

Decision Notice

Decision 266/2016: Mr Paris Gourtsoyannis and the Scottish Police Authority

Report presented to SPA Finance and Investment Committee

Reference No: 201600106

Decision Date: 15 December 2016



Scottish Information
Commissioner

Summary

The SPA was asked for a report presented to a meeting of its Finance and Investment Committee and any minutes or discussions around the report.

The SPA withheld the information under exemptions relating to the effective conduct of public affairs. Some information was disclosed during the investigation.

The Commissioner accepted that the SPA was entitled to withhold some of the information. However, she did not agree that the SPA was entitled to withhold the remainder and required it 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(b)(ii) and (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 11 November 2015, Mr Gourtsoyannis made a request for information to the Scottish Police Authority (the SPA). The information requested was the report(s) presented to the SPA Finance and Investment Committee meeting of 10 November 2015¹ as items 16 and 16.1. He also requested any minutes or transcripts of discussion around these items at the same meeting.
2. The SPA responded on 3 December 2015. The SPA withheld the information under the exemptions in section 30(b) and (c) of FOISA.
3. On 3 December 2015, Mr Gourtsoyannis wrote to the SPA requesting a review of its decision. He did not consider the information was exempt from disclosure and believed there was a clear public interest in its disclosure.
4. The SPA notified Mr Gourtsoyannis of the outcome of its review on 22 December 2015 upholding its original decision without modification.
5. On 15 January 2016, Mr Gourtsoyannis wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Gourtsoyannis stated he was dissatisfied with the outcome of the SPA's review because he did not consider that the disclosure of the information would result in the prejudice or inhibition suggested by the SPA. He also considered the public interest favoured disclosing the information.

¹ <http://www.spa.police.uk/meetings-events/183376/financemeetings2015/272477/>

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Gourtsoyannis 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 1 February 2016, the SPA was notified in writing that Mr Gourtsoyannis had made a valid application. The SPA was asked to send the Commissioner the information withheld from Mr Gourtsoyannis. In response, the SPA indicated that it had already provided the withheld information to the Commissioner in relation to a separate application on the same subject. The case was allocated to an investigating officer.
8. The investigating officer subsequently contacted the SPA pointing out that the information provided previously concerned an entirely unrelated request for information. The SPA was asked again to send the Commissioner the information withheld from Mr Gourtsoyannis in relation to his request of 11 November 2015.
9. On 22 April 2016, the SPA provided information to the Commissioner which fell within the scope of the request.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPA 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.
11. The SPA provided submissions explaining that the information requested was being withheld under the exemptions in section 30(b)(i) and (ii) and (c) of FOISA.
12. During the investigation, the SPA disclosed to Mr Gourtsoyannis some of the information that had previously been withheld. This comprised the main body of the report presented to the SPA Finance and Investment Committee on 10 November 2015.
13. At this stage, the SPA confirmed that the remaining information was being withheld under the exemptions in section 30(b)(ii) and (c) of FOISA.
14. At a later stage during investigation, the SPA provided further information to the Commissioner which fell within the scope of Mr Gourtsoyannis's request. The SPA considered this information also to be exempt from disclosure in terms of section 30(b)(ii) and (c) of FOISA.

Commissioner's analysis and findings

15. 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 Gourtsoyannis and the SPA. She is satisfied that no matter of relevance has been overlooked.
16. The remaining information which the SPA has withheld in this case comprises the appendices to the single report (Budget Action Plan) presented to the SPA Finance and Investment Committee meeting of 10 November 2015 at item 16.1 and the minute of the discussion around this item. The SPA withheld all of this information under the exemptions in section 30(b)(ii) and (c) of FOISA.

Section 30(b)(ii) – Free and frank exchange of views

17. In order for the SPA to rely on this exemption, it must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
18. There is a high standard to be met in applying the tests in the section 30(b)(ii) exemption. In applying the exemption, the chief consideration is not whether the information constitutes opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
19. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring. Each request must be considered individually.

