

Decision Notice

Decision 181/2016: Mr T and City of Edinburgh Council

Report by Safecall relating to whistleblowing allegation

Reference No: 201600324

Decision Date: 24 August 2016



Scottish Information
Commissioner

Summary

On 17 December 2015, Mr T asked City of Edinburgh Council (the Council) for information contained in a report produced by Safecall and in a letter relating to a whistleblowing allegation.

The Council responded, withholding the information under three separate exemptions of FOISA, one of which was section 30(c) (Prejudice to effective conduct of public affairs). Following a review, Mr T remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had properly responded to Mr T's request for information in accordance with Part 1 of FOISA. She found that the exemption in section 30(c) of FOISA was correctly applied to all the information Mr T sought.

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)

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 17 December 2015, Mr T made a request to the Council for information in a report produced by Safecall following a whistleblowing allegation. He also requested information in a letter related to the report, produced by the Council's Director of Children and Families. Mr T stipulated that he was happy to receive this information with any confidential information either blanked out or removed.
2. The Council responded on 14 January 2016, withholding the information under sections 30(c) (Prejudice to effective conduct of public affairs) and 35(1)(g) (read with section 35(2)(b)) (Law enforcement) of FOISA. It also cited sections 38(1)(a) and (b) of FOISA for any personal data in the requested information.
3. On 20 January 2016, Mr T wrote to the Council, requiring a review of its decision. He believed the information contained inaccuracies which were prejudicial to him and noted that it had been seen by a number of people within the Council.
4. The Council notified Mr T of the outcome of its review on 15 February 2016. It upheld its original decision, with further explanation.
5. On 22 February 2016, Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T stated he was dissatisfied with the outcome of the Council's review, submitting that it was in the interests of natural justice for the information to be disclosed.
6. The application was accepted as valid. The Commissioner confirmed that Mr T 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 10 March 2016, the Council was notified in writing that Mr T had made a valid application. The Council was asked to send the Commissioner the information withheld from him. 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 answer specific questions, with reference to the provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

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

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

10. 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
11. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).
12. The Council explained the circumstances of this request, which cannot be set out here in any detail without divulging elements of the withheld information.
13. The Council contended that disclosure of the withheld information was contrary to both the Public Interest Disclosure Act 1998 (PIDA)¹ and the Employment Rights Act 1996 (ERA)², and that legal action would follow if it were to disclose this information under FOISA.
14. To explain this, the Council commented that PIDA introduced protections for workers (including employees) who “blow the whistle” on wrongdoing at work, by incorporating protections into ERA. It outlined these protections, and the kinds of disclosure covered (“protected disclosures”), by reference to the relevant provisions.
15. The Council supplied a copy of key sections of its Whistleblowing Policy, setting out how whistleblowers can expect to be treated. In particular, it highlighted the expectation that protected disclosures will be handled in confidence.

¹ <http://www.legislation.gov.uk/ukpga/1998/23/contents>

² <http://www.legislation.gov.uk/ukpga/1996/18>

Substantial prejudice

16. The Council was asked to explain the harm it envisaged would be caused by disclosure of the withheld information. It responded that if an employee makes a protected disclosure to it, or to a person acting on behalf of the Council, he or she has the right to expect that this will be kept confidential by the Council and any organisation acting on its behalf. The Council contended that disclosing the withheld information (which related to a protected disclosure) under FOISA would be contrary to ERA: the information would cease to be confidential, which in turn could lead to litigation against the Council. The Council confirmed that the information had been shared with a limited number of individuals, within the Council, only: it stated who had been given access to the information and the safeguards applied.
17. The Council submitted that disclosure would harm the relationship between it and the individuals identified in the report. It would almost certainly deter other individuals from making disclosures in line with their rights under PIDA and ERA in future. Therefore, individuals would be less likely to report issues to the Council, which (by extension) impacted on its ability to ensure that it was complying with both legislative requirements and good practice. It also highlighted the risk of harm to individuals should information relating to protected disclosures be disclosed under FOISA.
18. Mr T contended that confidentiality of the withheld information was not maintained, as he believed it had been shared with a number of people.
19. The Commissioner has considered the nature and content of the withheld information, along with the Council's submissions and those of Mr T.
20. In this case, it is clear the issues covered are still relatively recent and not entirely resolved. It is important to bear in mind that disclosure under FOISA is disclosure to the world at large and not just to the person who asks for the information. In this case, the Commissioner is satisfied that none of the individuals identified in the withheld information would have any reasonable expectation that its contents would be used for any purpose other than those envisaged and covered by the relevant legislation (PIDA and ERA).
21. The Commissioner acknowledges that those individuals are entitled to confidentiality in relation to the matters covered in the withheld information. From the Council's submissions, she is satisfied that such confidentiality has been maintained. Whilst Mr T suggested in his request that sections of confidential information could be blanked out or removed, the Commissioner cannot identify any of the withheld information which is other than confidential at present.
22. The Commissioner is satisfied that disclosure of the withheld information would undermine expectations inherent in the whistleblowing process and the underpinning legislation, and that (given the subject matter here) the Council's apprehensions of wider harm are well founded. She is also satisfied that the harm identified by the Council would amount to substantial prejudice to the effective conduct of public affairs.
23. Therefore, in all the circumstances of this case, the Commissioner accepts that the Council was correct to apply the exemption in section 30(c) of FOISA to the withheld information.
24. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must, therefore, go on to consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption.

The public interest

25. Generally, the Council acknowledged the importance of transparency and accountability in its actions. Against this, the Council presented the risk that disclosure would mean future investigations arising from its Whistleblowing Policy would be very unlikely to obtain information voluntarily, due to fears about potential disclosure into the public domain. The resulting harm to its ability to exercise its public functions would, the Council submitted, be contrary to the public interest.
26. The Council highlighted that PIDA was enacted in recognition of the greater public need to protect whistleblowers and the importance of an effective whistleblowing process. In the light of this, it submitted there was a significant public interest in ensuring that employees had the ability and confidence to make reports such as this, with the assurance that the information they provided would be treated confidentially. The Council considered there was little public interest in disclosing the withheld information, given the likely consequence that whistleblowing would be discouraged and the process thus made less effective.
27. Mr T highlighted what he considered to be a strong public interest in disclosure, given his perception that it contained inaccuracies and had other shortcomings in its creation.
28. The Commissioner accepts there is a general public interest in transparency and accountability, particularly involving holders of public office and their public duties. Having considered Mr T's submissions, she acknowledges that there is some public interest in disclosure of the withheld information to him.
29. That said, there is a clear public interest in the whistleblowing process functioning effectively and, to that end, maintaining the confidence of employees. Disclosure of the withheld information under FOISA would be disclosure to the world at large, not just to Mr T. Having accepted the risks inherent in disclosure in this particular case, the Commissioner accepts that disclosure of the withheld information would be contrary to the public interest in an effective whistleblowing process.
30. On balance, having taken account of all the submissions before her, the Commissioner considers the public interest in maintaining the exemption in relation to this information outweighs that in disclosing it.
31. The Commissioner therefore finds that the Council was entitled to withhold this information under section 30(c) of FOISA. As the Commissioner has determined that the Council was entitled to withhold the information under this exemption, she is not required to consider the application of sections 35 and 38(1)(b) of FOISA to the same information.

Decision

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

Appeal

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

Rosemary Agnew
Scottish Information Commissioner

24 August 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (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.

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