



Decision Notice 014/2024

Lauriston Castle Trust report

Applicant: The Applicant

Authority: City of Edinburgh Council

Case Ref: 202200033

Summary

The Applicant asked the Authority for a copy of the Lauriston Castle Trust (private report) discussed at the 12 August 2021 meeting of the Authority's Finance and Resources Committee. The Authority withheld the information as it considered disclosure was prohibited by another enactment. During the Commissioner's investigation the Authority changed its position, though continuing to withhold the information as it considered disclosure would substantially inhibit the free and frank exchange of views, would prejudice commercial interests, and that the information was confidential.

The Commissioner investigated and found that the Authority had partially breached FOISA in responding to the request. While the Commissioner found that the Authority had failed to respond to the Applicant's requirement for review within the statutory timescale, and had wrongly withheld the information in its response and review in terms of the cited exemption, he found that the Authority had correctly withheld the information, as disclosure would substantially inhibit the free and frank exchange of views.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) and (2)(b) (Effect of exemptions); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 26(a) (Prohibition on disclosure by another enactment); 30(b)(ii) (Prejudice to the conduct of public affairs); 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 8 October 2021, the Applicant made a request for information to the Authority. He asked:
“12 August 2021 ECC Finance and Resources Committee – Lauriston Castle Trust (private report)

I am a beneficiary of the Lauriston Castle Trust. Please provide me with a copy of the report.”
2. The Authority responded on 2 November 2021. It withheld the report that the Applicant had requested as it considered the exemption in section 26(a) (Prohibition on disclosure by another enactment) of FOISA applied. The Authority explained that the enactment under which it was claiming this exemption was the Local Government (Scotland) Act 1973, as amended by the Local Government (Access to Information) (Scotland) Order 1996.
3. On 2 November 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority’s decision because he considered that the matter related to Lauriston Castle Trust business, not that of the Authority, and that all beneficiaries of the Trust were entitled to the information he had sought. He did not consider sufficient reasons had been given by the Authority to explain why the information he had requested was exempt under FOISA. He also questioned why the Authority’s response had not been provided earlier and why the request had to come to the attention of the Authority’s Freedom of Information (FOI) unit.
 - The Authority notified the Applicant of the outcome of its review on 21 December 2021. It apologised for not meeting the statutory timescale with its review response. It upheld its initial response, withholding the information falling within the Applicant’s request under section 26(a) of FOISA.
4. On 10 January 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he did not think that the Authority had the right to claim an exemption as the information requested did not fall within the Authority’s business stream. In addition, he did not consider that the Authority responded to his request promptly, and that it could have responded to earlier, in accordance with the legislation.

Investigation

5. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
6. On 14 February 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.
7. 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 reasons why it

considered the exemption in section 26(a) of FOISA applied to the information falling within the scope of the request.

8. The Authority provided submissions to the Commissioner in which it explained that it no longer wished to rely on section 26(a) of FOISA to withhold the information requested by the Applicant, but instead sought to rely on the exemptions in sections 30(b)(ii) (Prejudice to the effective conduct of public affairs), 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality) of FOISA.
9. The Authority informed the Applicant of its change of position and he provided his comments on this new position to the Commissioner.

Commissioner's analysis and findings

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

Was the information held by the Authority?

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allows Scottish public authorities to withhold information or charge a fee for it.
12. The information falling within the scope of the Applicant's request is a report that was discussed at the Authority's Finance and Resources Committee meeting on 12 August 2021. This report was discussed in private, and was described by the Authority as a "B agenda report".
13. The Applicant was dissatisfied that the Authority had handled his request, not as related to the business of Lauriston Castle Trust (LCT), but as the Authority's business. His view was that he was a beneficiary of the Trust, and as such, was entitled to the information falling within the scope of his request.
14. The Authority submitted that, whilst the ownership of the castle, grounds and collection falls to LCT, the management of the Trust is undertaken by the Authority's officers, and oversight is carried out by the Authority's Finance and Resources Committee, which has delegated responsibility for charitable trusts from the Authority, to act in the role of trustee of its charities, including LCT. Therefore, the information sought fell within the business stream of the Authority, and was (it explained) held by it for the purposes of FOISA.
15. The Authority stated that it is the sole trustee of LCT, and that the Deed of Trust is clear that the castle, grounds and collection are to be kept for the benefit of the nation. It emphasised that there is no named beneficiary group in the Deed of Trust.
16. The Authority explained that in its capacity as trustee, it had sought and received legal advice relating to LCT. It argued that as the management of LCT is undertaken by its officers, and oversight is carried out by the Finances and Resources Committee, the information sought fell within the business stream of the Authority, and the information was therefore held by the Authority.

