

Decision Notice

Decision 146/2017: Ms Jackie Baillie MSP and the Scottish Ministers

Information relating to Vale of Leven Community Maternity Unit

Reference No: 201700869

Decision Date: 7 September 2017



Scottish Information
Commissioner

Summary

The Ministers were asked for information concerning the Vale of Leven Community Maternity Unit. The Ministers disclosed some information, but withheld the remainder under the exemption in section 30(c) of FOISA (Prejudice to effective conduct of public affairs).

The Commissioner accepted that the Ministers were entitled to withhold some of the information, but that other information had been incorrectly withheld under this exemption. She required this information 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(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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 20 December 2016, Ms Baillie made a request for information to the Scottish Ministers (the Ministers). The information requested was as follows:
 - (i) A list of the Cabinet Secretary for Health and Sport’s meetings with the Chair and/or Chief Executive of NHS Greater Glasgow and Clyde since May 2016 when the Vale of Leven Community Maternity Unit was discussed, including the private meeting following the Board’s Annual Review on 4 August 2016, and a copy of all communications, including briefings, notes, minutes etc.
 - (ii) Copies of all communications between the Scottish Government, its Ministers and officials and NHS Greater Glasgow and Clyde regarding marketing activity to promote the Vale of Leven Community Maternity Unit since the Vision for the Vale, including but not limited to emails, notes of meetings, minutes, notes of telephone calls, briefings etc.
2. The Ministers did not respond to this request and, on 17 February 2017, Ms Baillie wrote asking them to review their failure to respond.
3. The Ministers did not respond to the requirement for review within the timescale set down in section 21(1) of FOISA.
4. On 21 March 2017, Ms Baillie applied to the Commissioner for a decision on the Ministers’ failure to respond to her requirement for review.
5. The Ministers subsequently carried out a review and notified Ms Baillie of the outcome on 24 April 2017. The Commissioner then issued *Decision 058/2017 Ms Jackie Baillie MSP and*

*the Scottish Ministers*¹. This decision found breaches of the technical requirements of FOISA in the Ministers' handling of the request.

6. In their review outcome, the Ministers disclosed some information, comprising the dates of meetings falling within the scope of part (i) of the request. The Ministers withheld all other information falling within the scope of the request under the exemption in section 30(c) of FOISA. This was on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
7. On 15 May 2017, Ms Baillie wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Baillie stated she was dissatisfied with the outcome of the Ministers' review as she did not consider that the disclosure of the information would inhibit the effective conduct of public affairs and she considered there was a public interest in its disclosure.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Ms Baillie 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.
9. On 30 May 2017, the Ministers were notified in writing that Ms Baillie had made a valid application. They were asked to send the Commissioner the information withheld from her. The Ministers provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, focusing on the requirements of section 30(c) of FOISA.
11. The Ministers responded with submissions.
12. During the investigation, Ms Baillie also provided submissions on the exemption in section 30(c) of FOISA and the associated public interest test.

Commissioner's analysis and findings

13. 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 Ms Baillie and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

14. 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

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700560.aspx>

would be expected to follow from disclosure. The exemption (if found to be engaged) is also subject to the public interest test in section 2(1)(b) of FOISA.

The Ministers' submissions

15. The Ministers submitted that it was necessary for the Scottish Government's Health Performance and Delivery Directorate, on behalf of the Ministers, to communicate regularly with Health Boards such as NHS Greater Glasgow and Clyde in relation to highly sensitive and contentious service planning and redesign proposals.
16. In the Ministers' view, due to the nature of these proposals (frequently designated as major service changes) it was likely that they would ultimately be subject to Ministerial clearance and approval. As such, they submitted, it was essential for officials in both the Health Boards and Scottish Government to be able to communicate fully and frankly in order to identify issues, and negotiate, discuss and debate issues arising, in order to effectively manage the process of developing health services in Scotland.
17. The Ministers considered disclosure of certain aspects of these communications would be likely to substantially prejudice the Health Boards' trust in the Scottish Government, thereby inhibiting the Ministers' ability to undertake communications and discussions of this type in the future.
18. In the Ministers' view, if they were unable to engage in a free and frank manner without fear of publication before a settled view had been reached, this would substantially prejudice the Scottish Government's ability to ensure it had all the necessary information required to make fully informed decisions.

Ms Baillie's submissions

19. Ms Baillie did not agree that disclosure of the information would inhibit the effective conduct of public affairs. She considered the lengthy delay in responding to her request was indicative of the lack of transparency in the Ministers' approach to the request.
20. Ms Baillie contended that Ministers and their officials were in regular contact with public bodies and similar information had been disclosed in relation to previous FOI requests, including information relating to services at the Vale of Leven Hospital. She submitted that there had been no unintended consequences for the conduct of public affairs as a result of such disclosures. In her view, it was ridiculous to suggest that disclosing the information would have such a negative impact on trust between the two agencies that the NHS would no longer speak to the Scottish Government about the future of health services.
21. Ms Baillie stated that the Cabinet Secretary for Health gave a statement to the Scottish Parliament on 2 November 2016, setting out the process for considering the service change proposals at the Vale of Leven Maternity Unit. Ms Baillie stated that, in this statement, the Cabinet Secretary indicated that the Scottish Government would not pre-judge the outcome of the public engagement exercise and NHS Greater Glasgow and Clyde would consider its next steps, including whether to proceed with the proposals, at its next Board meeting.
22. Ms Baillie pointed out that her request was submitted on 20 December 2016. This was before it was known whether the proposals would proceed and before the Scottish Government had engaged with the arguments for and against service change. As such, she did not see why there should be anything in the documents that could substantially prejudice the effective conduct of public affairs.

