

Decision Notice



Decision 081/2009 Mr Bruce Pattullo and Angus Council

Communications concerning school closures or mergers

Reference No: 200801038
Decision Date: 16 July 2009

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Summary

Mr Bruce Pattullo requested information from Angus Council (the Council) concerning the closure or merger of schools. The Council withheld this information under the exemptions in section 30(b) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that disclosure would be likely to inhibit free and frank exchanges of views or the provision of advice, or would be likely to otherwise prejudice substantially the effective conduct of public affairs. The Council subsequently identified additional relevant information, some of which was supplied to Mr Pattullo. Following a review, the Council maintained its decision to withhold the information first considered and some of that subsequently identified. Mr Pattullo remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council identified further information that fell within the scope of Mr Pattullo's request. Some of this was released, whilst the remaining information was withheld in terms of sections 30(b) and (c) of FOISA.

The Commissioner found that, while the Council had correctly applied the exemptions in section 30(b) of FOISA to some of the information withheld from Mr Pattullo, it had misapplied the exemptions in section 30(b) and (c) to other information. The Commissioner therefore required the Council to disclose additional information to Mr Pattullo. In addition, the Commissioner found that the Council had breached section 1(1) of FOISA by failing to identify and supply all relevant and non-exempt information until after the commencement of the Commissioner's investigation.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002: sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 30(b) and (c) (Prejudice to the 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. Before setting out the details of Mr Pattullo's information request, it may be helpful to provide some background information relevant to this case.



2. The Council has an ongoing programme to evaluate its schools estate and this involves the consideration of whether certain schools should be closed, combined or relocated. In March 2008, the Council's Director of Education had prepared an internal briefing paper considering options regarding possible school closures. Following discussions with the Council's Administration Group, the Director then put a report to the Education Committee recommending that a proposal that Eassie Primary School should close be the subject of a formal consultation exercise (in terms of the Education (Publication and Consultation Etc.) (Scotland) Regulations 1981). The Council accepted this recommendation on 24 April 2008. The consultation took place in May 2008, and the responses indicated that there was strong opposition to the proposal. On 5 June 2008, it was decided by the Council that Eassie Primary School would remain open.
3. On 22 April 2008 (i.e. before the decision was taken to undertake consultation on the proposal to close Eassie Primary School), Mr Pattullo emailed the Council requesting three different types of information relating to its education service. Only the last of these is the subject of this decision. Mr Pattullo stated that he would like to see any internal communications since 3 May 2007 (including email and hand-written notes) between the Director of Education and the Convenor of the Council's Education Committee (referred to below as the Convenor of Education) on the subject of Eassie Primary School, and also regarding any other school closures/mergers.
4. The Council responded on 21 May 2008. It explained that the only relevant internal communication identified was a briefing paper and that this was being withheld under the exemptions in sections 30(b) and (c) of FOISA.
5. On 23 May 2008 (i.e. while the public consultation was ongoing), Mr Pattullo emailed the Council requesting a review of its decision to withhold the briefing paper in response to his request. He indicated that he believed the public interest favoured disclosure as part of a fair and open consultation. Mr Pattullo also stated that he considered it quite unusual that consultation had commenced on the subject of the possible closure of Eassie Primary School without any other exchange of communication between the Director of Education and the Convenor of Education. He asked the Council to verify whether there were other communications regarding Eassie Primary School or any other school closures.
6. The Council emailed Mr Pattullo on 27 May 2008 and provided him with an additional document falling within the scope of his request which had been identified in the course of responding to another information request. The Council apologised for failing to provide this information with its initial response, and noted that Mr Pattullo's request for a review had been passed to its Review Panel.
7. The Council then notified Mr Pattullo of the outcome of its review on 23 June 2008 (i.e. after the decision had been taken to retain Eassie Primary School). The Council identified an additional five documents falling within the scope of Mr Pattullo's request. It released one of these, but withheld the remaining four documents (two draft committee reports, one email and one memorandum) under sections 30(b) and (c) of FOISA. The Council also maintained its decision to withhold the briefing paper in terms of these exemptions.