17. The Authority explained that, as a member of the public, the Applicant has a right under the [Charities and Trustee Investment \(Scotland\) Act 2005](#)¹ to request and receive certain information of a charity. It concluded that this right, however, did not extend to the information falling within the scope of the request.
18. The Applicant considered that the request related to business of LCT and not the Authority, and that as such all beneficiaries of LCT are entitled to the information. His view is that the public are those beneficiaries. The Applicant referred to legislation he considered relevant.
19. The Commissioner has considered the submissions from both the Authority and the Applicant, as well as the withheld information, in addressing this issue. He is satisfied, from the content of the withheld information, and the explanations provided by the Authority (all stated above) that, for the purposes of FOISA, the information was (and is held by the Authority). There is an appropriate connection between the information and the Authority, the content of the information, the circumstances in which it was created, and how it was held. The Authority was therefore correct to provide the Applicant with a response under FOISA, as it did, given that the information requested was held by the Authority in terms of section 3(2) of FOISA. (In any case, it is not apparent to the Commissioner how the information would fall within the ambit of FOISA at all, if it were not held by the Council as a Scottish public authority: he presumes the applicant wants this to be a case the Commissioner has a remit to consider.)

Handling of the request – failure to comply with timescales

20. As set out in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs) (the "[Section 60 Code](#)"²), sections 10(1) and 21(1) of FOISA require all public authorities to respond "promptly" to a request or a requirement for review (and, in any case, within a statutory 20 working day timescale).
21. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
22. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
23. Both provisions make it clear that the 20-working day period is a long-stop and that the overriding requirement is to respond promptly.
24. The Applicant was dissatisfied that the Authority had not responded to his request earlier in accordance with the legislation.
25. The Authority, in its submissions to the Commissioner, stated that it endeavoured to respond to requests for information under FOISA within the statutory time frames, but that there were occasions when that did not happen. The Authority highlighted that its resources were finite, and occasionally and, regrettably, deadlines were sometimes missed.
26. The Authority noted in its response to the requirement for review to the Applicant that it had also been experiencing staff absences.

¹ [Charities and Trustee Investment \(Scotland\) Act 2005 \(legislation.gov.uk\)](#)

² [FOI/EIR: section 60 code of practice - gov.scot \(www.gov.scot\)](#)

27. It can be seen from the response to the Applicant that the Authority responded on the seventeenth day i.e. within the statutory 20 working days allowed by FOISA. The Authority therefore complied with section 10(1) in its response.
28. It is a matter of fact that the Authority did not respond to the Applicant's requirement for review within 20 working days. The Authority acknowledged this in its response to the requirement for review and apologised for the delay.
29. The Commissioner therefore finds that the Authority did not respond to the Applicant's requirement for review promptly or within the statutory timescale. As such, he finds that the Authority failed to comply with section 21(1) of FOISA.

Section 30(b)(ii) – Prejudice to the effective conduct of public affairs - substantial inhibition to free and frank exchange of views

30. 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.
31. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of this 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.
32. Each request must be considered on a case-by-case basis, considering 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 should have any bearing. As with other exemptions involving 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 future, not simply a remote or hypothetical possibility.

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

33. The Authority confirmed that it considered that section 30(b)(ii) of FOISA applied to all the information falling within the scope of the Applicant's request.
34. It explained that the report requested by the Applicant related to the governance of the LCT by the Authority. It stated that the report contained a range of views that, without free and frank discussion, would not come to form.
35. The Authority's view was that both councillors and the Authority's officers would likely be substantially inhibited from providing their views if the information falling within the scope of the request were to be disclosed. It considered that publication of this information would deter debate in future decision-making.
36. The Authority considered that councillors should be able to discuss sensitive issues relating to LCT outwith the public view, to ensure that debate was free and frank, and that difficult questions could be debated fully before the matter could be made public, and appropriate representations made by interested third parties. It argued that if the content of the report were to be made public, the ability of councillors to address the issues frankly would be curtailed.

37. The Authority added that the matters under discussion were still the subject of confidential reports, and were considered by the Authority's Finance and Resources Committee again on 20 June 2023 (not in the public hearing), and that the matter had still to come before the full Council for determination, and accordingly the issues and potential outcomes were still under discussion.
38. The Authority considered that the ability of both councillors and officers to partake in an effective decision-making process requires free expression of potentially diverging views, and open discussion. It maintained that if those involved in the decision-making felt unable to discuss matters freely and frankly, and outwith the public glare, that this would have serious consequences that could result in a lack of openness and scrutiny throughout any future decision-making process, substantially inhibiting the ability of councillors to consider issues and putting the decision-making process at risk.

