



Scottish Information
Commissioner

Decision 067/2006 Mr George Harper & Perth and Kinross Council

<i>Sections of a monitoring officer's report</i>
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Applicant: George Harper
Authority: Perth and Kinross Council
Case No: 200501574
Decision Date: 24 April 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 067/2006 – Mr George Harper & Perth and Kinross Council

Sections of a monitoring officer's report – section 30(b)(i) effective conduct of public affairs

Facts

Mr Harper requested a copy of an investigation report produced by Perth and Kinross Council's monitoring officer, together with certain related documents. The Council provided the documents it held in relation to Mr Harper's request, but withheld certain paragraphs from the investigation report, citing the exemption in section 30(b)(i) (effective conduct of public affairs) of the Freedom of Information (Scotland) Act 2002 and arguing that the public interest in withholding the information outweighed that in disclosing it. Mr Harper sought a review of the Council's decision in relation to the information withheld. On review, the Council upheld the decision to withhold the information on the basis of the exemption cited in response to the original request. Mr Harper remained dissatisfied and applied to the Commissioner for a decision.

Outcome

The Commissioner found that Perth and Kinross Council acted fully in accordance with the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Harper's request for information and in particular that it applied the exemption in section 30(b)(i) of FOISA correctly to the information withheld.

Appeal

Should either Mr Harper or Perth and Kinross 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 of receipt of this notice.



Background

1. Mr Harper wrote to Perth and Kinross Council (the Council) on 17 January 2005, requesting the following information:
 - a) A copy of a report by the investigating/monitoring officer following an investigation into two issues raised by Mr Harper in terms of the Public Interest Disclosure Act 1999 in relation to the Council's Financial Regulations and Scheme of Administration (Item 1)
 - b) Copies of all statements taken by the investigating/monitoring officer for the purpose of the above report (Item 2)
 - c) Copies of all correspondence between the Council and Audit Scotland regarding the subject matter of the report (Item 3).
2. The Council responded to Mr Harper on 17 February 2005. It provided a copy of Item 1, edited to remove certain paragraphs. The Council argued that the editing was necessary to allow the free and frank provision of advice and therefore that the exemption in section 30(b)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA) applied to the information removed. The Council stated that it did not hold Item 2 and served notice on Mr Harper accordingly, in terms of section 17 of FOISA. It provided copies of all correspondence comprising Item 3.
3. On 22 February 2005, Mr Harper wrote to the Council requesting a review of its decision to remove certain information from Item 1. The Council responded on 9 March 2005, upholding the decision to withhold the information under section 30(b)(i) of FOISA.
4. Mr Harper did not agree that the Council was entitled to withhold the information and applied to me for a decision on 13 April 2005. An investigating officer was assigned to the case.

Investigation

5. Mr Harper's application was validated by establishing that he had made a valid request for information to a Scottish public authority and had applied to me only after asking the Council to review its response to his request.



6. The investigating officer wrote to the Council on 1 June 2005, informing it that an application had been received and that an investigation had begun. It was asked to comment on Mr Harper's application and in particular on its handling of his request for information and its application of the exemption in section 30(b)(i) of FOISA to that information. It was asked to provide a copy of the information withheld. The Council responded in full on 17 June 2005.
7. The Council has given the following reasons for applying the exemption in section 30(b)(i):
 - a) The information withheld contains comment and opinion given by the monitoring officer in a free and frank manner
 - b) The Council's monitoring officer has a proactive role in ensuring good practice, procedures and governance, including the provision of advice to all members of the Council on issues of lawfulness and the Council's powers to act, maladministration, financial impropriety, probity and the policy and budget framework. In particular, he or she is required to prepare a report for the consideration of the full Council if any proposal, decision or omission by the Council, or by any committee, sub-committee or officer, is believed by the monitoring officer to contravene any legislation or code of practice
 - c) The comments withheld are not directly relevant to the subject matter of the report and do not relate to fact
 - d) The monitoring officer must be allowed to give appropriate advice to the Chief Executive without fear of recrimination. The monitoring officer has confirmed that were this information to be disclosed he would be unwilling to give free and frank advice on the current matter. This would substantially inhibit the provision of such advice and could raise doubts about his continuing role as monitoring officer
 - e) While recognising that there is a public interest in the disclosure of information contained within reports written by the monitoring officer, so that the public can be reassured that the Council is running effectively, efficiently and legally, and that the monitoring officer's investigations are conducted fairly and impartially, the Council submits that the information withheld does not directly impact on the investigation or its conclusions and therefore that disclosure in this case would not contribute to the public's knowledge of the conduct of the investigation. The public interest would be better served by withholding the information, in order to allow advice to continue to be provided by the monitoring officer to the Chief Executive in a free and frank manner.