8. On 11 July 2008, Mr Pattullo emailed 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.
9. The application was validated by establishing that Mr Pattullo had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

10. On 7 August 2008, the Council was notified in writing that an application had been received from Mr Pattullo and it was asked to provide the Commissioner with any information withheld from Mr Pattullo. The Council provided copies of the information withheld, and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Council on 23 September 2008, 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
12. In its response on 21 October 2008 the Council confirmed that it was relying upon the exemptions within sections 30(b) and 30(c) of FOISA. Its submission detailed why it considered these exemptions applied and why it had concluded that the public interest in maintaining the exemptions outweighed that in disclosure.
13. The investigating officer emailed the Council on 11 November 2008 to request details of the searches it had undertaken in locating the information requested by Mr Pattullo and to suggest that it reconsider its decision to withhold certain information from Mr Pattullo.
14. On the same day (and independently of the investigating officer's suggestion), the Council released two of the withheld documents to Mr Pattullo. These were the two draft committee reports that were identified in the Council's review.
15. As a result of the investigating officer's email of 11 November 2008, the Council undertook an additional search for information falling within the scope of Mr Pattullo's request, and again identified additional information. In an email dated 25 November 2008, the Council provided the Commissioner with an explanation of the searches it had undertaken, and indicated that it intended to release some of the additional information identified to Mr Pattullo, but to withhold some parts of the communications under section 30(b) and (c) of FOISA.
16. In additional correspondence with the investigating officer dated 27 November 2008, the Council indicated that searches relating to another information request had led to the identification of another email which fell within the scope of Mr Pattullo's request.



17. The Council's letter to Mr Pattullo (also dated 27 November) also enclosed copies of three additional documents that had been identified following the Council's supplementary search for the requested information, with content that the Council still considered to be exempt from release removed. The Council also released information from the documents withheld in its review response to Mr Pattullo, which it no longer considered should be withheld under FOISA.
18. Mr Pattullo contacted the investigating officer on 4 December 2008 to advise her that he been made aware that the Council held two further drafts of one of the reports which had been released to him on 11 November 2008. The investigating officer sought clarification from the Council on this point. The Council's response acknowledged that two further drafts did exist, but explained that these were not communicated between the Director of Education and the Convenor of Education, and so it believed that these fell outside the scope of the request. Since these drafts were not communicated between the two relevant parties, they do not fall within the scope of Mr Pattullo's request and so will not be considered further.
19. Mr Pattullo also raised concerns regarding the piecemeal manner in which information had been identified by the Council. To address these concerns, the investigating officer and the Deputy Head of Enforcement met with representatives of Angus Council on 23 January 2009. The purpose of this meeting was to discuss Mr Pattullo's application and, in particular, to determine whether the searches undertaken were reasonable and were sufficient to allow the Commissioner to conclude that all relevant information had by that stage been identified.
20. The investigating officer subsequently emailed Mr Pattullo, to advise him that the outcome of the meeting was that the Commissioner's staff were now satisfied that reasonable searches had been conducted (albeit belatedly), and that all relevant information had now been identified. Mr Pattullo was advised of the scope of this decision, and that it would not consider any information that was generated after the date of his request of 22 April 2008 (as this would not fall within the scope of his request). Mr Pattullo was also invited to comment on the public interest in the disclosure of the information withheld from him. Mr Pattullo's response confirmed that he was satisfied that the information specified by the investigating officer fell within the scope of his request and provided detailed on the public interest test and other matters relevant to the case.
21. The submissions from both parties are summarised where relevant in the analysis and findings section below.

Commissioner's analysis and findings

22. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Pattullo and the Council and is satisfied that no matter of relevance has been overlooked.



