

Decision Notice 087/2020

SPFL Report on fan behaviour at football fixtures

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 201901001



Scottish Information
Commissioner

Summary

The Ministers were asked for their correspondence with the SPFL regarding SPFL grading assessment rules relating to fan behaviour at football matches, and for the SPFL “end of season” report on this sent to Ministers in 2018.

The Ministers disclosed some correspondence, but refused to provide other information, including the report, on the basis that disclosure would not only prejudice the effective conduct of public affairs, but also lead to an actionable breach of confidence. They also withheld some information which they considered to be personal data.

During the investigation, the Ministers changed their position for some of the withheld information, having recognised that this was already publicly available.

The Commissioner investigated and found that the Ministers had wrongly withheld some other information as either confidential or because of substantial prejudice to the effective conduct of public affairs. He required the Ministers to disclose the information found to have been wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) and (c) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(c) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality)

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 30 November 2018, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was details of all correspondence between the Scottish Government and the Scottish Professional Football League (SPFL) regarding the SPFL grading assessment rules relating to fan behaviour at football matches from 1 July 2017 to 30 November 2018, plus a copy of any “end of season” report prepared by the SPFL on this subject and sent to the Ministers during 2018.
2. The Ministers responded on 3 January 2019, disclosing some correspondence (a redacted email chain). They refused to provide any further information, as they considered this to be exempt from disclosure under the following exemptions in FOISA, as summarised:
 - Section 38(1)(b): the Ministers considered some of the information to be third party personal data, disclosure of which would breach the data protection principles in Article 5(1) of the General Data Protection Regulation and section 34(1) of the Data Protection Act 2018.
 - Section 36(2): the Ministers withheld all of the information on the basis that disclosure would constitute an actionable breach of confidence. They considered the information was confidential, was provided by the SPFL in circumstances which imposed an

obligation on the Ministers to maintain that confidentiality, and unauthorised disclosure would be to the SPFL's detriment.

- Section 30(c): the Ministers withheld all of the information on the basis that disclosure, particularly without the stakeholder's consent, would prejudice communications between the Ministers and stakeholders on this type of issue in future. This, in turn, would significantly harm the Ministers' ability to carry out many aspects of their work and make fully informed decisions on unacceptable conduct. The Ministers explained why they believed that the public interest favoured non-disclosure.

3. On 1 February 2019, the Applicant wrote to the Ministers, requesting a review of their decision to withhold the SPFL report. The Applicant argued that the information in the report had a clear impact on public policy relating to tackling sectarianism in society. In support of its view, the Applicant referred to:

- an extract from the 2017 report¹ "Tackling sectarianism in Scotland: review of implementation", published by the Ministers on behalf of their Independent Advisor on Sectarianism, Dr Duncan Morrow [specifically, third and fourth recommendations under "Football" on pages 31-32]. This extract related to the need for monitoring the current system in place for reporting, investigating and determining sectarian conduct at SPFL and Scottish Football Association (SFA) matches, and
- a link to an article on the BBC website² published in March 2018 relating to concerns expressed by "whistleblowers" within the SPFL match observer system, highlighting their concerns about how reports passed to the SPFL are treated. In the Applicant's view, this called into question the integrity of the current system.

The Applicant confirmed it was happy to accept that personal emails might fall outwith the terms of FOISA, but could see no valid reason for the withholding of the report, particularly given the recommendations by Dr Morrow in his 2017 report.

4. The Ministers notified the Applicant of the outcome of their review on 26 February 2019, fully upholding their original decision in respect of the exemptions in sections 30(c) and 36(2) of FOISA, for the reasons set out in their original response. In respect of any personal information withheld under section 38(1)(b), the Ministers clarified that the emails did not fall outwith FOISA and the exemption applied to the personal data in them. The Ministers further commented that neither the extract from Dr Morrow's report nor the BBC article (referred to in the request for review) raised any issues not originally considered by the Ministers, nor did they provide any grounds for changing their original decision.

5. On 14 June 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated it was dissatisfied with the outcome of the Ministers' review on the following basis:

- It believed that, even if some information was exempt from disclosure, it was highly unusual for an entire document to be withheld, and an appropriately redacted version could be disclosed.

