



Scottish Information
Commissioner
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Decision Notice 032/2024

Draft of lease contract between the Authority and Royal Dornoch Golf Club

Authority: Highland Council
Case Ref: 202200269

Summary

The Applicant asked the Authority for the latest draft of the lease contract between itself and Royal Dornoch Golf Club. The Authority refused to disclose the lease contract, arguing that to do so would prejudice substantially its own commercial interests, as well as inhibiting substantially the free and frank exchange of views. The Commissioner investigated and found that the Authority's response complied with FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(ii) and (c) (Prejudice to the effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner)

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 15 November 2021, the Applicant made a request for information to the Authority. They asked the Authority to provide the latest draft of the lease contract between itself (on behalf of Dornoch Common Good) and Royal Dornoch Golf Club.
2. The Authority responded on 2 February 2022. The Authority refused to disclose a copy of the lease because drafting was still in progress and it believed disclosure would, or would be likely to, prejudice its own financial interests, as well as those of Dornoch Common Good. The Authority therefore considered the exemption in section 33(1)(b) of FOISA to be applicable to the information.
3. The Authority also argued that disclosure would likely inhibit substantially the free and frank exchange of views for the purposes of deliberation, as it was concerned disclosure of the information whilst still in draft form would leave it open to third parties attempting to influence the drafting of the deed, which would compromise the integrity of negotiations. Therefore, the Authority also considered the exemption in section 30(b)(ii) to be applicable to the information covered by the request.
4. On the same date, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they considered the Authority to have made errors in relation to the negotiation of the lease. In the Applicant's view it was very much in the public interest to ensure that "appropriate management of common good" is taking place before any new lease is signed. The Applicant also commented that they did not consider themselves to be a third party, as they represented the beneficiaries of the Common Good, and were concerned that the Authority was not acting in the interests of the beneficiaries in refusing to disclose the information which they themselves had taken considerable trouble to help draft.
5. The Authority notified the Applicant of the outcome of its review on 3 March 2022. The Authority upheld its reliance on the exemptions in sections 30(b)(ii) and 33(1)(b) for withholding the draft lease agreement.
6. The Authority explained that the parties to the lease are itself and Royal Dornoch Golf Club and that the Applicant was a third party and therefore not entitled to view the lease. The Authority acknowledged the assistance the Applicant had given its surveyors in preparing the heads of terms, but noted that the matter is now with the solicitors for the respective parties. The Authority reiterated its concern that disclosure of the information could allow third parties to influence the drafting of the deed and therefore hamper negotiations.
7. On 3 March 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because they did not consider themselves to be a third party for the purposes of the lease agreement. In the Applicant's view, the Authority was not unable, but unwilling to disclose the lease, and they also did not agree that disclosure would allow third parties to influence the drafting of the lease and hamper negotiations.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

9. On 24 March 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the exemptions in sections 30(b)(ii) and 33(1)(b) of FOISA, the Authority's consideration of the application of the public interest test and on the Applicant's view that, as the elected representatives of the beneficiaries of the Common Good, they have a right to view the lease agreement.
11. During the course of the investigation, the Authority informed the Commissioner that it had disclosed a copy of the final version of the lease agreement to the Applicant. The Applicant confirmed receipt of this, but given their concern that the Authority may, in future, refuse to allow beneficiaries of the Common Good access to documents that affect them, they wished to continue with their application.
12. During the course of the investigation, the Authority informed the Commissioner that it was also seeking to rely on the exemption in section 30(c) of FOISA.

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Background

14. In December 2020, a consultation was launched by the Authority around a proposal to dispose of an area of Common Good Land to Royal Dornoch Golf Club, through the provision of a new lease.
15. The proposal was to cover the whole area occupied by Royal Dornoch Golf Club with a new lease which would last for 99 years and include a new, agreed figure for rent. This was to include proposals for a new clubhouse, access and parking. The consultation period ended on 12 March 2021.
16. Under the terms of Section 104 of Part 8 of the [Community Empowerment \(Scotland\) Act 2015](#)¹, the Authority is required to consult with interested parties (including the Applicant) where it proposes to dispose of, or change the use of a Common Good Asset.
17. In response to these consultations, the Applicant (and others) can make representations to the Authority.
18. The Authority is required to have regard to these representations when it is deciding whether or not to dispose of any property held by it as part of the common good, or to change the use to which any such property is put.
19. Where the Common Good Assets covered by the proposal are deemed to be inalienable (as in this case), an application for approval has to be made to the Court. The Applicant (and others) can also make representations to the Court during this process, although this is completely separate to the Community Empowerment Process.