Searches undertaken by Angus Council

23. Mr Pattullo expressed dissatisfaction in his requests to the Council and in his correspondence with the investigating officer that the Council had not identified all the information that fell within the scope of his request. As noted above, this sought all communications between the Director of Education and the Convenor of Education on the subject of Eassie Primary School or any other school closures or mergers.
24. Also as detailed above, the investigating officer's requests prompted the Council to conduct additional detailed searches to identify any other information that fell within the scope of Mr Pattullo's request. Although several communications were identified and provided to Mr Pattullo as a result of these searches, a number of these fell outside the scope of his request, because they post-dated that request. However, the Council's searches identified three additional relevant documents; one of these was released in full and the other two documents were partially released to Mr Pattullo on 27 November 2008.
25. As noted previously, the investigating officer and the Deputy Head of Enforcement met with the Council on 23 January 2009 to discuss the searches undertaken by the Council and its reasons for identifying additional information in carrying out a review of Mr Pattullo request during the Commissioner's investigation. The Council provided a detailed explanation of the searches it had undertaken in locating the relevant information during its responses to Mr Pattullo and the Commissioner's investigation and why it had not identified all the information prior to responding to Mr Pattullo's initial request.
26. Having considered the findings of this meeting, and the documentary evidence provided by the Council, and after the consideration of the information identified, the Commissioner is satisfied that the Council had, by the end of the investigation, conducted reasonable searches to identify information falling within the scope of Mr Pattullo's request. He accepts that, on balance of probabilities, the Council does not hold any further information that could reasonably be expected to be retrieved and that falls within the scope of Mr Pattullo's request.
27. However, the Commissioner considers that, in its initial response to Mr Pattullo's request, the Council failed to undertake the necessary searches to locate all the relevant information. It appears that the Council initially interpreted the request very narrowly, and this led to inadequate searches being undertaken. The Commissioner accepts that this failure was rectified during the investigation, but he would remind the Council that a public authority in receipt of an information request must take reasonable steps to identify all the information sought. Therefore, in this case, he has come to the conclusion that as a result of taking an overly narrow interpretation of the information request, the Council failed to carry out the proper searches and, as such, failed to comply with section 1(1) of FOISA.

Information withheld

28. As noted above, the Council disclosed various pieces of information to Mr Pattullo during the investigation. Five documents have been withheld in part from Mr Pattullo and these are:



1. Memorandum from Director of Education to the Convenor of Education dated 23 January 2008
2. Email from to the Convenor of Education to Director of Education dated 26 January 2008
3. Memorandum from to the Convenor of Education to Director of Education dated 30 January 2008
4. Email from to the Convenor of Education to Director of Education, two other Councillors dated 18 March 2008
5. Director of Education's briefing paper dated March 2008

Timing of Mr Pattullo's request / review response

29. When the Commissioner receives an application and comes to a decision as to whether the public authority complied with Part 1 of FOISA in responding to the request, he must consider the position as at the time the public authority issued its response to the request for review.
30. In this instance, Mr Pattullo was notified of the outcome of the Council's review on 23 June 2008. As noted in paragraph 2 above, the Director of Education had prepared an internal briefing in March 2008 considering options regarding possible school closures. The Education Committee subsequently accepted the recommendation of the Director of Education that a proposal that Eassie Primary School should be closed be the subject of a formal consultation exercise. The consultation took place in May 2008, and the Council decided on 5 June 2008 that Eassie Primary School would remain open.
31. Therefore, notwithstanding that Mr Pattullo made his request while the future of the Eassie Primary School was in doubt, the Commissioner must consider whether the exemptions applied as at the date of the response to the request for review (23 June 2008) when the decision had been taken to retain Eassie Primary School. In reaching his decision, he cannot take into consideration any events after the relevant time.