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<https://www.gov.scot/publications/review-implementation-recommendations-advisory-group-tackling-sectarianism-scotland-report-dr/pages/4/>

² <https://www.bbc.co.uk/sport/football/43395124>

- It considered the exemptions had been wrongly applied. For section 30(c), it argued that the Ministers had not fully explained how disclosure of the information would damage public affairs, and had failed to prove that such damage would be “likely” as well as “real and demonstrable”. For section 36(2), it believed the Ministers had failed to explain and evidence the circumstances which imposed an obligation on them to maintain confidentiality, for example, the signing of a contract that would allow the SPFL to sue the Ministers for disclosure.
- In terms of the public interest, it believed non-disclosure of the information represented an unjustifiable barrier to proper public scrutiny of a matter of national importance and public concern.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 27 June 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers 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 Ministers were invited to comment on this application and to answer specific questions. These focused on the Ministers’ justification for withholding the information in the report under the exemptions in sections 30(c) and 36(2) of FOISA. The Ministers were also asked to clarify which of the information provided fell within the scope of the request for the “end of season” report.
9. On 11 July 2019, the SPFL wrote directly to the Commissioner expressing its views on disclosure of the information requested. As it was not normal practice for the Commissioner’s office to correspond directly with any third party during an investigation, the SPFL was asked, and agreed, to forward its views to the Ministers for their consideration and, if necessary, inclusion with their submissions to the Commissioner.
10. As the Ministers were withholding the information under an exemption in FOISA which is subject to the public interest test (section 30(c)), the Applicant was also invited to submit any further comments on the public interest in disclosure of the information.
11. Both parties provided the Commissioner with submissions.

Commissioner’s analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Information held

13. As stated above, the Ministers were asked to clarify which parts of the withheld information, provided to the Commissioner, constituted the “end of season” report requested by the

Applicant. They were also asked to explain the searches carried out to identify and locate the information falling within the scope of this part of the request.

14. In response, the Ministers confirmed that the report comprised three specific elements, plus two annexes. They explained that the information requested was held in their electronic Record and Document Management System (eRDM) in a "Football: Professional: Advice and Policy part 2" file. The Ministers submitted that, given the recent period of the request, the Policy Lead on fan behaviour at football matches was aware this was the only report received. As such, the Ministers were satisfied that no further searches were considered necessary.
15. The Ministers were also asked to explain why one of the annexes in the withheld information (Annex B) contained a heading only. In response, the Ministers explained that this was the only version they held and which had been used for internal considerations. They submitted that, given the passage of time, the Policy Lead was unable to comment further as to why the missing information had not been obtained.
16. Having considered the Ministers' submissions, the Commissioner is satisfied that the Ministers identified and located all the relevant information they held that fell within the scope of the Applicant's request for the "end of season" report.

Section 25(1) – Information otherwise accessible

17. 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 that information by the authority, subject to qualifications which (by virtue of section 1(6) of FOISA) allow Scottish public authorities to withhold information or charge a fee for it.
18. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.
19. In their submissions, the Ministers informed the Commissioner that, in respect of the information contained in Annex A, they now wished to withdraw reliance on the exemptions applied at review stage. They confirmed that they now wished to rely retrospectively on section 25(1) of FOISA for this information, as it was publicly available at the time the Applicant made its request.
20. On 30 July 2019, the Ministers issued a further response to the Applicant, informing it that this information was publicly available (and so exempt under section 25(1) of FOISA), and providing the relevant link to where the information could be accessed online.
21. The Applicant subsequently confirmed to the Commissioner that it did not accept that the Ministers' further response, effectively providing a link to the information in Annex A, satisfied its request.

The Commissioner's view - section 25(1)

22. It is a matter of fact that, in responding to the Applicant's request and requirement for review, the Ministers withheld the information in Annex A under the exemptions in sections 30(c) and 36(2) of FOISA. During the investigation, the Ministers effectively withdraw reliance on these exemptions and substituted them with section 25(1), given that they had retrospectively identified that this information was publicly available at the time of the request.