¹ [Community Empowerment \(Scotland\) Act 2015 \(legislation.gov.uk\)](#)

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

20. The Authority relied on this exemption for all of the information withheld in the draft lease agreement.
21. In order for the Authority to rely on this exemption, it must show that disclosure of the information 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.
22. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
23. 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 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.

Factors to consider

24. The Commissioner's [guidance](#)² states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.
 - (ii) The circumstances in which the advice or views were given. The context in which the communications took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once the decision has been taken. The degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.

The Authority's submissions on section 30(b)(ii)

25. The Authority commented that it was the circumstances which existed at the time of the request that led to its decision to withhold the draft lease.
26. It is the Authority's position that disclosure of the draft lease agreement would reveal the interim positions of contracting parties, before a contract has been formed. This would, in

² [BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf \(itspublicknowledge.info\)](#)

the Authority's view, mislead third party scrutinisers, such as the Applicant, if it were disclosed.

27. The Authority explained that the solicitors representing the parties to the lease relied on an established practice whereby each side suggests clauses/adjustments to a draft lease which would be of most benefit to their client, but which they realise may not be accepted in full, or at all, by the other party. This means that each version of the draft lease is effectively part of a series of negotiations and accommodations, and the final version may be significantly different from the first draft.
28. It is the Authority's view that if the solicitors were working in the knowledge that a draft could be viewed by a third party at any time they would be substantially inhibited from advancing positions that would no longer be scrutinised by professional legal colleagues working within a code of professional practice and custom.
29. Concern was also expressed by the Authority that if the draft lease were disclosed the Applicant may take steps to try to influence the content of it, which would be highly likely to inhibit the contracting parties. The Authority argued that its own solicitors and other officers would be substantially inhibited from providing views if the draft lease was disclosed. The Authority contended that these solicitors and other officers need to be able to work freely and without favour or influence by third parties once they have been instructed on commercial matters.
30. Disclosure of the draft lease would, the Authority argued, seriously undermine the entire process of commercial contracting and would seriously inhibit current and future commercial practice by its officers, and particularly solicitors whose job is to act for their respective clients and not a third party.

The Applicant's submissions

31. The Applicant asserted that they are not a third party to the lease. The Applicant explained that they represent the beneficiaries of the Common Good, and have reason to believe that the Authority was not acting in the interests of the beneficiaries by refusing to allow them to see the documents they personally had taken considerable trouble to draft.
32. The Applicant commented that the Authority's role in relation to the lease is as a trustee for the beneficiaries of the Common Good. As the Authority is not a beneficiary, the Applicant considered that it had no incentive to act in the best interest of the beneficiaries.
33. The Applicant argued that it is not a case of disclosure of the information allowing third parties to influence the drafting of the deed and hampering negotiations. In fact, in the Applicant's view, their input was necessary to avoid mistakes being made by the Authority.

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

34. The Commissioner has considered the withheld information, along with the submissions from both the Authority and the Applicant.

Role of the Applicant

35. Prior to setting out his views around whether the exemption in section 30(b)(ii) of FOISA applies to the withheld information, the Commissioner considers that it would be helpful to clarify the role of the Applicant in relation to the proposal by the Authority to dispose of, or change, the use of Common Good Assets.

36. As mentioned in the background section above, prior to making a decision over the disposal or change of use of Common Good Assets, the Authority is required, by law, to undertake a consultation.
37. As part of this consultation process, community councils (like the Applicant in this case) are required to be alerted to the consultation and invited to make representations. Such representations should be taken into account by the Authority in its decision making. Beyond the right to make representations during the consultation period, a community council's only other legal right of involvement would be if it wished to make representations to the Court where the Common Good Assets under consideration were deemed to be inalienable.
38. The Authority has confirmed that there is nothing in custom or law which empowers the Applicant to have detailed oversight of the legal process of commercial leasing conducted by its solicitors on its behalf as owners of the Common Good.
39. While the Community Empowerment (Scotland) Act 2015 acknowledges that the Applicant has a role, it does not necessarily regard them as the sole representative of the beneficiaries. Furthermore, the Commissioner considers it important to note that as trustees of the Common Good Assets in question, the legal duty to "get it right" in this case rests with the Authority, not the beneficiaries.
40. Subject to statutory consultation requirements and the supervision of the Court, the Authority must therefore bear responsibility for the proper management of those assets. Even if the Commissioner were to accept that the Applicant should be considered to be wholly representative of the Common Good beneficiaries, this would not mean that the Authority could delegate or share responsibility for managing the Common Good to/with them.
41. Whilst it is clear from the submissions made by the Applicant that they had a role to play in the preparation of documents influencing the content of the lease, submissions received from the Authority have made it clear that this input, working with the Authority's Property Team, covered the Heads of Terms of the lease, with the drafting of the lease being passed on to its legal team.
42. Bearing in mind that while the Applicant was entitled to make representations to the Authority over its proposals around the specific Common Good land, but they are not a legal party to the lease agreement (that being between the Authority and the Royal Dornoch Golf Club), the Commissioner is satisfied that the Applicant would be correctly considered as a third party to the lease agreement itself.