Section 30(b)(i) and (ii): substantial inhibition to free and frank advice and exchange of views

32. The Council applied the exemptions in section 30(b)(i) and (ii) to the information withheld in the five documents identified in paragraph 28 above.
33. The exemptions in section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that information falls within the scope of the exemption, it is then required to go on to consider the public interest test laid down in section 2(1)(b) of FOISA.
34. The Council did not differentiate between section 30(b)(i) and 30(b)(ii) in respect of the information withheld. Therefore, the Commissioner will consider whether either or both of these exemptions apply to the withheld information.



35. In order for the Council to be able to rely on the exemptions laid down in section 30(b) of FOISA, it would have to 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)).
36. The Commissioner has in previous decisions made his views clear that the standard to be met in applying the tests contained in section 30(b)(i) and (ii) is high. In applying these exemptions, the principal consideration is not whether the information constitutes advice or opinion (although that may well be relevant), but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice and/or the exchange of views, as the case may be.
37. The Commissioner takes the view that in this context "inhibit" means to restrain, decrease or suppress the freedom with which advice is given, and opinions or options are expressed, whilst the word "substantial" is considered to mean 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.
38. The Commissioner has considered all of the arguments presented by the Council in relation to section 30(b), but dismissed a number on the basis that they raised issues not relevant to the tests set out in section 30(b). A number of these points were relevant to the consideration of section 30(c) or to the public interest test, and so he has considered these arguments in reaching his conclusions elsewhere in this decision.
39. The Council's submissions made the following points which are relevant to the tests contained within section 30(b):
 - The information under consideration is the provision of advice and exchange of views in relation to tentative proposals which reflected the very early stages of discussions as to which schools to consider for closure. Disclosure of this information would inhibit future exchanges between officers and members of the Council.
 - It is essential that such "early stage" communications on such a controversial subject take place on the basis of complete candour and in private. A free and frank exchange of views and advice is absolutely essential to properly inform any action as a consequence. If the information had to be made publicly available, officers and members of the Council would feel unable to have such frank discussions, and might feel "pressured" to act in a less thorough manner from an options appraisal perspective in dealing with potential school closures.
 - It would be misleading to release tentative proposals into the public domain, and this would bring forward public discussion on an emotive topic in advance of the point where any formal decision had been taken. It is important that discussions about "prospective only" options can be taken forward without any participant feeling "pressured" that their advice and views would be made available at an early stage.



- The Council noted in *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers* that the Commissioner upheld the application of exemptions in section 30(b) to certain draft documents. That decision states at paragraph 68 that, “The Commissioner considers that officials should be permitted some breathing space to consider, review and redraft such communications and that substantial future inhibition might be expected to result if such documents were released”. The Council acknowledged that the withheld information in this case is not draft documents as such, but stated that it was firmly of the view that the concepts raised were very early draft concepts, while the documents that had ultimately been made available were the “end result” of this process. Some of the proposals contained in the March briefing document (Document 5), they noted, never went beyond the stage of draft concepts. They argued that, for the same reasons set out in Decision 105/2008, the Commissioner should accept that the early documents should be withheld.
40. Having read the Council’s submissions, Mr Pattullo did not accept that the release of the withheld information would restrain, decrease or suppress the freedom with which opinions or options are expressed. He submitted that, in the preparation of such documents, a public official should be able to provide advice and options in an open and free manner, without resorting to personal opinion which cannot withstand public scrutiny.
41. Mr Pattullo cited comments by the Commissioner in previous decisions which had noted that, to date, no evidence has been presented to the Commissioner that the disclosure of information has had a significantly inhibiting effect on the way public authorities carry out their business.