23. The Commissioner is satisfied that the Ministers were entitled to apply section 25(1) of FOISA to this information. In the circumstances, he finds that while, by the end of the investigation, the Ministers had properly applied section 25(1), they wrongly withheld the information in Annex A under the exemptions in sections 30(c) and 36(2) at review and, by so doing, breached section 1(1) of FOISA.
24. Given that the Ministers provided the Applicant with a revised response, effectively substituting the exemptions originally applied (to the information in Annex A) with section 25(1), and providing the relevant link to the publicly available information, the Commissioner does not require the Ministers to take any further action in relation to this failure. The Commissioner is, however, disappointed to note the original withholding of information under sections 30(c) and 36(2) which was already publicly available.
25. The Commissioner will now go on to consider whether the Ministers were entitled to withhold the remainder of the report under the exemptions in sections 36(2) and 30(c) of FOISA.

Section 36(2) – Confidentiality

26. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure, by the authority so obtaining it, to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.

Information obtained from another person

27. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
28. In their submissions, the Ministers confirmed that the information under consideration here (the report) had been supplied to them by another person, namely the SPFL, having been sent to the Ministers by the SPFL in confidence, with a letter setting out the explicit conditions attached to its use.
29. In the circumstances, the Commissioner is satisfied that all of the withheld information was obtained by the Ministers from another person and that the first part of the section 36(2) test has been fulfilled.

Actionable breach of confidence

30. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
31. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;

- (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.
32. In its application to the Commissioner, the Applicant was dissatisfied that, while the Ministers claimed the information was confidential and had been provided in circumstances which imposed an obligation on them to maintain confidentiality, they had not made clear, or evidenced, what those circumstances were (or what detriment there would be in the event of disclosure).

Necessary quality of confidence

33. The Ministers referred to the SPFL's covering letter to the report, which confirmed that the accompanying information was not publicly available or accessible. The Ministers further submitted that, in this letter, the SPFL had specified the limited uses that could be made of the information, and listed the parties it had consented to sharing the information with.
34. For these reasons, the Ministers believed the information had the necessary quality of confidence at the time of the request (and remained so) as it was not common knowledge, not publicly available and had not been shared outwith the parties listed in the SPFL's covering letter.
35. Having considered the information requested and the arguments put forward by the Ministers, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence. In the form in which it is presented in the report, the information is not common knowledge and could not readily be obtained by the Applicant by any other means (that said, however, much of it relates to matters which are themselves public knowledge, given the proactive approach taken by some clubs surrounding fan behaviour and improving safety at football fixtures: the implications of this will be considered further in assessing the public interest, below).

Obligation to maintain confidentiality

36. The Ministers submitted that the SPFL's covering letter to the report was explicit as to its intentions when providing the information, in confidence. As noted at paragraph 33, they referred to the limitations set out in the covering letter. In the circumstances, the Ministers considered they had received the information in circumstances which imposed an obligation to maintain confidence, expressly recorded.
37. The Ministers further submitted that the SPFL had confirmed that its position remained that, should the Ministers disclose the information, it will claim a breach of confidentiality, for the reasons set out in its letter to the Commissioner dated 11 July 2019.
38. As such, the Ministers confirmed they were relying on an explicit obligation of confidence and considered the SPFL to have a strong legal claim to challenge the disclosure of any information which would breach this explicit obligation.
39. Having considered the circumstances of its provision to the Ministers, the content of the SPFL's covering letter to the report and the SPFL's letter to the Commissioner dated 11 July 2019, the Commissioner is satisfied that the information withheld from the Applicant was received in circumstances which imposed upon the Ministers an obligation to maintain confidentiality. The withheld information falls within the overall definition of "confidential

information” as described in the covering letter. On the face of it, therefore, he is satisfied that there is an explicit obligation of confidence.

40. While the obligation to maintain confidentiality might not remain in place for all time, the Commissioner is satisfied that it did remain in place at the time the Ministers received the request and when they carried out their review. Whether it was realistic for the SPFL to expect that the information would, in fact, remain confidential is another matter, on which the public interest (considered below) has some bearing.

