

Decision Notice

Decision 078/2019: Mr T and East Renfrewshire Culture and Leisure Trust

Implementation Plans for leisure operations

Reference No: 201801282

Decision Date: 14 May 2019



Scottish Information
Commissioner

Summary

The Trust was asked for copies of Implementation Plans derived from audits of its leisure services. The Trust withheld the information as commercially confidential and, after a review, an application was made to the Commissioner. During the Commissioner's investigation, the Trust disclosed the information.

The Commissioner investigated and found that the information should have been disclosed at the time of the review response. The Trust's review response was also issued outwith the required 20 working days.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy)

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 5 June 2018, Mr T made a request for information to East Renfrewshire Culture and Leisure Trust (the Trust). He asked for copies of the Implementation Plans produced to date by Big Wave Media (in relation to maximising swimming lessons and gym and health & fitness operations).
2. The Trust responded the following day. It withheld the Plans under section 33(1)(b) of FOISA (Commercial interests and the economy).
3. On 12 June 2018, Mr T wrote to the Trust requesting a review of its decision. He was of the view that the Trust had failed to demonstrate a justification for withholding the information, on a proper application of the public interest test.
4. The Trust notified Mr T of the outcome of its review on 16 July 2018 and apologised for its late response. The Trust accepted that its initial response had failed to demonstrate a proper consideration of the statutory provisions in failing to make reference to the public interest test. It upheld its application of section 33(1)(b) of FOISA, however, finding that the public interest favoured withholding the plans. The Trust stated that it did not consider the passage of time to have minimised the risk or its effects.
5. On 30 July 2018, Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T stated he was dissatisfied with the outcome of the Trust's review because, in his view:
 - (i) the Trust was not justified in its decision to withhold the information
 - (ii) the public interest test had not been properly considered by the Trust, and
 - (iii) the review response had been late.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr T made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 28 August 2018, the Trust was notified in writing that Mr T had made a valid application. The Trust was asked to send the Commissioner the information withheld from Mr T. It 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 Trust was invited to comment on this application, with particular reference to its application of section 33(1)(b) of FOISA and to the other points raised by Mr T in his application.
9. Mr T was also asked for any comments he wished to make. Submissions were received from both Mr T and the Trust.
10. During the investigation, the Trust disclosed the Implementation Plans to Mr T. The Trust stated that it was withholding further information (two audit reports), but these reports were deemed by the Commissioner to fall outwith the scope of Mr T's request. Mr T subsequently submitted a new information request to the Trust for this additional information.
11. The Trust maintained that it was still justified in withholding the Implementation Plans when responding to Mr T. Mr T disagreed. This decision will therefore consider whether the plans should have been disclosed to Mr T at the time of his review requirement.

Commissioner's analysis and findings

12. 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 Mr T and the Trust. He is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) of FOISA – Commercial interests and the economy

13. The Trust submitted that, at the time of the review response, the information sought by Mr T was exempt from disclosure in terms of section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
14. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
15. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on

disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

Submissions from the Trust

16. The Trust submitted that the commercial interests which would have been prejudiced by release of the information were primarily those of the Trust itself, although prejudice would also be suffered by its consultants, Big Wave Media. The Trust provided the following statement from Big Wave Media, which indicated that the plans were part of information which Big Wave Media considered to be commercially confidential.

“Further to our discussion about a recent FOI request to ERCL, I can confirm that Big Wave Media views the information provided as part of our agreement with East Renfrewshire Culture and Leisure (Initial Audit on Swimming and Gyms & Fitness and the subsequent Implementation Plans, Membership Sales process documentation and manuals) as commercially sensitive information.”

The Trust also submitted that disclosure would reveal Big Wave Media’s methodology for programmes of this sort.

17. As regards the Trust’s own commercial interests, it submitted that such interests were wider than mere financial benefit and also encompassed ongoing viability in the competitive leisure market, through provision of innovative and attractive services to its customers and the generation of a wide and growing customer base to ensure its ongoing and future stability and resource. The Trust explained that it was a charity and was not fundamentally driven by profit generation, but it was clear that its ongoing viability (encompassing its ability to provide services to the public at reasonable cost and of as high quality as possible) was a fundamental commercial interest.
18. The Trust went on to argue that this interest was impacted on by the availability of alternative private sector leisure service providers in the local area. It was the view of the Trust that, in that sense, the disclosure of business plans spanning the immediate, short and longer terms was clearly prejudicial insofar as it would allow other parties in the market to react to such proposals to nullify benefit to the Trust, and to replicate or take competing steps to maintain any advantage in customer numbers, and so hamper the ongoing development of the Trust provision.
19. The Trust stated that the Implementation Plans specified timeframes for service development and that access to these by competitors could threaten the viability of the Trust and, by implication, its very existence. The Trust considered disclosure would not merely prejudice, but substantially prejudice, the interests it had identified and did not consider the passage of time minimised the risk of such prejudice.
20. The Trust stated that its decision to release the information during the investigation was primarily based on the lapse of time since the original request was received. The Trust submitted that some of the content of the plans had now been put into practice (and as such was now visible to the public), while other proposals had been the subject of consequent decisions not to proceed. Taken together, the Trust stated, while there were still aspects which were considered commercially sensitive, the extent of the sensitivity had diminished in the intervening period.