Conclusions on the exemptions in section 30(b)

42. The Commissioner has considered the submissions made by the Council and by Mr Pattullo and the content of the information withheld. He recognises that the information withheld relates to early discussions and thinking regarding possible school closures. Within this phase, various options were explored, including some which were not taken forward. The documents include the exchange of both advice and views, which in some instances are freely and frankly expressed.
43. The Commissioner has noted that, by the time of the Council’s review of Mr Pattullo’s request, the public consultation regarding Eassie Primary School had been taken, the consultation had closed, and the decision to retain the school in the light of the consultation responses had been made. Disclosure would not, therefore, at the time of review, inhibited or have been likely to inhibit the exchange of views or advice within that same process on the same issue.
44. However, he must also consider whether disclosure would or would be likely to inhibit substantially future exchanges of advice and views on any topic. In considering this, the Commissioner has had particular regard to the Council’s statement that officials developing options papers of this type (whether on the issue of school closure or any other topic) could feel pressured to act in a less thorough manner if the information were released.



45. The issue to be considered is whether the effect of disclosure would be adverse by way of causing, or being likely to cause, the individuals to be substantially inhibited in the provision of advice or the exchange of views. If, on the other hand, the effect of disclosure was simply to increase the care given when offering advice and views to ensure they are justifiable and measured, and provide an accurate representation of the issues being addressed, then this is unlikely to be adverse and would not represent substantial inhibition. The Commissioner has recognised in previous decisions that the possibility of information being released under FOISA could also have a positive effect, by ensuring that options are considered in an accurate and measured way, concerns not overstated, and overall, that advice and views are expressed as a reasonable representation of the issues which needed to be addressed.
46. The Commissioner accepts that officers preparing information of this kind might be inhibited substantially in the expression of their views and advice by the prospect of disclosure at a time when the matters under consideration were still current and under development. He acknowledges that their reasons for being so inhibited might include a desire to avoid raising unnecessary concerns in relation to something (such as possible closure of a particular school) which may or may not come to pass.
47. It could also be argued more generally that disclosure might inhibit officials from conducting similar discussions in the future simply for fear that information may be disclosed at any future point. The particular subject of school closures or mergers is an emotive one for parents, communities and the Council involved. Given the sensitivity of the subject matter, it might be argued that disclosure of this information would make future discussions on similar subjects (whether about the same or different schools) less full and forthright.
48. While recognising this point, the Commissioner has taken into consideration that those involved in the discussions concerned were senior professional officers within the Council and elected members from the Council's Administration Group. All those involved would have been well aware that any recorded information held by the Council might be requested under FOISA, but would also have been aware that FOISA looks at the particular timing and circumstances of each request. Disclosure in this case would not automatically suggest that, in future cases, disclosure would be expected while initial discussions were ongoing and before decisions had been reached.
49. Having considered all of the arguments, the Commissioner has concluded that some of the information withheld was appropriately exempted in terms of sections 30(b)(i) and (ii) of FOISA. He has accepted that the exemptions apply where he considers the advice or views expressed to be those of an individual who would be inhibited from providing such comment in future. He has found that all of the withheld information within document 4 and some of the information within documents 1 and 5 to be exempt. The relevant parts are:
- Document 1 – 3rd paragraph
 - Document 4 – all withheld information
 - Documents 5 – last two sentences of point 2.3 and all the information from point 3.2 to the end of point 5.7.



50. However, he has concluded that neither of the exemptions in section 30(b) applies to the information withheld within documents 2 and 3, or the remaining information withheld from document 5. For this information, the Commissioner does not accept that disclosure in response to Mr Pattullo's request for review would, or would have been likely to, lead to the substantial inhibition of future exchanges of advice and views.