Unauthorised disclosure which could cause detriment

41. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In that respect, the test of detriment is different from establishing whether, for example, disclosure would *prejudice substantially* the commercial interests of any person when considering the exemption in section 33(1)(b) of FOISA.
42. In its application to the Commissioner, the Applicant argued that, as the only professional football league operating in Scotland, the SPFL had no commercial competition that would stand to benefit from information which might compromise its reputation. It questioned whether disclosure of the information would truly be to the detriment of the SPFL, as claimed by the Ministers, and in what way, for example financial, reputational, or risk of prosecution.
43. The Ministers submitted that disclosure would be detrimental to the interests of the SPFL. While they conceded that the SPFL’s covering letter did not give a detailed indication of the detriment likely to be caused to the SPFL, the Ministers submitted that policy officials from the Active Scotland division had been in extensive dialogue with the SPFL both prior to, and following, receipt of the report. In addition, officials met with the SPFL and other stakeholders in Scottish football on a regular basis where this subject, and the information provided by the SPFL, had been discussed. As such, officials were satisfied that the detriment to the SPFL’s interests was clear and sufficient.
44. The Ministers further submitted that a representative of Active Scotland had confirmed, through discussions with the SPFL, that disclosure of the information would likely materially damage the SPFL’s relationship with its member clubs/shareholders and delegates, who would be less open or even unwilling to share data. In this regard, the Ministers noted that the SPFL had stated it would likely stop collating and sharing this type of information, should it be disclosed. This, the Ministers submitted, would be to the detriment of the evidence base used by the SPFL, its members and the Ministers to inform decisions on relevant issues: if it was not available, these parties would have only a partial understanding of supporter conduct in football stadia, thus impairing collaborative work to develop policy responses on this important issue.
45. The Ministers believed that their relationships with stakeholders, including the SPFL, were crucial to meeting their overall objectives to develop effective evidence-based policies to reduce or eliminate unacceptable behaviour in Scottish football. In order to do so, they submitted that stakeholders must be able to engage with the Ministers safe in the knowledge that their information would, where appropriate, remain private. The Ministers submitted that disclosing sensitive information such as this would have a negative impact on potential outcomes.

46. As the SPFL used the information in the report to communicate with Police Scotland on specific incidents, the Ministers considered disclosure could give insight into the monitoring process which would be less effective were the SPFL unable to provide this information as robustly in future. The Ministers submitted that this detriment was evidenced in a statement by a representative of Active Scotland, and in the SPFL's letter to the Commissioner of 11 July 2019.
47. The Commissioner considers these submissions relevant to the withheld information. Having considered that information, alongside the submissions by the Ministers, he is satisfied that its disclosure would not be authorised by the SPFL and was sufficiently detrimental to meet the requirements for an actionable breach of confidence. In other words, the relatively low threshold of harm for such a breach has been met: it does not follow that the Commissioner accepts all of the Ministers' concerns as to harm (see below, in relation to the public interest).
48. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are met in this case.
49. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider where the balance of public interest lies in disclosure of the information.

Public interest defence – section 36(2)

50. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
51. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
52. In its submissions to the Commissioner, the Applicant argued that, given the recommendations in Dr Morrow's report, and the very clear public interest motivation contained therein, it was wholly inappropriate for the Ministers to enter into any agreement with the SPFL that the report should be hidden from public view and scrutiny. In the Applicant's view, this was an attempt to unjustifiably inhibit public scrutiny of matters of high national importance and genuine public concern.
53. The Applicant further submitted that the cross-party Scottish Parliament's Justice Committee had written to the SPFL, asking for a copy of the report for scrutiny. This, the Applicant claimed, was another clear indication that the information should be in the public domain.
54. In their submissions to the Commissioner, the Ministers recognised a general public interest in openness, transparency and accountability. They also acknowledged that disclosure of the information could help inform public debate, given the public interest in unacceptable conduct in Scottish football.
55. In contrast, however, the Ministers considered there was a strong public interest in maintaining and respecting explicit confidences where information was collated and shared on a confidential basis, as was the case here. In their view, this was underpinned by the

strong public interest in maintaining trust between stakeholders to facilitate the sharing of information for the purpose of reviewing and reducing societal issues in Scottish football, and to improve public safety and enjoyment at such events.