Factors to consider

20. The Commissioner's guidance on the section 30 exemptions² states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that views were passed from one person to another, depending on the relationship between those parties. Where views are communicated and received as part of an individual's day to day professional functions, for example, then the risk of substantial inhibition may well be diminished.
 - (ii) The circumstances in which the views were provided. The context in which the communication took place might be relevant: for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) The sensitivity of the views. The subject matter and content of the opinions, as well as the way in which the opinion is expressed, are likely to be relevant when determining whether the exemption applies.
 - (iv) Timing may also be relevant: disclosing opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken
21. The information withheld under this exemption comprises the appendices to the Budget Action Plan and the minute of the discussion around this report.
22. The SPA submitted that the withheld information related to potential options for making cost savings and comprised ideas put forward for discussion and consideration. In the SPA's view, management must be free to put forward and discuss proposals without those proposals being made public.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

23. The SPA submitted that, were such ideas and suggestions made public at this stage, this may inhibit officials from providing suggestions which in turn would prevent the SPA from considering all available options. In the SPA's view, management may be inhibited from providing views and ideas if the information were to be made public before it had gone through any form of test such as legality, proportionality or viability. The SPA argued also that other staff in Police Scotland and the SPA who contribute to the Finance and Investment Committee may find themselves inhibited by disclosure; this was because the information under consideration merely comprised options to be discussed, rather than an agreed way forward.
24. The SPA reiterated that the information comprised "potential options" to reduce costs which could involve sensitive areas of expenditure such as staff salaries and payments to third party contractors. The SPA argued that public disclosure of this information at a stage where it was merely a consideration could be damaging in terms of staff morale and competitive advantage.
25. The SPA submitted that some or all of the options identified may not be taken forward and thus to create the undoubted public debate that would ensue around something that was merely an idea would undoubtedly inhibit proposed cost saving ideas in the future. In the SPA's view, any proposed changes in future would be communicated firstly to staff and suppliers by the SPA and Police Scotland and not via the media.
26. In Mr Gourtsoyannis's view, the disclosure of the information would enhance the free and frank exchange of views for the purposes of deliberation rather than prejudicing it in any way.

The Commissioner's view

27. The Commissioner has considered the content of the withheld information along with the SPA's submissions.

Appendices to the report

28. The Commissioner notes that some of the figures withheld by the SPA in the appendices to the report are contained within the SPA Finance Report for the six month period to 30 September 2015³. Therefore, this information was already in the public domain at the time the SPA carried out its review on 22 December 2015. The Commissioner cannot see how the disclosure of information which has already been proactively published by the SPA could result in the inhibition suggested by the SPA. Therefore, she is unable to conclude that the exemption in section 30(b)(ii) of FOISA can possibly be engaged in relation to that information.
29. In relation to the remainder of the information contained in the appendices, the Commissioner considers this information to be one step removed from the actual process of exchanging views for the purposes of deliberation. The information comprises (generally) monetary figures and generic headings. The information in itself does not provide any indication of the nature of the views which have been exchanged or the type of discussions on which the figures were predicated.
30. The Commissioner does not consider that the disclosure of this information would result in the consequences suggested by the SPA. This information does not in itself identify any specific point of view, nor is it attributable to any individual. Consequently, she does not agree with the SPA that disclosure of this information would cause the harm envisaged and

³ <http://www.spa.police.uk/assets/126884/310253/310767>

does not accept that the information contained in the appendices is exempt from disclosure in terms of section 30(b)(ii) of FOISA.

31. The SPA also applied the exemption in section 30(c) of FOISA to the information contained in the appendices and this is considered below.

