner is satisfied that an email address on page 3 of document 7 would be exempt from disclosure under section 30(c) he is required to go on to consider the application of the public interest test to that information only.

Public interest

69. 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 interest of the public", i.e. disclosure must serve the interests of the public.

Submissions from the Applicant

70. In his submissions, the Applicant pointed out that while, the Fife MAPPA Annual Report did not state that the regional authorities would deviate from national guidance on ERAs, neither

did it guarantee that they would not. The Applicant explained that the inference he drew from the information in paragraph 2.5 of the Annual Report was that a compromise between scarce resources and risk was being sought, which might lead to the use of exemptions.

71. The Applicant submitted that, while it was inevitable that resources and risk must be balanced to some degree – and, while accepting that such an equilibrium need not necessarily lead to the public being placed at additional or unacceptable risk, the fact remained that national guidance was in place for ERAs. As such, the Applicant considered it to be plainly in the public interest to allow public scrutiny of the manner in which the national guidance had been implemented locally in Fife.

Submissions from the Council

72. The Council accepted that there was a public interest in disclosure of information to ensure scrutiny of the group and their compliance with their duties.
73. However, the Council argued that release of the withheld information had a high likelihood of providing offenders and the public with information that could be harmful to the process of managing offenders adequately. The Council submitted that this would undermine the ability for Criminal Justice and MAPPAs to carry out their duties, which would have a negative effect on their responsibilities to protect the public and clients.
74. The Council concluded that, for these reasons, it found that the public interest in withholding the information outweighed the public interest in disclosure.

Commissioner's view on the public interest

75. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public". The Applicant has argued that disclosure of the information would allow scrutiny of Fife MAPPAs' implementation of its duties in relation to undertaking ERAs. The Commissioner agrees that there is a public interest in ensuring that such policies are interpreted correctly and implemented adequately, to ensure the safety of all.
76. That said, the Commissioner does not accept that the disclosure of an email address used to follow the required process would shed any light on how effectively Fife MAPPAs are interpreting the required policy and implementing its process. Indeed, it is of far greater public interest to withhold this information to enable effective operation of the process and for Fife MAPPAs to effectively discharge its functions in relation to ERAs.
77. The Commissioner considers that disclosure of the information he has not found to be exempt would go some way to fulfilling the public interest in being able to scrutinise Fife MAPPAs' implementation of the ERA process at a local level.
78. Having carefully considered the circumstances, the Commissioner is satisfied that the public interest in withholding the information outweighs that in disclosing it. The Commissioner therefore concludes that the Council was entitled to withhold the email address on page 3 of document 7 under section 30(c) of FOISA.

Section 35(1)(a) – Law enforcement (prevention and detection of crime)

79. The Council has relied on the exemption in section 35(1)(a) of FOISA for withholding all of the information in documents 1, 2, 3 and 4 as well as the information it is continuing to withhold in documents 5, 6, 7, 8, 9, 10.

80. Under section 35(1)(a) of FOISA, information is exempt information if its disclosure would, or would be likely to, prejudice substantially the prevention and detection of crime. As the Commissioner's guidance on section 35 notes³, the term "prevention or detection of crime" is wide ranging. It encompasses actions taken to anticipate and prevent crime, or to establish the identity, and secure prosecution, of people suspected of being responsible for committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.
81. The exemption in section 35(1)(a) can only apply where disclosure of the information in question would, or would be likely to, prejudice substantially the prevention or detection of crime. FOISA does not define "substantial prejudice", but, as noted above, the Commissioner considers an authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely and, therefore, more than a remote possibility. The Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice the exemption is designed to protect against.
82. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
83. With regard to the withheld information in documents 1, 2, 3 and 4, the Council submitted that the authors of these documents considered disclosure of the information would have a detrimental impact on law enforcement.
84. In relation to the information the Council continues to withhold in documents 5 to 10 inclusive, it explained that these documents were used for the purposes of managing and monitoring offenders and for the prevention and detection of crime. There was, the Council argued, a high likelihood that releasing the process into the public domain would allow the individuals to have an understanding of that process, which would assist them in manipulating the process. This knowledge would, the Council contended, deter it from being able to prevent future crimes.
85. The Council also argued that release of the withheld information would cause detriment to the monitoring and reviewing of the individuals who fell within the process and would hinder the Council's ability to prevent crime. Public safety was, the Council submitted, paramount, in the monitoring and investigations being carried out and release of these details could enable offenders to re-offend, causing concern to public safety.
86. Having fully considered the submissions from the Council, together with the withheld information, the Commissioner cannot accept that the withheld information would be exempt from disclosure under section 35(1)(a) of FOISA.
87. As has been noted previously in this Decision Notice, the information the Council continues to withhold in documents 5 to 10 inclusive relates to the process to be followed when carrying out an ERA, together with comments on that and the appropriate Scottish Government guidance. Much of the mechanics of the process, together with who would be involved, likely timescales and reporting arrangements, is already publicly available via guidance on the Scottish Government website.
88. While the Commissioner acknowledges that some of the withheld information is specific to the manner in which particular local authority areas would implement the ERA process, he does not accept that it is so detailed that it would enable an individual to manipulate the