56. The Ministers considered there was no public interest in disclosing information that would result in stakeholders, such as the SPFL, being reluctant to share such detailed information in future. This, in turn, would undermine the quality of the decision-making process, through less-informed decisions being taken.
57. In conclusion, the Ministers believed there was no public interest defence permitting disclosure of the information.

Third party views

58. With their submissions, the Ministers provided copies of the two SPFL letters (the covering letter to the report, and the SPFL's letter to the Commissioner dated 11 July 2019), setting out the SPFL's views on disclosure of the information at the time it was provided to the Ministers, and at the start of the Commissioner's investigation. In summary, the SPFL's position was that the information was strictly private and confidential and should not be published without the approval of the SPFL.
59. The Ministers also provided a statement from a representative of Active Scotland, detailing the relevant information provided during regular discussions with the SPFL. This outlined that the information was considered sensitive from the outset, and that it was provided by member clubs and delegates to the SPFL in confidence, with the expectation that it would not be made public.
60. The Ministers submitted that, given that the SPFL's views were known to policy officials, they did not consider it appropriate to seek further written comments from the SPFL at the time of the information request, or request for review.

The Commissioner's views on the public interest defence – section 36(2)

61. In coming to a decision on this matter, the Commissioner has taken account of the public interest defence submissions made by the Ministers (including the third party views which are summarised above), and the submissions made by the Applicant on the public interest in disclosure of the information. He has also taken account of the content of the withheld information.
62. The Commissioner must consider the actual circumstances of the case, and whether the Ministers were correct in their decision, at the time they responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Ministers responded to this particular request correctly at the relevant time.
63. The Commissioner recognises there is clearly a strong public interest in transparency, to allow effective scrutiny of information relating to a matter of genuine public concern. There is no doubt that the elimination of unacceptable conduct at football matches is a matter of the utmost public concern.
64. On the other hand, there is also a strong public interest in the maintenance of confidences.
65. The Commissioner also recognises that, for some of the withheld information, its disclosure could lead to reputational damage to some clubs in terms of negative publicity, particularly where the information could be linked to specific fixtures and used to form a "league table" of incidents across clubs. Further, the Commissioner accepts that disclosure of some of the

information would potentially damage the relationship between the SPFL and its member clubs, with clubs becoming less willing to share such data in future, leading to less detailed information being provided to Ministers as evidence used in considering the issue of supporter conduct in Scottish football.

66. On balance, having considered all relevant submissions and the withheld information itself, the Commissioner is not persuaded that, for some of the withheld information, there is a public interest in disclosure sufficiently strong to outweigh the public interest in maintaining confidentiality. For that information, therefore, the Commissioner has concluded that there is no reasonable argument, in this case, for disclosure on public interest grounds and is consequently satisfied that the Ministers were entitled to withhold that information under section 36(2) of FOISA.
67. However, for the remainder of the withheld information, the Commissioner is not persuaded by the arguments put forward by the Ministers.
68. Having carefully examined the content of that remaining information in detail, the Commissioner notes that it is mainly factual in nature, or comments on information already publicly available. As rehearsed above, he recognises the concerns surrounding the disclosure of sensitive information which could potentially harm the reputation of some clubs, in the event that particular incidents or actions could be linked to specific clubs and so allow for some kind of crude comparison across clubs. For any information where this may be a possibility, however, he is satisfied that the information is capable of being disclosed in a way that would “anonymise” incidents, and prevent such comparison from being made, without losing the quality and substance of the data.
69. In the Commissioner’s view, disclosure of this particular information in this way would not cause detriment to the clubs who provided this type of information to the SPFL, as claimed by the Ministers. It is evident that some of the information is about matters already in the public domain, and the Commissioner does not believe disclosure of any of it under FOISA would lead to a breakdown in relationships between the SPFL and its member clubs. Neither does he believe it would lead to an unwillingness by the SPFL, and its member clubs, to continue to collate and share such information for the purpose of reviewing and tackling societal issues in Scottish football, and improving public safety and enjoyment at football matches, particularly as there appears to be a strong public appetite for such issues to be tackled. The SPFL and its members depend on the support of the public and it can hardly be in their interests to draw back from engaging fully and constructively with the Scottish Government and other relevant public agencies in these areas.
70. The Commissioner has also considered whether disclosure of the remaining withheld information would give any detailed insight into the monitoring and evaluation process undertaken in compiling the data in the report. Having done so, he does not believe disclosure would make this less effective, or would compromise the SPFL’s ability to effectively communicate with the police service in relation to specific incidents.
71. The Commissioner also notes that the Ministers’ position on the public interest appears to be at odds with the view of the Cabinet Secretary for Justice, as set out in the Scottish Parliament Questions (SPQ) transcript of 18 June 2019³. While stating that the information could not be published, as the data was not the Scottish Government’s and was provided

³ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12194&i=110128>

with the proviso that it remained confidential, the Cabinet Secretary appeared to take the view that the data *should be* published and that this was in the general public's interest.

72. The Commissioner has also taken into account the recommendations (on football) in Dr Morrow's report, the penultimate of which (on page 32) recommends:

... outcomes of robust monitoring and evaluation ... should be published annually to allow for a genuine debate on the extent of sectarian behaviour and attitudes in football, its impact on culture and the effectiveness of measures to reduce it, and to help further reviews.

This recommendation clearly outlines the benefit in proactively publishing information to enable progress to be made on identifying and reducing sectarian behaviour and attitudes in football, a matter which is of significant public concern. In the Commissioner's view, and specifically in relation to the information under consideration here in relation to section 36(2), any attempt to keep this information from public view is in clear conflict with this identified public interest, and would unjustifiably inhibit public scrutiny of a matter of genuine public concern.

73. In conclusion, the Commissioner has found that there is a strong public interest defence permitting disclosure of the remainder of the information withheld by the Ministers under section 36(2) of FOISA, in a manner which, in line with the duty in section 1(1) of FOISA, would not lead to an actionable breach of confidence.
74. He therefore concludes that the information in question was not exempt from disclosure under section 36(2) and the Ministers were not entitled to withhold it under this exemption.
75. As the Ministers are also withholding this information under the exemption in section 30(c) of FOISA, the Commissioner is now required to go on to consider the application of that exemption to the information he has found to have been wrongly withheld under section 36(2).

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

76. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
77. 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.
78. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
79. In its application to the Commissioner, the Applicant disagreed with the Ministers' view that disclosure of the report would prevent the SPFL furnishing them with similar information in the future. Given that sport was wholly devolved to the Scottish Parliament (including associated matters such as stadium licensing and public order responsibilities), plus the fact

that the SPFL and its members clubs had benefited from millions of pounds of public money, the Applicant found it absurd that the Ministers believed the SPFL would refuse to continue to provide them with information concerning public order and possible criminal offences at football matches. It further argued that the Ministers had not only failed to demonstrate how disclosure of the report would damage the effective conduct of public affairs, but had also failed to prove that such damage would be “likely” as well as “real and demonstrable”.

80. In their submissions to the Commissioner, the Ministers stated that the exemption in section 30(c) applied as disclosure of this information, without the SPFL’s consent, would likely undermine its trust in the Ministers and substantially inhibit future communications on this type of issue. The Ministers submitted that it was essential for officials to be able to communicate, often in confidence, with external stakeholders on the future development of a range of issues, including unacceptable conduct and societal issues in Scottish football. In the Ministers’ view, the SPFL would be less likely to provide such detailed information – at all, or at least as fully, freely and frankly – should it believe its information or views were likely to be made public, particularly where these related to sensitive or controversial issues, or to information obtained by the SPFL from its members on a confidential basis.
81. The Ministers also considered that candid discussions with relevant stakeholders were necessary to ensure these issues were addressed as robustly as possible, with sufficient research having been undertaken to identify options most likely to positively impact behavioural change. They submitted that access to detailed information, of the nature under consideration here, allowed for consideration of issues not otherwise apparent from less detailed information. In the Ministers’ view, disclosure of the report would adversely impact their ability to engage with stakeholders in any future collaboration on this, or similar subjects, should stakeholders believe their input, given in a confidential environment, would likely be subject to public scrutiny.
82. For these reasons, the Ministers believed that disclosure of the information, without the SPFL’s consent, would not only significantly harm their ability to carry out many aspects of their work on this issue and their wider ongoing relationships with stakeholders, but could also lead to policies being less effective in achieving the aim of eradicating unacceptable behaviour at football matches. Were such detailed information not available, the Ministers argued, they would only have a partial understanding of supporter conduct, which would impair their ability to develop robust policy to improve safety and experience at Scottish football fixtures and in the wider community.

