

Decision Notice



Decision 009/2014 Councillor David Alexander and Falkirk Council

Changes to decision-making structures

Reference No: 201301713

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 26 April 2013, Councillor Alexander asked Falkirk Council (the Council) for information about changes to the decision-making structures of the Council. The Council provided information to Mr Alexander. It withheld other information under section 30(b) of FOISA, claiming that disclosure would prejudice the effective conduct of public affairs.

Following an investigation, the Commissioner found that the Council had dealt with Councillor Alexander's request for information in accordance with Part 1 of FOISA, being entitled to withhold the information under section 30(b).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 3(2)(a)(i) (Scottish public authorities); 30(b) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 26 April 2013, Councillor Alexander wrote to the Council requesting information relating to the preparation or execution of the changes in the Council decision-making structures from Committee to Executive model.
2. The Council responded on 28 May 2013 and provided information to Councillor Alexander. It explained that information relating to the briefing of senior councillors, a group leader and a political group was being withheld in terms of section 30(b) of FOISA, because it believed disclosure would inhibit both the free and frank giving of advice and the free and frank exchange of views.
3. On 29 May 2013, Councillor Alexander wrote to the Council requesting a review of its decision. He did not believe information relating to policy and strategic matters could be exempt as the Council claimed.



4. The Council notified Councillor Alexander of the outcome of its review on 19 July 2013, upholding its original decision without modification.
5. On 23 July 2013, Councillor Alexander wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Councillor Alexander made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 5 August 2013, the Council was notified in writing that an application had been received from Councillor Alexander and asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested, accompanied by a schedule of documents, and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. It was asked to justify its reliance the exemptions in section 30(b) of FOISA.
9. The Council responded, providing submissions in relation to section 30(b) and (c) of FOISA. It noted that the information related primarily to the activities of councillors in their own political groups, but acknowledged that that the information it sought to withhold was held by the Council for the purposes of FOISA.
10. Given the focus of the request and the requirement for review, the Commissioner accepts that the request does not extend to purely administrative correspondence, for example emails setting up meetings or covering enclosures with no other substantive content.
11. Councillor Alexander provided reasons why he believed disclosure to be in the public interest.

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 her by both Councillor Alexander and the Council. She is satisfied that no matter of relevance has been overlooked.



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

13. The Council intimated that it was relying upon sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA to withhold the information. The Commissioner will consider the application of the section 30(b) exemptions first.
14. In order for the Council to rely on these exemptions, it must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
15. It is the Commissioner's view, as stated in previous decisions, that there is a high standard to be met in applying the tests in the section 30(b) exemptions. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
16. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring. Each request must, of course, be considered individually.
17. The Council submitted that in considering these exemptions, it had to have regard to and follow the *Protocol for Relations between Councillors and Employees in Scottish Councils*¹ (the Protocol), which has statutory effect through the Ethical Standards In Public Life etc (Scotland) Act 2000 (the Ethical Standards Act) and the Code of Conduct for Councillors (the Code), approved by the Scottish Parliament.
18. The Protocol forms Annex C to the Code of Conduct for Councillors. In *Decision 102/2009*² (also involving Councillor Alexander and the Council), the Commissioner considered similar arguments to the effect that requirements of confidentiality emanated from the Protocol (see in particular paragraphs 40-44). Briefly, the Commissioner found that while the Protocol (and in particular paragraph 14) might be relevant in determining whether an obligation of confidentiality existed in certain circumstances, it did not create an independent statutory right to confidentiality, applicable to every communication between an officer and a councillor: if information was to be confidential in any given case, that would be under the common law of confidence.

