

Decision Notice 046/2020

Council meeting with religious representatives

Applicant: The Applicant

Public authority: Perth and Kinross Council

Case Ref: 201901765



Scottish Information
Commissioner

Summary

The Council was asked about a meeting it held with representatives of the Roman Catholic Church.

The Council withheld information on the grounds that it was either legal advice or that its disclosure would dissuade the free and frank exchange of views for deliberation.

During the investigation, the Council disclosed further information to the Applicant, but it continued to withhold some information for the reasons it had previously cited.

Following an investigation, the Commissioner found that the Council had correctly applied exemptions to the withheld information, but he also found that the Council failed to comply with section 1(1) of FOISA by initially withholding information from the Applicant that it later 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) (Prejudice to effective conduct of public affairs); 36(1) (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 7 June 2019, the Applicant made a request for information to Perth and Kinross Council (the Council). The Applicant referred to a meeting reported in the media between Bishop Stephen Robson and representatives of the Council on the matter of religious representation on education matters, and asked for:
 - (i) any correspondence regarding this meeting (both prior to the meeting and afterwards);
 - (ii) any briefings, notes, advice or any other documentation produced by Council officials in preparation of this meeting;
 - (iii) any briefings, notes, advice or other documentation produced by a third party for use by the Council in consideration of the matter being discussed;
 - (iv) any notes, minutes or any other documentation taken at the meeting or created after the meeting to capture what was discussed and agreed and
 - (v) any other documentation held by the Council on religious representatives.
2. The Council responded on 25 June 2019, providing the Applicant with a response to requests (i), (ii), (iii) and (v) and withholding information falling within the scope of request (iv) on the basis that it was exempt from disclosure under sections 30(b)(ii) and 36(1) of FOISA. The Council also redacted personal data from the information it disclosed in response to requests (ii) and (v) under section 38(1)(b) of FOISA.
3. On 26 July 2019, the Applicant wrote to the Council requesting a review of its decision on the basis that he did not agree with its consideration of the public interest as it applied to

sections 36(1) and 30(b)(ii) of FOISA. In addition, he did not accept that the exemption in section 30(b)(ii) could be upheld.

4. The Council notified the Applicant of the outcome of its review on 13 August 2019. It maintained its reliance on section 36(1) of FOISA, but it disclosed the information it was withholding under section 30(b)(ii) of FOISA.
5. On 20 September 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he did not accept that the public interest test had been properly applied to the information withheld under section 36(1) of FOISA.

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 11 October 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
8. On 16 October 2019, the Council provided the Applicant with redacted versions of three documents it had been withholding. The Council notified the Applicant that it was withholding information contained in document 3 under section 36(1) of FOISA. The Council also informed the Applicant that it was withholding information contained in documents 1 and 2 under section 30(b)(ii) of FOISA (this information had previously been withheld under section 36(1) of FOISA).
9. The Applicant wrote to the Commissioner on 21 October 2019, challenging the Council's reliance on section 30(b)(ii) of FOISA and stating that he wanted the Commissioner to investigate the Council's reliance on this exemption (as well as section 36(1) of FOISA).
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions regarding its reliance on the exemptions contained in section 30(b)(ii) and 36(1) of FOISA.

Commissioner's analysis and findings

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

Information disclosed during the investigation

12. As noted above, on 16 October 2019, the Council provided the Applicant with information which it had been previously withholding from him.
13. As the Council disclosed this information to the Applicant, the Commissioner will not consider it in his Decision. However, in the absence of submissions from the Council as to why the information was originally, but was no longer, exempt from disclosure, he must conclude that

the information was wrongly withheld from the Applicant and that, in this respect, the Council has failed to comply with section 1(1) of FOISA.

Withheld information

14. The Council is withholding information contained in three documents from the Applicant. It is withholding information contained in documents 1 and 2 under section 30(b)(ii) of FOISA and it is withholding information contained in document 3 under section 36(1) of FOISA

Section 36(1) of FOISA

15. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As noted above, the Council has applied this exemption to information it has redacted from document 3.
16. Among the types of communication which fall within this category are those which are subject to legal professional privilege.

Legal advice privilege

17. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply, certain conditions must be fulfilled:
- (i) the communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the Council
 - (ii) the legal adviser must be acting in his/her professional capacity and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with his/her client.
18. The Council has argued that the information contained in document 3 constitutes confidential communications between client and lawyer, and in particular legal advice provided by the legal advisers to the Council which is of a confidential nature. The Council explained that the information was given by an in-house solicitor in their capacity as a professional legal adviser to the Council. It confirmed that the advice was provided in the context of the solicitor's professional relationship with the Head of Legal & Government Services (i.e. the Council).
19. Having considered the content of all of the information withheld, the Commissioner is satisfied that the information contained in document 3 relates directly to seeking and obtaining legal advice from a professional legal adviser, acting in that capacity.
20. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.
21. The Applicant argued that, as the Council has disclosed part of document 3, this has resulted in a loss of confidentiality of the legal advice and so the exemption itself does not apply.
22. The Council has stated that legal professional privilege has not been waived.

