

Decision Notice

Decision 107/2015: Mr Iain Howie and Perth and Kinross Council

Artists' fees for the festive lights switch-on in Perth

Reference No: 201500135

Decision Date: 8 July 2015



Scottish Information
Commissioner

Summary

On 10 November 2014, Mr Howie asked Perth and Kinross Council (the Council) about the cost of the festive lights switch-on in Perth, including the fee paid to each performing artist. The Council provided some information, but withheld individual fees. Following a review, Mr Howie remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had wrongly withheld the information covered by Mr Howie's request. She required the Council to disclose the information to Mr Howie.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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 10 November 2014, Mr Howie asked the Council for information about the costs of staging the festive lights switch-on in Perth, which was due to take place later that month. Among other requests not considered in this decision, he asked for the "individual costs for artists' fees, broken down to the artists".
2. The Council responded on 24 December 2014. The Council provided information about the festive switch-on event, but withheld the information about artists' fees under section 36(2) (Confidentiality) of FOISA.
3. On 29 December 2014, Mr Howie wrote to the Council requesting a review of its decision. He argued that disclosure would promote openness in public spending. He also noted that the Council had disclosed similar information on two previous occasions (the 2013 Christmas Lights Switch-on and the Queen's Baton Relay event held in July 2014).
4. The Council notified Mr Howie of the outcome of its review on 16 January 2015. The Council's review upheld the exemption in section 36(2) of FOISA on the basis that the contracts with the artists contained clauses which specifically prevented the Council from releasing the fees for performers.
5. On 20 January 2015, Mr Howie wrote to the Commissioner. Mr Howie applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council's review because of the precedent previously set by the Council. He also felt that, given that it was public money, the information should be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Howie 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 5 February 2015, the Council was notified in writing that Mr Howie had made a valid application. The Council was asked to provide the Commissioner with the information withheld from Mr Howie. The Council did so 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 answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. Initially, the Council continued to rely on section 36(2) of FOISA, but, during the investigation, indicated that instead it wished to rely section 33(1)(b) of FOISA (Commercial interests and the economy) to withhold the information. The Council provided reasons why it believed the exemption in section 33(1)(b) applied to the artists' fees, and why it believed the public interest favoured withholding the fees.
10. Mr Howie was informed of this change in the Council's position. He provided comments on the application of section 33(1)(b) of FOISA and on the public interest.

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

Section 33(1)(b) - Commercial interests and the economy

12. The Council submitted that the individual fees paid to each artist were exempt from disclosure under section 33(1)(b) of FOISA.
13. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is subject to the public interest test in section 2(1)(b).
14. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate:
 - (i) whose commercial interests would, or would be likely to, be harmed by disclosure;
 - (ii) the nature of those commercial interests; and
 - (iii) how disclosure would, or would be likely to, prejudice substantially those interests. The prejudice must be substantial: in other words, of real and demonstrable significance.
15. The Council submitted that disclosure would damage its own commercial interests, and the interests of those persons who profit from the economic benefit such events bring to the local area. In this instance, "commercial interests" referred to the Council's ability to conduct business with artistes' agents, to book artistes to appear at events, and to obtain favourable rates for those artistes. "Commercial interests" also referred to the additional business for traders, hotels, etc. arising from the public attending such events.
16. The Commissioner is satisfied that the interests identified by the Council are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. The Council must

enter a competitive market to secure the attendance of artists at events such as the festive lights switch-on, particularly at Christmas time when many such events are organised.

17. The Commissioner also accepts that the Council has identified commercial interests relating to the wider business community which might be affected, should disclosure of the information harm the Council's ability to stage similar events in future. Although the Council did not specify other named persons whose commercial interests would be affected by disclosure, it referred to "all those who profit from the economic benefit to the area". The Commissioner accepts that such persons (i.e. persons who provide services or goods to the Council or the public for the event) have relevant commercial interests.
18. The Commissioner must now go on to consider whether the commercial interests identified by the Council would, or would be likely to, be prejudiced substantially by the disclosure of the artists' fees.
19. The Council argued that artists could not be engaged for a similar event if their fees were disclosed. It submitted that there was evidence to show that disclosure of the individual artists' fees would result in the Council being unable to conduct business with many artists' agents. The Council commented that the importance attached to the fees (by the agents of the artists) was underlined by the confidentiality clauses specifically associated with certain of the contracts.
20. The Council estimated:

"...the benefits to the area vary from £1.5m to £1.9m for one event at the end of November. Clearly the loss of income of this magnitude would be a major impact on retail, entertainment, catering and hospitality industries in the area."
21. Mr Howie took the view that the Council had been unable to establish the facts as regards the potential loss to the economy which would follow if the event was not able to continue or attract star names. He regarded the figures provided by the Council for the anticipated footfall and economic boost to the local area as estimates. He said:

"The council claimed that around 27,900 people attended to watch the lights switch on, and some 127,000 visited the city centre during the weekend - which was well in excess of the switch-on, and probably more likely to contribute to the financial increase."
22. Mr Howie also commented that, previously, the Council had twice fully disclosed under FOISA details of fees paid to artists or those appearing as special guests for events such as the Christmas lights switch-on:
 - TV personality Mark Wright's payment of £7,000 was fully disclosed through FOISA by the Council after his appearance in 2013;
 - Vocalist Gareth Gates and other acts for the Commonwealth Games "welcome" event held in July were also fully disclosed.
23. In response, the Council said that, in practice, past disclosures had made agents much stricter in their approach to business with the Council.
24. The Council has argued that disclosure under FOISA would, or would be likely to, prejudice substantially its own commercial interests and the commercial interests of local businesses. This argument means accepting a causal chain of events that follows from disclosure of the fees; i.e.

- Disclosure of the fees would make it less likely that artists would attend the event.
 - The non-attendance of artists would result in there being no event or an event attended by fewer persons.
 - The attendance by fewer persons would result (in general terms) in less income for those who benefit from the event (hotels, retailers etc.).
25. The Commissioner is unable to accept this reasoning. Whilst she accepts that disclosure of fees *may* make it more difficult for the Council to secure other artists in future, she does not accept that the Council would not be able to obtain the services of any artists capable of attracting a crowd. She does not accept that the additional cost of securing certain artists (were such additional costs to arise), or the inability to engage artists managed by a certain agency, would be enough to prevent the Council from organising a popular, well-attended event in future.
26. The Commissioner agrees with the Mr Howie's view that the commercial success of such events is also dependent on many other factors (such as the weather) in addition to the appearance of certain artists. The Commissioner does not accept the argument that the commercial success of the event depends only or largely on the presence of certain artists.
27. The Council has disclosed similar information in the past. Other public authorities, including local authorities, have also disclosed such information. There is an increasing expectation that such fees will be made public by Scottish public authorities.
28. In all the circumstances of the case, the Commissioner is not satisfied that disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of the Council or of the wider business community. She cannot, therefore, accept that the artists' fees are exempt from disclosure under section 33(1)(b) of FOISA.
29. As the Commissioner has found that the exemption in section 33(1)(b) of FOISA does not apply, she is not required to go on to consider the public interest in disclosing the information or maintaining the exemption.

Decision

The Commissioner finds that Perth and Kinross Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Howie. The Council was not entitled to withhold the information under the exemption in section 33(1)(b) of FOISA.

The Commissioner requires the Council to provide Mr Howie with information about each artist's fee by **24 August 2015**.

Appeal

Should either Mr Howie 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

8 July 2015

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.

...

(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.

...

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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