The Commissioner's view

23. The Commissioner has considered carefully the submissions made to her by both Ms Baillie and the Ministers along with the content of the withheld information.
24. The information under consideration in this case comprises emails between the Scottish Government and NHS Greater Glasgow and Clyde officials and a Ministerial briefing.
25. The Commissioner is not persuaded that the disclosure of the majority of this information would cause the harm envisaged by the Ministers. In the Commissioner's view, most of the information is uncontentious and relatively innocuous in nature. The Commissioner is unable to accept the Ministers' assumptions that the disclosure of this information (and information of this nature generally) would inhibit their ability to communicate effectively with Health Boards in future.
26. Given the nature of this information, and in all the circumstances of the case, the Commissioner cannot accept that disclosure of these parts of the withheld information would, or would be likely to, prejudice substantially the effective conduct of public affairs under the exemption in section 30(c) of FOISA. The Commissioner now requires the Ministers to disclose this information to Ms Baillie.
27. The Commissioner does, however, accept that the exemption is engaged in relation to a section of information contained in document 4. The Commissioner recognises that this specific information is very sensitive in nature. In her view, disclosure of such information would curtail the ability of officials to make suggestions and promote options which would likely be the subject of public discussion before any finalised policy position had been adopted. This would unnecessarily divert the Ministers' and NHS Greater Glasgow and Clyde's resources in responding to such speculation. In the Commissioner's view, this would be substantially prejudicial to the effective conduct of public affairs.
28. The Commissioner recognises that the test to be considered in relation to section 30(c) is high, but she accepts in this instance that the Ministers were correct to apply the exemption in section 30(c) to this specific information.
29. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. For the information she has accepted as exempt, the Commissioner must, therefore, go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

The Ministers' submissions on the public interest

30. The Ministers recognised that there was a general public interest in the disclosure of information as part of open, transparent and accountable government, especially as the future of health services in Scotland was a topical subject with a significant range of interest. The Ministers acknowledged that disclosure of the information would inform public debate.
31. However, the Ministers considered the public interest in disclosure was outweighed by a greater public interest in allowing Ministers and officials a private space within which to explore and refine their respective thinking on shaping health services in Scotland. This would allow them to have the space in which to fully consider and debate issues arising from their thinking with candour.
32. The Ministers considered it was in the public interest for the Scottish Government to be able to rely on high quality information and advice, particularly in discussions where issues were

of a highly contentious nature. In their view, there was also a strong public interest in maintaining the integrity of the process of free and frank discussion.

33. The Ministers submitted that knowledge of the possible disclosure of early stage thinking would be likely to inhibit the Health Boards and the Scottish Government from communicating as openly in the future. In their view, this would substantially prejudice the candour and frequency with which issues were discussed, deliberated and revised in future, which would in turn substantially prejudice the decision-making process and undermine the purpose of Ministerial oversight.

Ms Baillie's submissions on the public interest

34. In Ms Baillie's view, if the information revealed that the Scottish Government had in fact expressed a view on the proposals (despite the Cabinet Secretary's parliamentary position that she would not), then it would surely be in the public interest for the information to be disclosed.
35. Ms Baillie submitted that the public interest was better served by disclosure, given the high level of concern around the future of Vale of Leven Hospital. She noted that the number of beds and staff at the hospital had fallen sharply in recent years, while the range of services had reduced due to the increasing centralisation of NHS services.
36. Ms Baillie stated that there was a strong perception among local patients that the Health Board was deliberately "running down" the hospital and there were concerns over a number of key services under review. Ms Baillie argued that the Scottish Government had a responsibility to be open, transparent and accountable, so constituents had a right to know what discussions had taken place between Ministers and officials regarding the hospital's future.
37. Specifically in relation to part (ii) of the request, Ms Baillie considered disclosure of the information was vital in informing public debate on the future of the maternity unit at the hospital. She explained that the Health Board had cited the low number of births at the hospital as the main reason for the proposal to close the birthing unit, but local campaigners believed the decrease was due to the Board's failure to market the service effectively and a change to clinical protocols. In her view, unless this information was disclosed, the public would not have the full facts available to decide whether the commitment to marketing the maternity unit had been delivered.

The Commissioner's view on the public interest

38. The Commissioner accepts there is a general public interest in transparency and accountability. In this case, she accepts that the matters under consideration are of significant interest to the public and of particular importance to service users and residents in the area served by Vale of Leven Hospital.
39. The Commissioner also acknowledges the risk of substantial prejudice to the effective conduct of public affairs in this case. She accepts that the matters under consideration here, while of significant importance, related to the early consideration of potential options for service delivery, ahead of a public consultation on the matter. At the time of the request, no decision had been taken on future plans for the maternity unit.
40. The Commissioner considers there is a strong public interest in allowing public authorities the opportunity, in confidence, to consider policy options and decisions which are at an early stage of development. In her view, disclosure of the information in this case risks

jeopardising the Ministers' ability to obtain the candid views of officials and to discuss and appraise these views fully: that would not be in the public interest.

41. 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 specific information outweighs that in disclosing the information.
42. The Commissioner therefore finds that the Ministers were entitled to withhold this specific information under section 30(c) of FOISA.
43. With this decision, the Commissioner will provide the Ministers with a copy of the document in question, indicating the information to be withheld. All remaining information falling within the scope of the request should be disclosed.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Baillie.

The Commissioner finds that the Ministers complied with Part 1 by correctly withholding some information under the exemption in section 30(c) of FOISA.

However, the Commissioner also finds that the Ministers were not entitled to withhold some information under section 30(c). By doing so, they failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to disclose to Ms Baillie the information incorrectly withheld under section 30(c) of FOISA. The Commissioner requires the Ministers to disclose this information by **23 October 2017**.

Appeal

Should either Ms Baillie or the Scottish Ministers 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 Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

7 September 2017

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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