23. Having considered both the information and the views put forward by the Applicant and the Council, the Commissioner is satisfied that the information contained in document 3 remained confidential at the time the Council responded to the Applicant's information request and requirement for review (and that it remains so now). While some information in document 3 has been disclosed, the Commissioner is satisfied that this does not, in any way, result in a loss of confidentiality of the information that has continued to be withheld.
24. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information in document 3 is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

25. The Council acknowledged that the general issue of the appointment of religious representatives to a Committee of the Council is a matter of some public debate, and that disclosure of such information could be in the public interest. However, it argued that there is a considerable public interest in maintaining the principle of legal advice privilege and it did not consider that the general public interest in disclosure outweighs the public interest in withholding the information.
26. The Council contended that the public interest is better served by maintaining the confidentiality of legal advice afforded by the courts and ensuring that advice from lawyer to their client is not disclosed to the public.
27. The Council also argued that the Applicant's comments are based on his presumption that the information withheld relates to the debate about religious representation rather than the matters actually discussed.
28. The Applicant has argued that disclosure would enhance the scrutiny of decision-making processes and improve accountability and transparency. The Applicant has argued that disclosure would also contribute to ensuring that the Council was meeting its statutory duties, namely the requirements under the Public Sector Equality Duty (PSED).
29. The Applicant argued that PSED requires authorities to have due regard to advance equality of opportunity between people who share a protected characteristic and people who do not share it; and foster good relations between people who share a protected characteristic and those who do not. He submitted that one such protected characteristic as defined in the Equality Act 2010 is religion or belief.
30. In this instance, the Applicant submitted that a meeting on the future influence of publicly funded and accessible schools by one religious organisation was held. He argued that no equal opportunity has been given to other groups who are equally valid religious or belief bodies under the duty nor people who are not members of any such group as is also required [by PSED].
31. The Applicant argued that it is in the public interest that members of these other religious or belief bodies (or individuals of no such group) are given fair access to information relating to the influence by a specific religious group on how local schools are run by the Education Authority. He further argued that, by holding meetings in private, the Council is not being transparent in its decision making with regard to local school provision and decision making.

32. The Applicant contended that, without disclosure of the information that has been withheld, it is impossible to ascertain to what extent the education authority is upholding its duties under PSED. He maintained that disclosure of the information is sufficiently more in the public interest than any of the reasons put forward by the Council for withholding it.

Commissioner's view on the public interest

33. The Commissioner has considered carefully the representations made by both the Applicant and the Council when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
34. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way towards providing that transparency and accountability. He notes the Applicant's arguments on the Council's duties under PSED, and his views on the importance of ensuring the Council is complying with PSED, particularly regarding "the equality of opportunity between people who share a protected characteristic and people who do not share it."
35. However, there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
36. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. One of those occasions may be the disclosure of information as a means to determining whether an authority is complying with its responsibilities under PSED. However, the Commissioner has read the withheld information and must agree with the Council that the information does not directly relate to the issue of religious representation in schools. The Commissioner is not satisfied that disclosure of the withheld information would shed any light on the Council's execution of its PSED duties.
37. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. He has reached this conclusion bearing in mind the importance attached by the courts to maintaining confidentiality of communications on administration of justice grounds.
38. Consequently, he accepts that the Council correctly withheld the legal advice contained in document 3 under section 36(1) of FOISA.

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

39. As noted above, the Council is relying on section 30(b)(ii) of FOISA to withhold information contained in documents 1 and 2. Document 1 is a note of a meeting attended by members of

¹ [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

the Council and religious representatives; document 2 is an email from the solicitor present at the meeting (to the Director of the Council department of Education and Children's Services) which recounts the key issues discussed and provides additional views/commentary on those issues.

40. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure 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.
41. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
42. Each request must be considered on a case by case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
43. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.
44. In its submissions to the Commissioner, the Council stated that the meeting was held with an expectation of confidentiality, allowing a free exchange of views between representatives of the Roman Catholic Church (the RC Church) and senior members of the Council. It explained that a note of the meeting was taken because a legal challenge regarding the situation was considered possible at the time.
45. The Council explained that a meeting between the two groups (senior Councillors and representatives of the RC Church) was an unusual event, and that a day-to-day exchange of views between the groups is unlikely.
46. The Council notes that the meeting was held in response to a particular situation which had defused somewhat, but the matter at its heart remains an outstanding issue for both local authorities and churches, and also for other interested parties. It argues that the comments recorded were not made with disclosure to the public in mind and were unlikely to have been made if such disclosure was probable.
47. The Council submitted that it is important that senior Councillors and representatives of organisations who are, or might be, affected by decisions of the Council are able to meet in confidence to exchange views frankly. Recording a note of such a meeting is unusual and was done solely in prospect of possible legal action.
48. The Council argued that if such a note was made public it is very likely to either prevent notes being taken at future meetings or constrain the expression of opinions by senior Councillors at private meetings. This would, in turn, hamper constructive dialogue with elected representatives and the working of the Council.
49. The Applicant argued that the exemption in section 30(b)(ii) can only be applied where the inhibition is "likely" and where is to be "substantial inhibition". He argued that the Council had not detailed how the specific information it had redacted would be a substantial "inhibition"

nor how it is “likely” to cause a major effect on the exchange of views. He notes that the Council merely stated that disclosure would “severely restrain those present” as “the comments would not have been made if it had been known they be made public”. The Applicant noted that if it was the case that the person present would not have said something if they knew it was to be made public, this simply strengthens the public interest in disclosure.