Commissioner’s findings on section 33(1)(b)

21. The Commissioner has in the first instance considered whether the Trust and Big Wave Media have relevant commercial interests. Commercial interests will generally relate to any

commercial trading activity an organisation undertakes, such as the ongoing provision, sale and purchase of goods and/or services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that the activities under consideration here, involving the provision of leisure facilities in an environment open to competition, are commercial in nature. As such, he is satisfied that the Trust and its consultant (Big Wave Media) have relevant commercial interests.

22. Having reached this conclusion, the Commissioner must now go on to consider whether the commercial interests he has identified would, or would likely to, be prejudiced substantially by the disclosure of the information.
23. The Commissioner has considered the arguments put forward by the Trust, but he is not persuaded that the likely effect of disclosure would be any of the consequences suggested. He is not, therefore, satisfied that disclosure would – or would be likely to – prejudice substantially the commercial interests of the Trust or the consultant.
24. In reaching this conclusion the Commissioner has taken account of the following relevant dates:
 - (i) The date of the review outcome, which was 16 July 2018.
 - (ii) The date when the Implementation Plans were disclosed to Mr T, which was 6 March 2019.
 - (iii) The date when the plans were drawn up by Big Wave Media, which was 1 April 2017.
 - (iv) The implementation period the plans cover, which is from April 2017 to March 2018.
25. The Commissioner has also taken account of the content of the plans, which shows various tasks, and the dates by which they should be implemented.
26. Firstly, with regard to the commercial interest of Big Wave Media, it is not apparent to the Commissioner how these plans could be said to reveal anything of substance about its methodology, as opposed to the products of that methodology.
27. As noted above, the plans show that the timetable for implementation for the bulk of the tasks was four months prior to the date of the Trust's review response to Mr T.
28. In any case, the Commissioner is not persuaded that the content of the plans can be considered to be commercially sensitive enough to satisfy the degree of prejudice required for this exemption. Taking account of the relatively innocuous and unsurprising nature of the actions, together with the fact that the implementation dates had very largely passed, the Commissioner is not convinced that the passage of time between 16 July 2018 and 6 March 2019 would have had any further effect on reducing the level of detriment beyond that which had already occurred by the former date.
29. In the absence of any more robust submissions or evidence from the Trust as to how or why disclosure of the information under consideration would have been more likely to harm the Trust's or Big Wave Media's commercial interests on the earlier date, the Commissioner is not persuaded that the Implementation Plans could not have been disclosed to Mr T at the time of the review outcome.
30. Consequently, the Commissioner does not accept that disclosure of the information withheld from Mr T at the time of the review outcome would have prejudiced substantially, or would have been likely to prejudice substantially, the Trust's commercial interests or those of Big

Wave Media. He therefore concludes that the Trust incorrectly applied the exemption in section 33(1)(b) of FOISA in this case.

31. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, he is not required to go on to consider the public interest in terms of section 2(1)(b) of FOISA.

Other matters raised by Mr T

Application of the public interest test

32. In his application to the Commissioner, Mr T also voiced his concern that, in its review outcome, the Trust had failed to demonstrate that it had applied the public interest test properly. He was of the view that the Trust had failed to provide him with adequate information on its consideration of the public interest test.
33. In its review outcome of 16 July 2018, the Trust set out why it believed the public interest favoured maintaining the exemption, in the interests of delivering the best possible quality and range of services. It acknowledged that the public had an interest in the services in question and their impact on the public purse, but noted that the Trust's financial business was the subject of other public reporting regimes. On balance, it concluded that the public interest in disclosure was outweighed by that in confidentiality being maintained.
34. The review outcome set out the competing public interest arguments and explained why the Trust concluded that the public interest favoured maintaining the exemption – in other words, the elements Mr T (rightly) contends should have been there. A notice such as this can only ever be a summary of the competing arguments and the public authority's reasoning but, in this case, the Commissioner is satisfied that it fulfilled its purpose of providing reasons as required by section 21(5) of FOISA. It would also have met the authority's obligation to provide reasons for its conclusions on the public interest in respect of the original decision, in terms of section 16(2) of FOISA. Clearly, it enabled Mr T to put forward his own arguments on the matter, which is the fundamental point in any obligation to provide reasons in relation to administrative decision-making.
35. The review outcome therefore demonstrated that the public interest test had been considered in reaching the authority's decision. The Commissioner does not find any breach of Part 1 of FOISA in this respect.

Section 21 of FOISA – review by a Scottish public authority

36. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to qualifications which are not relevant in this case.
37. The Commissioner notes that the Trust apologised to Mr T for its failure in responding timeously to his review requirement.
38. As the Trust has acknowledged, it failed to respond to Mr T's review requirement within the required timescale, so the Commissioner must find that in this respect it failed to comply with section 21(1) of FOISA.

The Commissioner finds that the East Renfrewshire Culture and Leisure Trust (the Trust) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr T by (i) failing to disclose the Implementation Plans until after his investigation had begun (in breach of section 1(1) of FOISA) and (ii) failing to respond to Mr T's review requirement within 20 working days (in breach of section 21(1)).

Given that the information has now been disclosed to the Mr T, the Commissioner does not require the Trust to take any action on these failures, in response to Mr T's application.

Appeal

Should either Mr T or the Trust 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

14 May 2019

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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