Public Interest

51. Having concluded that the exemptions in section 30(b) apply to the information specified in paragraph 49, the Commissioner must go on to consider the public interest test required by section 2(1)(b) of FOISA in relation to this information. This involves assessing whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
52. The Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure. As noted above, exempt information is only required to be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding the information).
53. The Council acknowledged that there is a strong public interest in relation to its proposals concerning its school estate, but submitted that there is a vital public interest in maintaining a secure environment in which officers and members of the Council can carry out their duties without the fear of disclosure inhibiting its ability to give proper consideration to the prospective proposals concerned. The Council maintained that it was a reasonable expectation that, in order to carry out this task, this exercise should take place in private to facilitate a robust discussion without fear that such advice and views might be picked over out of context and be subject to misinterpretation.
54. The Council noted that the information under consideration relates to a process which (where a decision is taken to proceed) can lead to the closure of a school. The Council argued that there is a public interest in protecting that process. The Council stated that if it was decided that even tentative proposals should be disclosed, officers and members of the Council would be less likely to use written communication to raise "possibilities", which, by their very significance, merit a free and frank exchange of views and the provision of advice. The Council maintained that if the information were released, this would potentially encourage less effective communication in relation to potential school closures with the disadvantage that an important issue or fact which is critical to the consideration of the options might be overlooked and effectively "fall through the net".
55. The Council additionally argued that the release of the information would not provide better understanding of the logic behind potential school closures. The Council noted that it is legally required to undertake a statutory consultation process in relation to proposed school closure and that certain information is required to be made publicly available at that stage. The Council stated that, with respect to Eassie Primary School, the reasons for and against the closure of the school have been well documented in publicly available committee reports.



56. Mr Pattullo provided detailed comments in relation to the public interest in disclosure of the information withheld in each of the documents concerned (redacted copies of which were, of course, available to him). While these are not summarised in full here, they have all been taken into account.
57. In relation to the general public interest in disclosure of the withheld information, he submitted that it is in the public interest that any factual information and advice given to elected councillors is examined to ensure it is both accurate and up to date. Mr Pattullo particularly noted that the briefing to the Council's Administration Group informed its decision making, but had not been open to challenge or scrutiny by the communities concerned. Mr Pattullo argued that disclosure would aid participation in the democratic process of local government, improve accountability and also help show whether or not the Council is adequately pursuing its regulatory responsibilities.
58. Mr Pattullo accepted that it would be reasonable to suggest that real harm may have been done to the Council's policy making and enactment had the documents been released when they were still under discussion. However, he noted that the matter had been closed with the decision to retain Eassie Primary School and that the documents were now (and at the relevant time for the Commissioner's consideration of this case) historical records, rather than contributing to current or ongoing policy formulation. As such, Mr Pattullo argued that it is in the public interest that interested parties are able to learn how local authority policies are developed.
59. Both the Council's and Mr Pattullo's submissions on the public interest are of a general nature considering all the information being withheld. As the Commissioner has come to the conclusion that only a part of that information can be withheld under section 30(b)(i) and (ii), his consideration of the public interest test in relation to those exemptions is restricted to this information.
60. The Commissioner has noted all of the points made by the Council and Mr Pattullo. In particular, he has found that the points made by Mr Pattullo have weight with regard to the contribution disclosure would make to understanding and participation by the communities concerned with respect to the issue of school closures. Disclosure would contribute to better understanding of the context in which decisions were taken and the advice on which these were based. Although the Commissioner accepts that information is available within the statutory consultation process, this does not preclude requests being made, or lead to an assumption against disclosure of related information outwith that context.
61. Against this, having accepted that disclosure of the exempt information would be likely to inhibit substantially the free and frank exchange of views and advice, the Commissioner is also of the view that such disclosure would be contrary to the public interest. It is in the public interest that officials and elected members are able to explore and discuss openly and frankly policy options, and alternatives, particularly in the early stages of policy development. Such discussions enable informed judgements to be made on both sides, and contribute to the effective work of local government.



