

Decision Notice

Decision 262/2016: Mr Gordon Tait and the Scottish Fire and Rescue Service

Cultural survey report and opinions of SFRS staff

Reference No: 201600206

Decision Date: 12 December 2016



Scottish Information
Commissioner

Summary

The Scottish Fire and Rescue Service (the SFRS) was asked for a cultural survey report, with the staff opinions gathered as part of that survey. It disclosed some information.

During the investigation, the SFRS disclosed more information. It continued to withhold some information, arguing that disclosure would substantially prejudice the free and frank exchange of views.

The Commissioner identified deficiencies in the SFRS's provision of information before the investigation started, and in its handling of the request. She accepted the SFRS's reasons for continuing to withhold some information.

Relevant statutory provisions

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

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. Mr Tait did not retain a copy of his request, which he submitted using an online web form. He confirmed to the Commissioner that a response (dated 27 January 2016) from the SFRS correctly stated the terms of his request, which was made around October 2015. Mr Tait requested the following:
 - a) "I am writing to request a copy of a staff survey carried out by the Scottish Fire and Rescue Service last year. I believe all staff were surveyed on an anonymous basis and the results were collated into a report."
 - b) "I would be interested in any costs associated with carrying out the survey and any email correspondence between the Chief Officer and his management team/board in relation to the report."
2. SFRS responded on 30 October 2015, seeking clarification of the request (i.e. the exact subject matter of the survey in which he was interested and any other details which would identify it).
3. On 3 November 2015, Mr Tait wrote to SFRS, confirming that he was interested in a survey commissioned to gather staff opinion across the service, carried out earlier that year. He stated that he was looking for a copy of the report and the opinions gathered from SFRS staff. He sent a further email on 10 November 2015, pursuing a response.
4. The SFRS acknowledged Mr Tait's reminder and informed him it was collating information.
5. On 7 and 14 December, Mr Tait requested a review on the basis that the SFRS had failed to respond within statutory timescales. Mr Tait also continued to discuss his request verbally

with the SFRS and summarised these discussions in an email to the SFRS dated 23 December 2016: he referred to seeking the raw data that came back from the survey.

6. On 8 January 2016, Mr Tait emailed the SFRS again, summarising his communications and again seeking a review in respect of the SFRS's failure to respond.
7. The SFRS notified Mr Tait of the outcome of its review on 27 January 2016. For part 1 of his request, the SFRS directed Mr Tait to a "covering report" which was published online, citing section 25(1) of FOISA (Information otherwise available): it provided a link to its website. For the second part of his request, the SFRS provided the figure of £16,023.50 plus VAT as the overall cost of the survey.
8. On 1 February 2016, Mr Tait wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. As Mr Tait was satisfied that the response addressed the second part of his request insofar as it related to costs, that element need not be considered further here. Mr Tait expressed dissatisfaction with the response to the remainder of his request, submitting that it had not been addressed fully. He also expressed concerns about the handling of the request.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr Tait made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
10. On 29 February 2016, SFRS was notified in writing that Mr Tait had made a valid application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SFRS was invited to comment on this application and answer specific questions, including whether it had identified all the information it held and the steps taken to establish this.
12. During the investigation, the SFRS disclosed further information to Mr Tait. It continued to withhold information on staff opinions, arguing initially that this was exempt under section 38(1)(b) of FOISA (which relates to personal data). Later, it submitted that it was withholding this information under section 30(b)(ii) of FOISA. Mr Tait was given the opportunity to comment on the application of this exemption.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Tait and SFRS. She is satisfied that no matter of relevance has been overlooked.

Information held

14. 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 certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.

15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
16. After clarification of Mr Tait's request, the SFRS responded by directing him to information published on its website. During the investigation, the SFRS disclosed further information which it acknowledged fell within the scope of the request.
17. The SFRS described the survey process and this was discussed with the investigating officer. It accepted that information held by the company commissioned to carry out the survey was held on SFRS's behalf. It also described searches carried out for information held internally. Information was disclosed to Mr Tait at this time, although this did not include staff opinions provided for the purpose of the survey.
18. The Commissioner finds that the information disclosed during the investigation should have been disclosed in response to Mr Tait's request or his requirement for review. In failing to do this, the SFRS failed to comply with section 1(1) of FOISA.
19. The Commissioner is satisfied, on balance of probabilities, that the SFRS had identified and located all the relevant information it held by the close of her investigation.
20. Mr Tait queried why the disclosure during the investigation did not include the responses to questions expressing the opinions of SFRS staff members. The SFRS's decision to withhold this information will be considered further below.