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

39. The Applicant, on being asked for his comments on the Authority's new position, stated that he considered LCT to be a trust whose beneficiaries are the public (everyone living in Scotland), and that it was not owned by the Authority.
40. His arguments focused on his previously stated position that the Authority had failed to nominate Trustees of LCT, and that, in his view, it was obliged to do this by virtue of section 223 of the Local Government (Scotland) Act 1973. He maintained that having not nominated Trustees, the Authority had no legal right to make decisions, let alone hide these discussion from the beneficiaries of LCT. He considered that the Authority had purposefully excluded the beneficiaries from involvement in the operation of the Trust.

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

41. The Commissioner has considered all of the submissions made by the Authority and the Applicant, along with the withheld information.
42. The Commissioner is not in a position to comment on the Applicant's arguments in relation to the legal position with regards to the LCT nor the Authority's actions in respect of the LCT. The Commissioner's remit extends only to assessing whether the Authority complied with FOISA in its response (and subsequent review), and in the amended submission during the investigation, in respect of the Applicant's request for recorded information about the LCT.
43. The Commissioner accepts the Authority's position that the matters within the report remained under discussion within the Authority at the time of the request (and indeed this was still the case as of June 2023).
44. The Commissioner also accepts that for councillors and officers of the Authority, when discussing routes that are open to them, some of which may be unpopular with the public, or other interested parties, it is important to be able (in appropriate circumstances) to have open debate and a safe space to have a free and frank exchange of views on these options, without fear of public reaction.
45. The Commissioner considers that disclosure of the information falling within the scope of the Applicant's request would be likely to result in the substantial inhibition to the free and frank exchange of views, which would have an impact of the decision-making ability of the Authority.

46. As a result, he is satisfied that the information under consideration is exempt from disclosure in terms of section 30(b)(ii) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test – section 30(b)(ii)

47. 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. 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.
48. The Applicant, as stated above, considered that the public are beneficiaries of LCT, as such have the right to the information being withheld.
49. The Authority acknowledged that there was public interest in ensuring it acted appropriately, especially in relation to a site such as Lauriston Castle and its grounds, which are cherished by the public, whether it is acting in its capacity as trustee of the site that is required to be open to the public, or otherwise.
50. The Authority's view was that, on balance, the public interest was better served in this instance by maintaining the ability of councillors to consider the recommendations of officers on a confidential basis, allowing officers and elected members the opportunity to consider in private the advantages, disadvantages, and legality of proposals, and allow free expression of potentially diverging views, and open discussion.
51. The Authority therefore considered that the public interest favoured maintaining the exemption.

The Commissioner's view on the public interest - section 30(b)(ii)

52. The Commissioner recognises the significant public interest in the running of the LCT. He also accepts that disclosure would promote accountability and transparency in relation to the actions of the Authority.
53. The Commissioner has noted the Authority's earlier comment that the issues were still undecided, and that once it has come to a determination in the matter, the public and other interested third parties will be given the opportunity to provide their view.
54. In this instance, the Commissioner accepts that there is greater public interest in ensuring that councillors and officers have a private space in which to fully explore, and have disagreements about the matters contained within the withheld information, before coming to any decisions.
55. On balance, the Commissioner has concluded that, in this instance, the public interest in maintaining the exemption in section 30(b)(ii) of FOISA outweighed that in disclosure of the information, and therefore concludes that the Authority was correct to withhold this information.
56. As the Commissioner has found that the Authority was correct to withhold all of the information falling within the scope of the request under section 30(b)(ii) of FOISA, he does not have to go on to consider the application of the other exemptions raised by the Authority i.e. those in sections 33(1)(b) and 36(1) of FOISA.

Section 26(a) – Prohibition of disclosure under another enactment

57. The Authority's response to the initial request, and to the Applicant's requirement for review, maintained that the information falling within the scope of the request should not be disclosed by virtue of section 26(a) of FOISA.
58. In its submissions to the Commissioner, the Authority stated that it no longer wished to rely on this exemption to withhold this information, and provided no submissions in relation to the use of the exemption.
59. The Commissioner therefore must find that the Authority wrongly withheld the information falling within the scope of the Applicant's request by its reliance on this exemption, and as such failed to comply fully with section 1(1) of FOISA.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. Although the Authority was correct to withhold the requested information, it was wrong to withhold the information under the cited exemption (section 26(a) of FOISA): in doing so, the Authority failed to comply with section 1(1) of FOISA. It also failed to respond to the Applicant's requirement for review within the statutory timescale, in breach of section 21(1) of FOISA.

Given that the Authority provided the Applicant with a review, albeit late, and the information was correctly withheld under another exemption (section 30(b)(ii) of FOISA), the Commissioner does not require the Authority to take any action in respect of these failures, in response to the Applicant's application.

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.

Euan McCulloch
Head of Enforcement

1 February 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 –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (b) section 26;

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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.

.

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

(a) is prohibited by or under an enactment;

...

...

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

...

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).

...