62. The Commissioner has balanced the desirability of making information available to the public along with the general need for transparency and accountability in decision making, especially where the decisions involved have such potentially far reaching consequences for the provision of a key public service, with the need for officials to be able to exchange views and discuss matters of substance freely and openly.
63. In balancing the public interest in this case, the Commissioner has had regard to the particular information found to be exempt, and has noted that, although this reveals the candid expression of views by the individuals concerned, it would not contribute in a significant way to the understanding of the Council's decision making process or the options and facts that were presented.
64. Given the limited insight into the decision process and options considered that this information would provide, and having balanced the public interest for and against disclosure of the information found to be exempt in terms of section 30(b), the Commissioner has concluded that the public interest in disclosure of that information is outweighed by that in maintaining the exemptions.
65. Therefore, the Commissioner concludes that the Council acted in accordance with Part 1 of FOISA by withholding the following information in terms of section 30(b)(i) and (ii):
- Document 1 – third paragraph
 - Document 4 – all withheld information
 - Documents 5 – last two sentences of point 2.3 and all the information from point 3.2 to the end of point 5.7.

Section 30(c): substantial prejudice to the effective conduct of public affairs

66. Section 30(c) of FOISA exempts from disclosure information which would otherwise (i.e. otherwise than as provided for in section 30(a) and (b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption, and as such is subject to the public interest test in section 2(1)(b) of FOISA.
67. The Commissioner will not consider the application of the exemption in section 30(c) to information found to be correctly withheld in terms of section 30(b). The information under consideration here, therefore, is the remaining information which has been withheld from Mr Pattullo (as noted above, the Council has already disclosed redacted versions of all five of the documents to Mr Pattullo):
- Document 1 – fourth paragraph
 - Document 2 – all information withheld
 - Document 3 – all information withheld



- Document 5 – information withheld up to and including the second sentence of point 2.3 and the final 3 pages
68. Authorities seeking to rely on the exemption in section 30(c) of FOISA need to show that disclosure would (or would be likely to) prejudice substantially the effective conduct of public affairs, such as the way in which they conduct their business.
69. They should be able to demonstrate that the risk of damage being caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance, not simply marginal, and would require to occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information requested unless disclosure would (or would be likely to) cause real, actual and significant harm.
70. The prejudice identified by the Council as likely to follow from disclosure is the disruptive effect on the way in which the Council conducts its business. Here, the Council's concerns related to references within the withheld information to schools other than Eassie Primary School.
71. The Council submitted (in arguments presented in relation to section 30(b), but which the Commissioner considered more relevant to this exemption) that the disclosure of such "tentative proposals" relating to other schools, would have a harmful impact on individuals including pupils, parents, staff and the wider community, leading to:
- Undue alarm to pupils, parents, staff and members of the wider community.
 - Schools which had only tentatively been identified as a candidate for possible closure concerned being put into a position of jeopardy prematurely (e.g. parents could decide to move house as a consequence or avoid moving to the catchment area of a school which is the subject of such discussion)
 - Wider economic impact on the community by the creation of uncertainty (e.g. house prices).
72. The Council maintained that releasing information relating to the tentative proposals considered would be likely to lead to parents or other members of the community putting pressure on individual members to act in a certain way. The Council indicated that the effect of disclosure would be to disrupt the Council's business by requiring it to expend considerable resources dealing with concerns quite rightly raised from a wide number of individuals on the basis of information which did not actually represent the final decision of the Council. The Council indicated that this would be harmful to both its relationships and its efficiency.
73. The Council has also indicated that the release of the withheld information would have serious implications for the business of the Council in terms of staff retention and recruitment for those schools concerned, the viability of those schools in terms of what could wrongly be perceived as the fact that their future was in jeopardy as well as the impact that such uncertainty would have on pupils, parents and members of the wider community.