Section 30(b)(ii) – Prejudice to the free and frank exchange of views

21. During the investigation, the SFRS originally submitted that the withheld information comprised personal data. It changed its position during the investigation, informing Mr Tait that it was withholding the information under sections 30(b)(ii) of FOISA. Mr Tait was invited to comment by the investigating officer, and did so.
22. To rely on this exemption, the SFRS 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.
23. There is a high standard to be met in applying the tests in this exemption. The inhibition must be substantial, in other words of real and demonstrable significance. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring.
24. In assessing whether the exemption applies, the Commissioner will take account of factors such as the content of the information withheld and the circumstances existing at the time of the request and requirement for review.
25. The SFRS submitted that disclosure would result in a lack of respect for confidentiality of the survey results, which in turn would undermine the trust between employer and staff. This, it argued, would undermine the effectiveness of processes for which frank communication were considered essential. The SFRS contended that responses were provided by staff expressly on the assurance that confidentiality would be protected. The SFRS supplied

documentary evidence (the statements made to staff, in various forms) during this investigation in support of this contention.

26. Mr Tait submitted that the confidentiality of employees responding to the survey was maintained by the fact that any comments were anonymised as part of the process. In Mr Tait's view, the assurances of confidentiality still held.
27. SFRS also expressed concern that disclosure here might cause "widespread cynicism" about any future requests for staff views. This might, in its view, undermine a number of key internal processes, which could not function effectively if staff believed their views might be disclosed in the public domain.
28. The SFRS explained that the survey was conducted across the organisation as a whole. It foresaw a severe adverse impact on its ability to make the improvements which might be needed to the service, if staff were inhibited from expressing their views freely and frankly. The SFRS also highlighted the perceived potential for damage to the organisation, and thus to its provision of a public service, through use of the information by someone hostile to the organisation.
29. Mr Tait disagreed with the SFRS's reasoning, expressing disappointment that the SFRS would suggest that this kind of impact on public safety could occur simply by disclosing responses to a survey of this kind.
30. Some of these submissions are difficult to evaluate in the absence of evidence from the SFRS. With regard to "widespread cynicism" and potential use by hostile outsiders, they appear to a large extent speculative and potentially overstated.
31. That said, the Commissioner does accept that there is real scope for harm as a result of disclosure of the information. It may not be possible to identify individuals from the information, but it is clear that staff provided their opinions on the understanding that their individual comments (as opposed to themes and conclusions drawn from them) would not be shared to a greater extent than was required for the purposes of the survey.
32. In the circumstances, the Commissioner is satisfied that disclosure would make it significantly less likely that individual employees would be willing to express their views freely and frankly in future surveys of this kind. In other words, it is likely that the free and frank exchange of views (for the purposes of deliberation) would be inhibited substantially by disclosure. Section 30(b)(ii) of FOISA would be engaged.
33. Where she has found that the exemption in section 30(b)(ii) of FOISA applies to the information withheld from Mr Tait (i.e. the raw data/staff responses), the Commissioner must now go on to consider the application of the public interest test, as set out in section 2(1)(b) of FOISA.

Public interest

34. The exemption in section 30(b)(ii) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must 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.
35. In his submissions to the Commissioner, Mr Tait pointed out that £16,000 of public money was used to pay for this survey. He argued the public was entitled to see the information, given this level of investment from the public purse.