The Commissioner’s views – section 30(c)

83. The Commissioner has taken account of all the relevant submissions, together with the corresponding withheld information.
84. The Commissioner is not persuaded that disclosure of the remaining information withheld under section 30(c) would cause (or be likely to cause) the harm envisaged by the Ministers. Indeed, he finds elements of the Ministers’ submissions to be somewhat over-stated for this information, some of which is largely factual in nature or comments on information already publicly available.
85. The Commissioner notes, from the Ministers’ submissions, that they consider disclosure of the information would lead to a reluctance by the SPFL and its member clubs, to provide such information in future, and that this would impair the Ministers’ ability to engage with stakeholders on the development of issues relating to unacceptable behaviour, inhibit communications on this type of issue, and lead to a lack of trust.

86. While the Commissioner recognises that Ministers must be allowed private space in which sensitive matters can be discussed and explored, he does not believe they have demonstrated that disclosure of the remaining withheld information would cause the substantial prejudice claimed. The Ministers appear to have taken a “blanket approach” in applying section 30(c) to the entire report (influenced to a large extent, it would appear, by the SPFL) and, as indicated above in considering the public interest defence for the purposes of section 36(2), the Commissioner is not satisfied that their concerns as to continuing engagement with the process have been borne out in relation to the information under consideration here.
87. The Commissioner is also aware, as stated above, that some of the remaining withheld information is about matters already in the public domain, due to the proactive approach taken by some clubs surrounding fan behaviour and improving safety at football fixtures.
88. The Commissioner has again taken into consideration that the Ministers’ position here appears to be at odds with that of the Cabinet Secretary for Justice, as set out in the SPQ transcript of 18 June 2019, where he stated that the data *should be* published and that this was in the general public’s interest.
89. In all the circumstances, therefore, the Commissioner is not persuaded, from the submissions he has received, that disclosure of the remaining information withheld under section 30(c) would result in the harm claimed by the Ministers.
90. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs. He does not believe such a conclusion can be reached on the basis of the arguments provided.
91. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of the remainder of the information withheld under this exemption.
92. Given that the Commissioner does not accept the application of the exemption for the remainder of the information withheld under section 30(c), he is not required to consider the public interest test in section 2(1)(b) of FOISA for that information.
93. As no further exemption has been claimed to justify the withholding of the information he has found not to be exempt under either section 30(c) or section 36(2) of FOISA, the Commissioner requires the Ministers to disclose it to the Applicant. He will identify that information to the Ministers along with this Decision Notice, in a marked-up copy of the report.

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 the Applicant.

The Commissioner finds that the Ministers were correct to withhold some information under section 36(2) (Confidentiality) of FOISA, and so complied with Part 1 of FOISA in that respect.

However, he finds that the Ministers were not entitled to withhold other information under the exemptions in section 36(2) (Confidentiality) and section 30(c) (Prejudice to effective conduct of public affairs), and in so doing failed to comply with section 1(1) of FOISA.

Given that, during the investigation, the Ministers issued the Applicant with a further response, withdrawing their reliance on sections 36(2) and 30(c) for Annex A and substituting section 25(1) for the withheld information therein, the Commissioner does not require the Ministers to take any further action in respect of their failure in that regard, in response to the Applicant's application.

However, the Commissioner requires the Ministers to provide the Applicant with the other information found to have been wrongly withheld under section 36(2) and section 30(c), by **28 August 2020**.

Appeal

Should either the Applicant or the 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 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.

Daren Fitzhenry
Scottish Information Commissioner

15 July 2020

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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (a) section 25;

...

- (c) section 36(2);

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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.

36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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