74. On the other hand, Mr Pattullo argued that the Council's arguments regarding the recruitment and retention of staff at schools which may be proposed for closure were apparently untrue, in Angus at least. Rather, he maintained that given the Council's track record with respect to rural school closures meant that "...it is already public knowledge that most small rural schools in Angus face the risk of closure and that their viability is regularly reviewed". He noted also that staff retention within schools considered for closure in the 2005 appeared not to have been affected.
75. Having considered all of the submissions from the Council and from Mr Pattullo, the Commissioner is not persuaded that disclosure of the information withheld would, or would be likely to, prejudice substantially the effective conduct of public affairs in the way suggested by the Council.
76. The Commissioner again recognises that the subject of possible school closures is one of great concern to the communities and individuals involved, and one that is likely to prompt public debate and contact with the Council. He accepts that this, in turn, will have resource implications for the Council dealing with enquiries on the subject.
77. However, the Commissioner does not consider that any additional contact or enquiries from stakeholders prompted by disclosure of the information withheld in this case would, or would be likely to, prejudice substantially the Council's ability to conduct its business. He recognises that, in the relevant period, the decision to consult on the possible closure of Eassie Primary School had already prompted discussion of the wider issue of rural school closures (which in turn led to Mr Pattullo's request), and created uncertainty about the future of the Council's rural school estate.
78. At the time of Mr Pattullo's request for review, the Council was already committing resources to address public questions and concerns on this topic. In a context where the general issue of school closure was already one of substantial public debate, the Commissioner does not accept that any additional communications prompted by disclosure in this case would have a significant effect on the overall resources required to deal with enquiries on this subject.
79. The Commissioner has considered carefully the Council's argument that disclosure would be harmful to communities, parents and teachers, by causing undue alarm about the possible future closure of particular schools. He recognises that a threat to a particular school could have a real effect on the community, parents, teachers and pupils, and could influence the choices people make. However, the Commissioner has taken into consideration here the nature of the proposals, which were early, tentative proposals which were not taken further.
80. By the time of the review, the Council had decided against closing Eassie Primary School, and so the process prompted by these early communications had been completed. While disclosure of tentative proposals regarding other schools might raise questions about whether these might be considered again in future, disclosure of the information might arguably be expected to dispel uncertainty on the subject.



81. The Commissioner has also noted that the Council has considered the closure of certain rural schools in both 2005 and 2008. In this context, it is public knowledge that the Council has considered rural school closures in the past and so it may well do so in the future. The Commissioner is of the view that communities in Angus which have small rural schools would already be aware that the future of such schools might have been discussed and could well be the subject of discussion in future.
82. The Commissioner does not accept the disclosure of options tentatively considered at one point would add significantly to the level of uncertainty or concern that is already in existence, and was at the time of Mr Pattullo's request for review.
83. For the reasons set out above, the Commissioner is unable to accept that substantial prejudice to the effective conduct of public affairs would (or would be likely to) be caused by the release of information under consideration. Therefore, the Commissioner is unable to uphold the application of section 30(c) with respect to this information. As a result, there is no need for him to consider the public interest test in relation to this information.
84. Having concluded that the Council breached Part 1 by withholding this information, the Commissioner requires it to disclose the information specified in paragraph 67 to Mr Pattullo.

DECISION

The Commissioner finds that Angus Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Pattullo.

The Commissioner finds that by withholding the information specified in paragraph 65 terms of sections 30(b)(i) and 30(b)(ii) of FOISA, the Council complied with Part 1.

However, the Commissioner also finds that the Council misapplied the exemptions in section 30(b)(i), 30(b)(ii) and 30(c) of FOISA in withholding the information specified in paragraph 67. In failing to disclose this information to Mr Pattullo, the Council failed to comply with Part 1 (and, in particular, with section 1(1)) of FOISA.

The Commissioner further finds that, as a result of taking an overly narrow interpretation of Mr Pattullo's information request, the Council failed to carry out the proper searches and failed to comply with Part 1 (and, in particular, with section 1(1)) of FOISA.

The Commissioner therefore requires the Council to release further copies of documents 1, 4 and 5 to Mr Pattullo, with the information specified in paragraph 67 restored, by 31 August 2009.

Decision 081/2009
Mr Bruce Pattullo
and Angus Council



Appeal

Should either Mr Pattullo or Angus Council wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
16 July 2009



Appendix

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 –
- (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-
 - (i) the free and frank provision of advice; or
 - (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.