36. The SFRS recognised the need for transparency, accountability and participation, but submitted that disclosure of individual comments by staff would do very little towards promoting these. It pointed out that the information disclosed already included summary information about staff feedback on both areas for improvement and positive themes. It contended this was sufficient to inform public debate, without damaging the operation of the service.
37. The SFRS also commented on a recruitment campaign during the summer of 2016, which it suggested would be extremely adversely affected by disclosure in response to the request or the requirement for review. The SFRS expressed concerns about the perceived prejudicial effect on operations and resulting damage to the service, which it contended was contrary to the public interest. It was concerned about the negative impact on staff and internal relations through betrayal of the trust staff placed in the SFRS when providing their responses to the survey in confidence.
38. The Commissioner recognises that disclosure of the information withheld under section 30(b)(ii) would increase transparency. Its disclosure would allow the public to gain a better understanding of what staff felt needed improvement and also what they believed worked well within their organisation. To some extent, it would contribute to following the public pound.
39. However, the Commissioner has also accepted that disclosure would be likely to lead to substantial inhibition from contributing freely and frankly to such surveys in future. This would diminish the effectiveness of future surveys and their scope for bringing about improvement across the organisation. It would, in turn, be likely to impact significantly on the effectiveness of the organisation and therefore on the effective provision of a key public service. This would not be in the public interest.
40. The Commissioner also notes the content of the information the SFRS has already disclosed in summary form, together with the information available online. She considers this goes some way towards satisfying the public interest in disclosure.
41. On balance, the Commissioner has concluded that in this instance, the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure of the information to which the exemption has been found to apply. She is satisfied that the SFRS was entitled to withhold the staff responses under section 30(b)(ii) of FOISA.

Handling of request

42. Mr Tait complained in his application about the number of holding responses involved and how difficult it had been to elicit a substantive response from the SFRS, to the point where he felt his request was being obstructed. The SFRS acknowledged the delay in responding, in the review outcome and in submissions to the Commissioner.
43. Although the failure was acknowledged in the SFRS's review outcome, the Commissioner notes that the SFRS failed to respond to the request within the 20 working days required by section 10(1) of FOISA.
44. Among factors contributing to the delay, the SFRS identified the Christmas period and unavailability of relevant staff. It also noted that Mr Tait did not want a response until it had collated all relevant information, submitting that it had maintained telephone and email contact with him during the intervening period.

45. The Commissioner notes the contact with Mr Tait while he was awaiting a response and would consider this to be good practice where a response is overdue. However, the fact remains that a Scottish public authority is under an absolute obligation to respond within the required timescale. It is also good practice to have arrangements in place to ensure that this happens: in particular, the authority should aim to maintain a reasonable degree of resilience in allocating resources to the FOI function.
46. For example, the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) regulations 2004¹ states (in the version in force at the time the SFRS responded to the request and requirement for review):

“Authorities should have in place robust arrangements to ensure that staff absence (whether planned or un-planned), does not affect the authority’s ability to respond to requests for information, and requests for review, within statutory timescales”.
47. Bearing in mind that public holidays are taken out of the calculation, this should include resilience over the festive period. It is hardly an unexpected or sudden event, and can and should be planned for in advance. The SFRS’s submissions suggest that its arrangements were inadequate on this occasion.
48. In any case, it should be noted that Mr Tait first made his request in October 2015, with his clarification dated and received on 3 November. This was well in advance of the festive period. There is nothing in any of the submissions to suggest that Mr Tait’s request presented (or, at least, should have presented) particular challenges in relation to identifying and locating the information. If it did, the SFRS may wish to review its records management and retrieval arrangements. In the light of the issues identified here, it should certainly review its resourcing and resilience arrangements, with a view to ensuring that it can respond to requests on time.
49. Given the nature of the concerns identified above, the Commissioner would suggest that Modules 1 and 2 of her “Self-Assessment toolkit”² and would provide a good starting point in reflecting on how the SFRS can improve future practice.

Decision

The Commissioner finds that the Scottish Fire and Rescue Service (the SFRS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tait.

The Commissioner finds that the SFRS was entitled to withhold some information (opinions expressed by individual employees) under section 30(b)(ii) of FOISA.

The Commissioner finds that the SFRS failed to comply with section 1(1) of FOISA, by failing to identify all the information it held and which fell within the scope of the request until during the investigation.

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

² <http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkitIntroduction.aspx>

Appeal

Should either Mr Tait or SFRS wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

12 December 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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

...

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