The Commissioner's analysis and conclusions

8. Under section 5 of the Local Government and Housing Act 1989, the role of a local authority's monitoring officer is broadly as the Council has described it. Every local authority is required to designate one of its officers as its monitoring officer and to provide that officer with staff, accommodation and other resources sufficient to enable the duties of the post to be carried out. The duties of the monitoring officer are personal to the officer designated and may be delegated to a nominated deputy only where the monitoring officer is unable to act owing to absence or illness.
9. Clearly, the role of securing lawfulness and overall probity in the operations of a complex entity such as a local authority is a significant and demanding one and I accept that there will be occasions on which an authority's monitoring officer will require to venture advice and opinion freely and frankly without fear of recrimination. The question for me here, however, is whether disclosure of the information withheld would, or would be likely to, have the effect of inhibiting substantially the provision of such free and frank advice.
10. The information withheld from the applicant in this case is to be found in paragraphs 22, 40 and 41 of the monitoring officer's report (Item 1 requested by the applicant). I agree with the Council that none of it relates directly to the subject matter of the report, which was the product of an investigation into allegations that failure to keep the Council's Financial Regulations and Scheme of Administration up to date had led, respectively, to the absence of an effective system of financial control and potentially unlawful acts. The withheld paragraphs relate not to these questions but rather to other issues which arose incidentally in the course of the investigation and which the monitoring officer appears to have considered it necessary to raise with a view to further appropriate action being considered by the Council. The monitoring officer appears to have considered them to be of some importance and there is no doubt that he expressed his views on them in a somewhat forthright manner. I should be most surprised if he would have said the same things, at least in the same manner and with the same force, if he had expected his comments to become public.



11. As will be clear from the preceding paragraphs, I accept that the role of the monitoring officer is an important one requiring a significant degree of authority and independence on the part of the post holder. What the monitoring officer considers it necessary to bring to the authority's attention will be very much a matter for professional judgement and discretion. If the job is to be done properly, it will from time to time be necessary to express views or provide advice on a matter (which may be of some sensitivity) in a forthright, or free and frank, manner. The paragraphs redacted from the report under consideration here were expressed in such a manner and constituted either the direct provision of advice or essential background material to the provision of advice. In the circumstances, I accept that the monitoring officer would be inhibited substantially from expressing his views in the way that he has done were the redacted paragraphs to be disclosed, and therefore that disclosure would inhibit substantially the free and frank provision of advice. Therefore I accept that the exemption in section 30(b)(i) of FOISA applies to the information withheld, subject to the application of the public interest test.

12. I must consider whether in this case the public interest in maintaining the section 30(b)(i) exemption outweighs the public interest in disclosing the information. There is clearly a public interest in maintaining the exemption to permit the monitoring officer to carry out his tasks fully and independently, without the risk of interference or recrimination. There is, conversely, a public interest in open access to his reports, so that the public can be satisfied that the Council is operating within the relevant legislation and guidance, that appropriate action is being taken (or at least recommended) if it appears not to be, and that the functions of the monitoring officer in securing overall probity are being discharged in a thorough and impartial manner. I am not persuaded, however, that the redacted paragraphs would be particularly illuminating for any of these purposes. They relate to matters which, while no doubt of considerable importance to the Council's internal management, are likely to be of only passing relevance to its proper and effective governance or the adequacy of scrutiny thereof by the monitoring officer. In all the circumstances, I am satisfied that the greater public interest lies in maintaining the exemption and not disclosing the information withheld.



Decision

I find that Perth and Kinross Council acted fully in accordance with the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Harper's request for information and in particular that it applied the exemption in section 30(b)(i) of FOISA correctly to the information withheld.

Kevin Dunion
Scottish Information Commissioner
24 April 2006