Minute of meeting

32. In relation to the minute of the meeting, the Commissioner accepts that the exemption is engaged in respect of the majority of the information. She is satisfied that disclosure of this information would be likely to result in views being provided in a more guarded and less candid fashion in future.
33. The information reflects frank discussions involving SPA and Police Scotland staff concerning the budget deficit, including actions taken previously and suggestions for future action. Most of the information comprises comments which are clearly attributable to specific individuals.
34. The Commissioner considers it reasonable in the circumstances of this case that the SPA would be able to represent the views of its own staff and make submissions about the likelihood of inhibition in providing views in the future. However, she is not persuaded by the SPA's submissions in relation to Police Scotland staff. While, on the face of it, the SPA's submission that disclosure would result in the future inhibition of free and frank views from Police Scotland staff may seem self-evident, the Commissioner must base her deliberations and conclusions on the arguments and evidence submitted. The SPA's submissions did not provide explanation or evidence to support how it had reached conclusions about Police Scotland staff (who are from a separate organisation), beyond merely stating that they would be more guarded in future. In the Commissioner's view, in the circumstances of this case, this amounts to little more than hypothesis.
35. Although she does not accept all of the arguments, overall the Commissioner accepts that the exemption is engaged in relation to some of the information. This is on the basis that disclosure of this information into the public domain would inhibit SPA staff participants from expressing candid views at similar meetings in future and would be likely to result in less robust scrutiny and questioning taking place at such meetings.
36. However, the Commissioner does not accept that the exemption is engaged in relation to all of the information in the meeting minute. Some of the information is factual in nature. The Commissioner is unable to conclude that the disclosure of such information would result in any inhibition of the nature envisaged by the SPA. As such, the Commissioner does not accept that the disclosure of this information is exempt from disclosure in terms of section 30(b)(ii) of FOISA - this comprises the information contained in paragraphs 16.1.1, 16.1.2 and 16.1.15 of the minute.
37. The SPA also applied the exemption in section 30(c) of FOISA to this information. This is considered below from paragraph 47.

Public interest test

38. Having concluded that the information contained in the meeting minute (with the exception of that noted at paragraph 36 above) is exempt from disclosure under section 30(b)(ii), the Commissioner must go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this information.

39. In the SPA's view, it was imperative that it be able to explore all options for cost savings while maintaining the confidence of its staff and the public. The SPA considered that the disclosure of information on suggestions which may never come to fruition could cause unnecessary speculation and alarm, thereby undermining confidence in the police service.
40. The SPA submitted also that none of the options which had been suggested may be progressed in practice. As such, it did not consider there was any public interest in disclosing information on deliberations at this early stage. The SPA accepted that, in due course, it may be appropriate for the public to see how it had considered effecting savings, but not during the course of ongoing deliberations.
41. Mr Gourtsoyannis submitted that speculation was rife about the possible changes to police services that financial pressures would necessitate. In his view, this was already harming the morale of police officers and staff. Mr Gourtsoyannis considered that additional clarity would support the SPA's and Police Scotland's own objectives and would reassure the public about the future of policing in Scotland.
42. Mr Gourtsoyannis argued also that an action plan developed to respond to an identified budget gap that has existed for over a year was not somehow a hypothetical document. Rather it was a plan on which action would be taken. In his view, it was in the public interest to know the shape of that plan and the decision-making process around the future of policing.
43. The Commissioner recognises that there is always a public interest in transparency and accountability and in scrutinising the decision-making processes followed by public authorities. The matter under consideration in this case is clearly of public importance.
44. The Commissioner recognises also that there is a public interest in allowing contributors to discussions of this nature an opportunity to provide and share views with candour. The Commissioner has already concluded that disclosure of this information would be likely to substantially inhibit SPA individuals from expressing their opinions and views. She considers, on balance, that such inhibition would hamper future policy and decision-making within the SPA and Police Scotland and would be contrary to the public interest.
45. The Commissioner therefore finds that the public interest in the disclosure of this information is outweighed by that in favour of maintaining the exemption in section 30(b)(ii) of FOISA.
46. Accordingly, the Commissioner has concluded that the SPA was entitled to withhold the information contained in the meeting minute (with the exception of that noted at paragraph 36 above) in terms of section 30(b)(ii) of FOISA.

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

47. The Commissioner will now go on to consider the SPA's application of the exemption in section 30(c) of FOISA to the information which she does not accept is exempt from disclosure under section 30(b)(ii). This comprises the appendices to the report and the information contained in paragraphs 16.1.1, 16.1.2 and 16.1.15 of the meeting minute.
48. 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 also subject to the public interest test in section 2(1)(b) of FOISA.

49. The SPA made a number of arguments to the Commissioner as to why the exemption in section 30(c) applied to this information. Not all of these arguments can be reflected here, as to do so would disclose some of the information which is at the heart of this appeal.
50. The SPA also argued that it was the role of its Board to hold Police Scotland to account and thus ensure that the public received a proper service and that taxpayers obtain value for money. In the SPA's view, if Board members backed down from robust challenges for fear of the granular, as opposed to high level, information being published then this would be prejudicial to the effective conduct of public affairs.