¹ <http://www.scotland.gov.uk/Publications/2010/12/10145144/11>

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200801026.aspx>



19. The Council acknowledged that the Protocol did not create a free standing obligation of confidentiality that might give rise to a breach of confidence and thus the protection of section 36(1) of FOISA. Notwithstanding this, it noted that breach of the obligations in the Code could result in disqualification from office and other disciplinary sanctions for councillors. Before taking office, the Council explained, councillors must sign a statutory undertaking confirming that they will abide by the Code.
20. The Ethical Standards Act, the Council went on to explain, is the principal statute governing the relationship between councillors and local authorities on which they serve. At the heart of the statutory scheme, they submitted, is the Code. In approving the Code, the Council submitted, Parliament has offered a clear view of the background against which the effective conduct of public affairs and the exemption in section 30 should be considered: the Council considered this to be a strong indicator of where the public interest lies in this area.
21. The Council provided submissions in respect of each withheld document. These cannot be considered in detail here without revealing elements of the withheld information. It noted that the withheld information could be divided in to three categories:
 - Officers' briefing for councillors
 - Notes of meetings between councillors and officers
 - Correspondence between councillors and officers.
22. The Council submitted that the briefing was conceptual rather than factual in nature, to provide a structure for a particular group of councillors in developing their own thinking. In the context in which the information was provided, there was an expectation and understanding that the information was private to that group. There was a similar expectation and understanding, the Council submitted (in line with the Protocol), in relation to the notes officers took of meetings with senior councillors: it referred to the nature of the discussions (involving internal debate around options), the terms in which views were expressed and the fact that some of the notes remained in draft.
23. The Council further submitted that in reliance on the Protocol, councillors and officers exchanged emails with the expectation of confidentiality. These could be very frank, as was necessary if there was to be a shared understanding of the issues involved. It identified information it considered senior officers should be aware of, but which it believed would be damaging on a number of levels if disclosed.
24. The Council also noted that in *Decision 102/2009*, the Commissioner recognised that such councillor/officer communications could fall within this exception, depending on the content. In dealing with this request, the Council submitted that it sought to rely on the reasoning of the Commissioner in that earlier decision and maintain a consistent approach. It stated that the emails found to have been correctly withheld in *Decision 102/2009* had the same sensitivities as those withheld in this case. It noted the frankness with which points were expressed.



25. The Commissioner has considered all of the submissions made by the Council, along with the withheld information, in the context of the Protocol. As indicated above, paragraph 14 of the Protocol is of particular relevance to communication with councillors and political groups. The Commissioner is satisfied that this is not factual information of the kind the Protocol envisages would be made available to all political groups. She has considered the nature of the information, including the terms in which views are expressed, and context in which it was created.
26. In all the circumstances of this case, the Commissioner accepts that disclosure of the withheld information would be likely to result in substantial inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, as argued by the Council. As a result, she is satisfied in the circumstances the all of this information is exempt from disclosure in terms of section 30(b)(i) and 30(b)(ii) of FOISA.
27. The Commissioner must now go on to consider the application of the public interest test, as set out in section 2(1)(b) of FOISA. Before the information can be withheld under these exemptions, the Commissioner must be satisfied that the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest test

28. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

Submissions by the Council

29. The Council submitted that the subject of the information was the decision making structure of a local authority. It recognised a public interest in this, but noted that that the matter had been debated in open Council, with the reports publicised and available to the public on line.
30. The Council explained that there had been a consultation process with all politicians. The main types of decision making models were generally well known and had been canvassed in the consultation process. It acknowledged that the system chosen would be shaped predominantly by the group in power at the time. It was not a secret that there were other ways of doing things and there might be other preferences even within the group itself. It was for the group to justify their collective decision on its merits.



31. The Council further submitted that the effectiveness of the new model would be subject to review after 12 months, when it would be assessed and considered by Council again. The process remained subject to public scrutiny, therefore, and would require justification based on what had in fact happened (and not just on principles and what it was anticipated would happen). Ultimately, a change in political power (through an election or a realignment of groupings) would allow a new or revised system to be considered. The public interest, the Council submitted, was in whether the chosen system worked and proved to be effective. There would be other systems that did this, but that did not mean the choice made had been right or wrong.
32. Regarding the briefing paper in particular, the Council submitted that disclosure would not add to public debate. It believed any point of debate to be apparent in the choice that was publicly made. The public interest was in the merits of the chosen system, not in knowing how far it was developed from the briefing paper prepared by officers. The briefing paper was not intended as advice on what a decision making process should look like, but rather as a framework for discussion.
33. Where there was some advice, the Council considered the public interest in permitting advice to be taken confidentially (as confirmed in the Protocol) outweighed the public interest in disclosure. It did not believe there to be any major public interest issue, apparent in the detail of this information, which would outweigh this. Conversely, the release of information from a continuing and contentious process would be damaging to that process.
34. The Council also referred to the Protocol as a strong statement of the public interest in maintaining the confidentiality in papers pertaining to discussions involving officers and political groupings. A strong counter public interest would be required to support disclosure and the Council did not believe this to be present here.

