

Decision Notice

Decision 023/2015: Mr William Forbes and Transport Scotland

Government funding for Prestwick Airport

Reference No: 201402442

Decision Date: 13 February 2015



Scottish Information
Commissioner

Summary

On 19 June 2014, Mr Forbes asked Transport Scotland for information regarding Scottish Government funding for Prestwick Airport. On receiving no response, Mr Forbes asked for a review. Transport Scotland responded by disclosing some information and withholding the remainder under the exemption relating to the effective conduct of public affairs (section 30(c) of FOISA). Following an investigation, the Commissioner accepted this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 30(c) (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 19 June 2014, Mr Forbes made a request for information to Transport Scotland. The request related to the then Deputy First Minister's evidence to the Infrastructure and Capital Investment Committee of the Scottish Parliament on 18 June 2014, during which she announced investment in Prestwick Airport. He requested:
 - (i) Information which would show that the announced investment was not the cumulative five year estimate and there would be additional investment required over the next four years at least.
 - (ii) Information showing the estimated capital investment over the next five years.
 - (iii) All information which passed between the Scottish Government and Ryanair on the question of a change of name of Prestwick Airport.
2. Having received no response, Mr Forbes wrote to Transport Scotland on 22 July 2014, requesting a review.
3. Transport Scotland notified Mr Forbes of the outcome of its review on 7 August 2014. It stated that it held no information falling within the scope of request (i). In relation to request (ii), it disclosed a projected total for the financial year 2014/15, but withheld any other information it held under section 33(1)(b) of FOISA. It provided information in response to request (iii).
4. On 16 October 2014, Mr Forbes wrote to the Commissioner and applied for a decision in terms of section 47(1) of FOISA. He disagreed with Transport Scotland's assertion that it held no information falling within the scope of request (i), and with its decision to withhold information covered by request (ii). In relation to request (iii), Mr Forbes stated that he wished to see the full content of the letter from which his response had been extracted.

Investigation

5. The application was validated by establishing that Mr Forbes made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.
6. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 21 October 2014, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr Forbes and asked to provide the Commissioner with the information withheld from him. The Ministers provided the information and the case was then allocated to an investigating officer.
7. Subsequent references to contact with or submissions from Transport Scotland are therefore references to contact with or submissions from the Ministers on behalf of Transport Scotland.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application, with reference to the provisions of FOISA applied in responding to the request. It was also asked specific questions in relation to the information requested.
9. Transport Scotland provided submissions, applying section 30(c) of FOISA to the information falling within the scope of request (ii) (in addition to section 33(1)(b)).
10. Mr Forbes also provided submissions, specifically on why he thought it would be in the public interest for the information to be disclosed.

Commissioner's analysis and findings

11. 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 Mr Forbes and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

Information held by Transport Scotland

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given the information by the authority. This is subject to qualifications which, by virtue of section 1(6), allow authorities to withhold information or charge a fee for it. These qualifications are not relevant here.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.

Request (i)

14. Transport Scotland gave Mr Forbes notice in terms of section 17(1) in respect of part (i) of his request. It is apparent, however, that the information withheld in relation to request (ii) would also address request (i). Even on cursory examination of the information, therefore, it was not correct to say that Transport Scotland held no information falling within the scope of this request. In other words, it was incorrect in giving Mr Forbes notice to that effect, in terms of section 17(1) of FOISA. The withholding of this information is considered further below.

Request (iii)

15. The Commissioner was provided with a full copy of the letter from which Transport Scotland provided Mr Forbes with an extract regarding the possible renaming of Prestwick Airport.
16. She has examined the remaining content of the letter and is satisfied that none of that remaining content falls within the scope of Mr Forbes's request. Consequently, Transport Scotland was not required to provide any other information from the letter in response to request (iii).

Was any further information held?

17. Transport Scotland was asked to provide the Commissioner with details of the searches it had carried out to identify and locate information falling within the scope of Mr Forbes's requests. It was also asked to explain why such searches would have been likely to retrieve any information covered by the request.
18. Transport Scotland stated that it had searched its electronic Records and Document Management system (eRDM) and the inboxes and files of all relevant Transport Scotland staff likely to have had any involvement with Prestwick Airport information. It provided the Commissioner with the names and designations of those members of staff whose inboxes and files had been searched, all from the Aviation Team.
19. Transport Scotland submitted that these searches would have covered all correspondence between itself and Ryanair in relation to the renaming of the Airport. It noted that the possible renaming was first raised through a Public Petition lodged with the Scottish Parliament on 22 February 2014. As this was a relatively recent event, Transport Scotland considered there had been limited scope for correspondence. It added that, because Prestwick Airport was being operated on a commercial basis and at arm's length from the Scottish Government, Transport Scotland had a very limited requirement for any direct or indirect interaction with Ryanair.
20. In relation to the estimated investment, Transport Scotland also submitted that the information was limited in scope and easily identifiable by standard searches. All staff members likely to have had any dealings with this topic were, it submitted, easy to identify.
21. Having considered all relevant submissions, the Commissioner is satisfied that Transport Scotland carried out adequate, proportionate searches for any information it held and which fell within the scope of Mr Forbes's request. Having carried out these searches, it was correct to conclude that it held no further information falling within the scope of the request (although it should have recognised that some information fell within the scope of both request (i) and request (ii)).

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

22. The Commissioner must now consider the information withheld by Transport Scotland. This is the cumulative figure for estimated capital investment in Prestwick Airport over the period specified by Mr Forbes. Transport Scotland applied sections 30(c) and 33(1)(b) of FOISA to this figure. The Commissioner will first consider section 30(c).

23. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
24. As the Commissioner has said in previous decisions, there is a high standard to be met in applying the tests in section 30(c). The prejudice in question must be substantial and therefore of real and demonstrable significance. It must also be at least likely – prejudice cannot be simply a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
25. Transport Scotland asserted that there was no current commitment by the Ministers to provide any funding to Prestwick Airport beyond that identified in budgetary terms, i.e. beyond 2015/16.
26. Transport Scotland deemed it necessary for itself, Prestwick Airport and the Ministers to be able to engage in discussion and commercial planning for the future development of policies and projects in relation to the Airport, and to engage in research to ensure that any potential programmes of work or approaches to third parties (for the purposes of contracts or investment) were supported as robustly as possible.
27. Transport Scotland also submitted that sufficient research needed to be undertaken, sought, communicated and developed, to ensure that the work being engaged in was legal, useful and in the interests of best value for the people of Scotland, before consideration of what financial funding should be provided and when.
28. Releasing estimated figures, before a total level of funding had been decided, was likely (in Transport Scotland's view) to put pressure on Ministers and the Scottish Government to provide that level of investment into the Airport, even where that amount of funding might not be necessary or might not be the most appropriate use of taxpayers' funds. It pointed out that circumstances might change. By extension, it submitted, the smooth running of government would be significantly harmed.
29. Having considered all the points made by Transport Scotland, the Commissioner accepts that disclosure of the withheld information, at the time Mr Forbes's request was considered, would have been likely to have a detrimental effect on Transport Scotland's position, and that of the Ministers. She acknowledges that disclosure of estimated figures for a timespan so far ahead could set up an expectation of funding at that level, at a point long before the relevant funds could be committed.
30. The Commissioner recognises that the test to be considered in relation to section 30(c) of FOISA is high, but she accepts in this instance that disclosure would be likely to prejudice substantially the effective conduct of public affairs, in relation to discussion and planning for the effective future of the Airport while properly managing the public purse. In the circumstances, the Commissioner accepts that the exemption in section 30(c) was correctly applied to the information withheld.

The public interest test

31. As noted above, the exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.
32. Mr Forbes stated that there was a public interest in any public money which had been set aside by the Scottish Government to support a business, now or at some future time in the future. By definition, he stated, this would be taking that same money away from other Government services.
33. Mr Forbes acknowledged that Prestwick Airport was operating as a private company, at arms' length from the Scottish Government: he had no right to information on what that company did with any investment it secured. However, he went on to argue, the Scottish Government was a public body and was obliged to disclose how it spent public money, even if it was supporting a private enterprise. He believed the public had a right to know how much investment was needed now and in the future, suggesting that if the Airport did not wish information of this kind to be disclosed it could raise funds privately.
34. Mr Forbes submitted that the information was an estimate, provided externally, and as such would provide a yardstick the public could use to measure the performance of the Scottish Government when addressing important issues at Prestwick Airport. He suggested that accountability was removed at times of the Government's choosing.
35. There was still a legitimate concern, Mr Forbes contended, that estimates provided by consultants might have been abandoned. If that were the case, he did not believe there would be any plan or other discipline controlling the spending of public money on the Airport. Mr Forbes stated that the Scottish Parliament had been informed there was no total figure or definite timescale being adopted by the Scottish Government when supporting Prestwick Airport. He suggested that this approach was irresponsible and reinforced the case for disclosure.
36. Mr Forbes asked whether withholding this information served the interest of the Scottish Government, which he distinguished from that of the public, by removing any yardstick by which their decision-making could be measured.
37. Transport Scotland acknowledged that there would be some public interest in any information relating to Scottish Government policy development, and with regard to openness and transparency in public affairs. On the other hand, Transport Scotland argued, this was outweighed by the public interest in authorities being able to make their own funding decisions without undue external pressure, particularly where that was based on an estimate produced at a particular time and under particular circumstances which were open to change.
38. Transport Scotland also reiterated the harm it believed would result from disclosure, as described above. It did not consider this to be in the public interest and, on balance, concluded that the public interest favoured of upholding the exemption.

39. The Commissioner has taken account of the fact that public money has not actually been committed for the whole of the period in question and that the figure being withheld is therefore only an estimated five-year projection. She has recognised the harm disclosure of this uncommitted estimate would be likely to cause, which itself would not be in the public interest. In all the circumstances, given the potential for change, she is not persuaded that the estimate would provide a reliable yardstick against which the Scottish Government's performance in this area could be judged.
40. The Commissioner recognises that there is a general public interest in public authorities being transparent and open, with a view to enhancing accountability (particularly where large amounts of public money are involved). However, she does not accept that this can outweigh the more specific, and substantial, reasons why disclosure would not be in the public interest.
41. The Commissioner therefore concludes, having taken account of all the relevant circumstances, that Transport Scotland was correct to conclude that the public interest in disclosing the withheld information was outweighed by that in maintaining the exemption in section 30(c) of FOISA. She therefore accepts that the information was properly withheld under that exemption.
42. In the light of the above conclusion, the Commissioner is not required to go on to consider Transport Scotland's application of section 33(1)(b) of FOISA to this same information.

Decision

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

Transport Scotland was entitled to withhold information under section 30(c) of FOISA. However, it should also have recognised that this information fell within the scope of request (i), with the result that it was incorrect to apply section 17(1) of FOISA to that request.

Given that the information was correctly withheld under section 30(c), the Commissioner does not require Transport Scotland to take any action in respect of this failure in response to Mr Forbes's application.

Appeal

Should either Mr Forbes or Transport Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

13 February 2015

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.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1) if it held the information to which the request relates; but

- (b) the authority does not hold that information, it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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.

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