50. The Applicant submitted that the views/statements withheld under this exemption may have been based on erroneous information, unsubstantiated opinion or prejudice. He noted that the withheld comments were made at a meeting where third parties were present and thus the views being shared were not confidential within the authority (i.e. they were not solely shared between staff members) where such an exemption may have a stronger effect.

Commissioner's view on section 30(b)(ii)

51. The Commissioner has considered all of the submissions made by the Council and the Applicant, along with the withheld information under consideration. He has considered the content and nature of the information, which, for the most part, contains frank views expressed by representatives of the RC Church, individual Councillors and a Council employee. The Commissioner is satisfied that attendees at the meeting did not envisage their comments being recorded and disclosed in response to a FOI request, and that such disclosure may dissuade attendees from discussing their concerns so freely or frankly in future.
52. The Commissioner accepts that it is important that the Council can meet with stakeholders to discuss their concerns and to share views freely and frankly and he is satisfied that disclosure of the comments withheld in documents 1 and 2 is likely to prevent other external groups from engaging with the Council and from sharing their views so frankly in the future.
53. In all the circumstances of the case, the Commissioner accepts that disclosure of the information withheld under section 30(b)(ii) of FOISA would be likely to result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation, as argued by the Council. As a result, he is satisfied that the Council correctly applied this exemption to the information it is withholding in documents 1 and 2.

Public interest test

54. As the Commissioner has found that the exemption in section 30(b)(ii) was correctly applied to the information under consideration, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).

Council's view on the public interest

55. The Council acknowledged that the general issue of the appointment of religious representatives to a Committee of the Council is a matter of some public debate, and that there is a public interest in disclosure of such information. However, the Council argued that the actual content of the withheld information adds little, if anything, to the general debate since it relates specifically to the particular situation within the Council.
56. The Council contended that the ability of elected representatives and their guests to be able to express their views frankly and without fear of public disclosure outweighs the competing arguments for disclosure.

Applicant's view on the public interest

57. The Applicant submitted that previous decisions made by the Commissioner have considered the public interest in disclosing the information to be strong unless there is a substantial reason given for why it should be withheld. The Applicant submitted that in this case the Council had made no specific claims with regard to the public interest, simply that the public interest is better served by ensuring Councillors can be open in discussions. The Applicant notes that the Commissioner's guidance on section 30(b)(ii) of FOISA, indicates that a "chilling effect" reasoning is not sufficient and specific reasoning should be given case by case. He argued that in this case, the Council has not made any specific reasons beyond a general chilling effect reasoning.

Commissioner's conclusions on the public interest

58. The Commissioner has considered the public interest arguments put forward by both the Council and the Applicant.
59. He considers that, in cases such as this, there is a strong public interest in elected members being able to share their views freely and frankly at meetings with external parties, without fear of such views being made public. This is particularly the case when the subject matter of those views is sensitive and the meeting at which they were shared was an unusual occurrence, i.e. it was held in response to a particular situation which may have led to legal action. In addition, he considers it beneficial for third parties to be able to communicate their own frank views to elected members in such cases in the confidence that they will not be published.
60. The Commissioner understands that the Applicant, and indeed the general public, has an interest in how the Council engages with religious representatives, particularly in relation to educational matters. While disclosure may increase transparency and give a wider understanding of the issues considered by the Council and the RC Church, he is not persuaded that this outweighs the public interest in withholding the information, as highlighted in the previous paragraph.
61. The Commissioner notes that the Council is only withholding a limited amount of information under section 30(b)(ii), and that it has disclosed the remainder of the information contained in the documents to the Applicant. The Commissioner is satisfied that the public interest has already been satisfied by disclosure of this information, and disclosure of the withheld information would add little to public debate or discourse.
62. The Commissioner is satisfied that disclosure of the views expressed in this case, would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation.
63. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information was outweighed by that in maintaining the exemption in 30(b)(ii) of FOISA. Consequently, he is satisfied that the Council was correct in withholding the information under this exemption.

Decision

The Commissioner finds that Perth and Kinross Council 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 by correctly withhold information under section 30(b)(ii) and 36(1), the Council complied with Part 1.

However, by withholding information which it later disclosed to the Applicant during the investigation, the Council failed to comply with section 1(1) of FOISA.

As the Applicant was provided with this information during the investigation, the Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

Appeal

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

Margaret Keyse
Head of Enforcement

11 March 2020

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (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

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

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