Submissions by Councillor Alexander

35. Councillor Alexander submitted that that it was important that the Council's decision-making processes, including any relevant advice given by officers and the consideration given to that advice, were open to proper scrutiny.
36. In this particular case, Councillor Alexander submitted that there had been a fundamental change in the manner in which Falkirk Council was structured, which he believed went to the heart of democracy. He placed this in the context of the political balance of the Council, where the coalition administration had a majority of two.
37. Councillor Alexander submitted that the new decision-making structure devolved 95% of council decisions to a newly established Executive Committee consisting of nine members of the Administration and only three opposition members, a majority of six in a twelve-person committee. He further submitted that unlike the previous (politically proportional) committees there was no mechanism to call reports into the next full Council meeting. The result was that the Executive Committee had absolute power, with very little opportunity to properly scrutinise the actions of the Executive.



38. Councillor Alexander described these changes as “massive” and therefore considered it to be in the public interest that every aspect of the deliberations in the process was open to scrutiny, including the origins of the new structure and the alternatives presented to the administration but not the opposition.
39. Councillor Alexander stated that the general public and all of their elected representatives were entitled to read the views and advice of officers whose salaries were paid by the taxpayer, and to determine for themselves how much of that advice was taken and how much ignored.

The Commissioner's view

40. The Commissioner has considered all of these arguments carefully, in the context of the information withheld. She acknowledges that there is a public interest in transparency in relation to the development of the Council's decision-making processes, including any contribution to that process by officers of the Council. These processes are clearly of considerable public significance, and the Commissioner accepts that the withheld information would shed some light on the process, thereby assisting the public in understanding the basis on which the administration came to its decision on the preferred model. The Commissioner accepts that there is some controversy surrounding the decision on the new structure, which lends a degree of weight to the public interest in disclosure.
41. On the other hand, the Commissioner acknowledges the extent to which (as the Council has submitted) the chosen decision-making structure has been, and will be, subject to public scrutiny in any event. What remains relates to the early development of that chosen option, within the administration group, before it was open to wider scrutiny.
42. The Commissioner must also acknowledge the relevance of the Protocol in considering information relating to dealings between councillors and officials, and more widely the need to secure effective governance within local government, which requires effective working relationships between those two key groups of individuals. Such relationships may not involve an inherent obligation of confidentiality, but they do rest on mutual trust and respect. The primary consideration, however, has to be the actual content of the information withheld: in particular, the Commissioner accepts the Council's submissions on the character of the briefing paper.
43. The Commissioner has considered all submissions very carefully, with the withheld information, in balancing the potential benefits of disclosure against the potential harm. In all the circumstances, she is not satisfied that the public interest in disclosure of this particular information is strong enough to outweigh the public interest in maintaining the exemptions claimed.
44. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemptions in section 30(b)(i) and 30(b)(ii) of FOISA. Consequently, she is satisfied that the Council correctly withheld the information under these exemptions.



45. Given that the Commissioner has concluded that all of the information withheld by the Council was correctly withheld in terms of section 30(b)(i) and (ii) of FOISA, she is not required (and does not intend) to consider the exemption in section 30(c) in relation to that information.

DECISION

The Commissioner finds that Falkirk Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Councillor Alexander.

Appeal

Should either Councillor Alexander or Falkirk 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
27 January 2014



Appendix

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.

...

3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

- (a) by the authority otherwise than-

- (i) on behalf of another person;

...



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-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or

...