The Commissioner's view of section 30(b)(ii)

43. The Commissioner notes that the Applicant considers their status as a community council should allow them access to the draft lease argument. However, the Commissioner must be mindful that disclosure of information under FOISA is disclosure to the world-at-large, not only to the Applicant.
44. Taking the legal position of the Applicant into consideration, alongside the submissions made by the Authority, the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding information in the draft lease agreement.
45. The Commissioner recognises that at the time the request was submitted discussions were ongoing around certain parts of the lease and a final position had yet to be agreed upon.
46. The Commissioner also acknowledges the position of the Authority that once the lease had been passed to its legal team for negotiation, it was right and proper that they should follow

standard practices when exchanging views around the content of the lease with legal representatives for the other party.

47. The Commissioner therefore accepts the submissions from the Authority that if the draft lease were disclosed in response to the Applicant's request it would, or would be likely to inhibit substantially the free and frank exchange of views between the legal representatives for the purposes of negotiating the lease agreement.
48. As the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding the information in the draft lease agreement, he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test

49. As noted above, section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(b)(ii) was correctly applied to the withheld information, he is now required 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.

The Applicant's comments on the public interest

50. The Applicant commented on previous errors they considered the Authority to have made in the negotiation of the lease, and argued that it is very much in the public interest to ensure that "appropriate management of Common Good" is taking place before any new lease is signed.
51. The Applicant asserted that they are not a third party and that they represent the beneficiaries of the Common Good. The Applicant explained that they have reason to believe that the Authority is not acting in the interests of the beneficiaries by refusing to allow them to see the document they themselves had taken considerable trouble to draft.

The Authority's comments on the public interest

52. The Authority acknowledged the public interest that lies in favour of transparency in decision making where this relates to actions taken by, or on behalf of, the public. The Authority also recognised that disclosure of the "working out" of solicitors' practice may assist in dispelling public perception that little thought or effort is required when preparing legal documents (such as leases), thereby providing the public with valuable insight into one aspect of its work.
53. Against this, the Authority argued that solicitors must be free to represent their client's best interests and to seek to achieve best value for the public purse. In the Authority's view, the statutory requirement to achieve best value was, in this case, best served by the ability to negotiate openly and confidently with professionally trained colleagues acting on the other side of transactions. This would allow the contracting parties to operate within a tried and tested professional framework free from third party influence.
54. On balance, the Authority concluded that the public interest lay in maintaining the exemption in section 30(b)(ii) of FOISA because:
 - the freedom to negotiate commercial contracts in relation to public assets would be seriously inhibited by disclosure,
 - the local public were consulted widely at the start of the process via a statutory consultation under the Community Empowerment (Scotland) Act 2015, and the requestor

was closely involved in drafting the Heads of Terms which became part of the instructions to its solicitors, and

- the public interest was front and centre of the preparatory work for the lease, but would not be best served by disclosing the withheld information

The Commissioner's view on the public interest

55. The Commissioner has carefully considered the submissions received from both the Applicant and the Authority.
56. Having done so, the Commissioner agrees that there is a public interest in ensuring that actions/processes relating to Common Good Land (particularly assignation or disposal) are shared with the relevant parties and that they have the opportunity to consider and comment on them. However, the Commissioner is of the view that this public interest has been met through the provision of the statutory consultation process the Authority was required to carry out in line with the Community Empowerment (Scotland) Act 2015.
57. The Commissioner notes the Applicant's view that disclosure of the information would fulfil the public interest in ensuring the "appropriate management of the Common Good". As mentioned previously, the legal requirement to "get it right" lies with the Authority as the Trustee of the Common Good Assets. The Commissioner considers that by carrying out the statutory consultation process the Authority has fulfilled the public interest in ensuring that relevant parties have the opportunity to scrutinise and comment on proposals.
58. The Commissioner agrees with the Authority that the public interest in this case lies in ensuring that appropriate personnel can negotiate and reach a final agreed position on the lease agreement in question. As the Commissioner has already concluded that disclosure of the information would be likely to inhibit substantially the Authority's ability to do that he must conclude that, on balance, the public interest lies in favour of maintaining the exemption in section 30(b)(ii) in this case.
59. As the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding all of the information in the draft lease agreement covered by the Applicant's request, he is not required to go on to consider the application of the exemptions in sections 30(c) and 33(1)(b) that the Authority also relied upon.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner

18th March 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

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
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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).
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).