³ [Exemptions - Law Enforcement \(section 35\) \(itspublicknowledge.info\)](#)

process to their advantage or for illegal means. Other than providing a general statement that harm would be caused to the ability of the Council to prevent and detect future crimes, the Council has not demonstrated how, specifically, a determined or motivated individual would use the actual information that has been withheld to manipulate the process to their advantage. Similarly, the Council has not explained how knowing this particular information places an individual at any more of an advantage than knowledge of the information contained in the publicly available Scottish Government guidance would.

89. While the Council has claimed that disclosure of the information in documents 1 to 4 inclusive would have a detrimental impact on law enforcement, it has not said how or why. In the absence of any specific submission to substantiate this claim, the Commissioner cannot uphold the Council's application of section 35(1)(a) of FOISA to this information.
90. The Commissioner is therefore unable to uphold the Council's assertion that disclosure of the withheld information would, or would be likely to, prejudice substantially the prevention or detection of crime.
91. Because the exemption has not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to this information.

Section 35(1)(b) – Law enforcement (apprehension and prosecution of offenders)

92. The Council is relying on the exemption in section 35(1)(b) of FOISA for withholding information in documents 1 to 4 inclusive.
93. Section 35(1)(b) of FOISA states that, information is exempt information if its disclosure would, or would be likely to, prejudice substantially the apprehension and prosecution of offenders.
94. As the Commissioner's guidance on section 35 notes, there is likely to be some overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime." In his view, "apprehension or prosecution of offenders" is narrower, focusing on the process of identifying, arresting or prosecuting anyone suspected of being responsible for unlawful activity. This term could refer to the apprehension and prosecution of specific offenders, or to more general techniques (such as investigative processes used, information received, or guidance given) and strategies designed for these purposes.
95. The exemption in section 35(1)(b) can only apply where disclosure of the information in question would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. FOISA does not define "substantial prejudice", but the Commissioner considers an authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely and, therefore, more than a remote possibility. The Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice the exemption is designed to protect against.
96. The exemption in section 35(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.
97. The Council has relied on the same arguments as in relation to section 35(1)(a) (see above) for withholding the information in documents 1 to 4 under the exemption in section 35(1)(b).

98. As noted under consideration of the Council's application of the exemption in section 35(1)(a) of FOISA, while the Council has argued that disclosure of the information would have a detrimental impact on law enforcement, it has not said why or how. In the absence of any specific arguments detailing how and why disclosure of the withheld information would prevent the Council or others from identifying, arresting or prosecuting anyone suspected of a specific offence, or following relevant investigative processes to do so, the Commissioner cannot uphold the Council's application of the exemption in section 35(1)(b) of FOISA.
99. The Commissioner is therefore unable to uphold the Council's assertion that disclosure of the withheld information in documents 1 to 4 would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders.
100. Because the exemption has not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to this information

Decision

The Commissioner finds that Fife Council (the Council) generally failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. The Commissioner is not satisfied that the Council was entitled to rely on the exemptions in sections 30(c) (with the exception of one item – see below), 35(1)(a), 35(1)(b), 36(2) or 39(1) for withholding information from the Applicant.

The Commissioner therefore requires the Council to disclose all of the withheld information in documents 1 to 4 inclusive and all of the remaining withheld information in documents 5 to 10 inclusive, other than the email address contained on page 3 of document 7, by **27 June 2022**.

Appeal

Should either the Applicant 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.

Margaret Keyse
Head of Enforcement

13 May 2022

Appendix 1: 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.

...

- (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.

...

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.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;
(b) the apprehension or prosecution of offenders;

...

36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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