The Commissioner's view

51. The Commissioner has again considered the content of the withheld information along with the SPA's submissions on this exemption.

Appendices to the report

52. As noted above, some of the figures withheld by the SPA in the appendices to the report are already in the public domain. Therefore, for the same reasons as those in relation to section 30(b)(ii), the Commissioner is unable to accept that the exemption in section 30(c) of FOISA can be engaged in relation to that information or to the generic headings contained within the appendices.
53. In relation to the remainder of the information in the appendices, the Commissioner accepts that this information is not publicly available. Having considered the SPA's submissions, the Commissioner accepts that the disclosure of such information would, or would be likely to, result in the harm envisaged by the SPA.
54. It is clear that the information under consideration is sensitive and remained unresolved at the time of the SPA's response to Mr Gourtsoyannis's request for review. In the Commissioner's view, disclosure of the information would undermine discussions addressing the financial challenges being faced and would have a detrimental effect on ongoing action being taken undertaken. In all the circumstances of the case, the Commissioner accepts that the SPA was correct to apply the exemption in section 30(c) of FOISA to this particular information.

Paragraphs 16.1.1, 16.1.2 and 16.1.15 of the meeting minute

55. As the Commissioner has already noted in her consideration of the exemption in section 30(b)(ii), the information contained in these paragraphs of the meeting minute is factual in nature. In the Commissioner's view, this information is uncontentious and she is unable to conclude that there would be any prejudice to the effective conduct of public affairs by its disclosure. Accordingly, she does not accept that the disclosure of this information is exempt from disclosure in terms of section 30(b)(ii) of FOISA.

Public interest test

56. The Commissioner has concluded that the information contained in the appendices to the report (with the exception of the information that is already in the public domain) is exempt from disclosure under section 30(c) of FOISA. She will now go on to consider the application of the public interest test in section 2(1)(b) in relation to this information.

57. The SPA accepted that the public had a right to know how the budget deficit was going to be managed once it had decided how that would be achieved in practice. However, the SPA did not consider that the information should be disclosed when discussions were at a conjectural stage which may then be exacerbated by public comment.
58. Mr Gourtsoyannis's submissions on the public interest were the same as those which he provided in relation to the section 30(b)(ii) exemption. His submissions are summarised at paragraphs 41 and 42 above.
59. Again, the Commissioner acknowledges that there is always a public interest in transparency and accountability and in scrutinising the decision-making processes followed by public authorities. Having considered Mr Gourtsoyannis's submissions on the public interest, she accepts that there is a considerable public interest in the disclosure of this information to him and the wider public.
60. However, she also accepts that there is a public interest in allowing public authorities to consider and formulate their plans and policies fully before coming to a finalised position. In the Commissioner's view, speculation and conjecture about such plans and policies, before a final position had been decided, would lead to an unnecessary and diverting public discussion which would be contrary to the public interest.
61. On balance, having taken account of all of the submissions before her, the Commissioner considers the public interest in maintaining the exemption in relation to this information outweighs that in disclosing it.

Conclusion

62. The Commissioner accepts that the SPA was entitled to withhold some of the information contained in the meeting minute under the exemption in section 30(b)(ii) of FOISA. She also accepts that the SPA was entitled to withhold some of the information contained in the appendices to the report under the exemption in section 30(c).
63. The Commissioner now requires the SPA to disclose to Mr Gourtsoyannis all of the information that is not exempt from disclosure in terms of section 30(b)(ii) and (c) of FOISA.
64. With this decision, the Commissioner will provide the SPA with a marked up copy of the withheld information, indicating the information that should be disclosed.

Decision

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

The Commissioner finds that the SPA was entitled to withhold some information under the exemptions in section 30(b)(ii) and (c) of FOISA.

However, the Commissioner finds that the SPA incorrectly withheld the remainder of the information under the exemptions in sections 30(b)(ii) and (c), and to that extent failed to comply with section 1(1) of FOISA.

The Commissioner requires the SPA to disclose to Mr Gourtsoyannis the withheld information, with the exception of that which the Commissioner has found to be exempt from disclosure, by **30 January 2017**.

Appeal

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

Rosemary Agnew
Scottish Information Commissioner

15 December 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-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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