

Decision Notice

Decision 073/2019: Mr N and the Scottish Ministers

Draft hate crime posters

Reference No: 201801991

Decision Date: 10 May 2019



Scottish Information
Commissioner

Summary

While developing their “Hate has no home in Scotland” campaign, the Ministers showed drafts of posters to some third party organisations. The Ministers were subsequently asked for the draft posters, but decided the posters were exempt from disclosure. Following an investigation, the Commissioner found that the Ministers were entitled to refuse to disclose the drafts.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (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. On 8 October 2018, Mr N made a request for information to the Scottish Ministers (the Ministers). He asked for copies of all draft posters for the “*Hate has no home in Scotland*” campaign which were shown to third party organisations on behalf of the Scottish Government, including those shown to BEMIS and Police Scotland under the anti-bigotry topic.
2. The Ministers responded on 1 November 2018. They refused to provide the information arguing that it was exempt under section 29(1)(a) of FOISA (Formulation of Scottish Administration policy etc.).
3. Later that day, Mr N wrote to the Ministers requesting a review of their decision. He commented that the information related to a major campaign from the Scottish Government and it was in the public interest for the Government to be transparent about the different designs shown to stakeholders.
4. The Ministers notified Mr N of the outcome of their review on 16 November 2018. The Ministers confirmed their original decision without modification.
5. On 16 November 2018, Mr N wrote to the Commissioner. Mr N applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He commented that, if the Ministers considered the content of the draft posters to be appropriate to show to external organisations, the posters must have been viewed as suitable for publication.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr N made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 14 January 2019, the Ministers were notified in writing that Mr N had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr N. The Ministers provided the information and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on the application and they were asked questions about their decision to withhold information under section 29(1)(a) of FOISA.
9. On 7 March 2019, the Ministers notified Mr N and the Commissioner that they were withdrawing their reliance on 29(1)(a) of FOISA, and instead they were now relying on section 30(c) (Prejudice to effective conduct of public affairs) to withhold information from Mr N. The Ministers provided both Mr N and the Commissioner with their reasons for applying section 30(c) of FOISA.
10. The investigating officer sought, and obtained, further comments from the Ministers on section 30(c). Comments on this new exemption were also obtained from Mr N.

Commissioner's analysis and findings

11. 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 him by both Mr N and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Withheld information

12. The Ministers are withholding six draft campaign posters that were shown at a stakeholder meeting on 9 August 2018 along with a PowerPoint presentation (which includes the draft posters) dated 30 August 2018 and which was shared with Police Scotland.

Section 30(c) of FOISA – Prejudice to effective conduct of public affairs

13. The Ministers applied section 30(c) of FOISA to all of the information requested by Mr N.
14. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. The standard to be met in applying the tests contained in section 30(c) is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

Mr N's submissions

16. Mr N argued that the need for Ministers to operate in a private space is different from what took place on this occasion, given that the draft posters were shown to external organisations. Mr N stressed that this was not an internal process. Mr N argued that the Scottish Government had an agency draft posters for a huge advertising campaign, which

was then deemed suitable to show to external agencies. He argued that time has passed since the campaign was launched and the issue of hate crime remains significant.

The Ministers' submissions

17. The Ministers explained that the posters form part of a wider presentation that was delivered to a group of stakeholders and shared with Police Scotland and which discusses the Scottish Government policy on increasing awareness of and reducing hate crime in Scotland.
18. The Ministers argued that it is important (and necessary) that they are able to engage in discussion on the future development of awareness campaigns and to seek the views of relevant internal and external stakeholders, such as Police Scotland, in order to ensure that their campaigns are supported as robustly as possible and that sufficient research has been undertaken, sought, communicated and developed.
19. The Ministers submitted that due to the serious nature of the topic, it was important to get the message and the language absolutely right in order to maximise the effectiveness of the campaign.
20. The Ministers explained that the process of finalising the posters was a collaborative one. They were produced by an external agency and a number of stakeholders helped shape the final version and language through various iterations that were then tested with the target audience and a final text agreed. The Ministers argued that disclosing the content of the draft posters would make it very hard to engage stakeholders in any future collaboration about hate crime, or similar campaigns of this nature, and it would undermine what was intended to be a safe and confidential environment.
21. The Ministers submitted that if the posters were disclosed it would be possible for third parties to compare the draft and finalised versions and, rightly or wrongly, attribute which stakeholder(s) had a say in finalising the campaign approach.
22. The Ministers argued that stakeholders would be very reluctant to provide their views as fully and frankly, either in writing or at meetings if they believe that their views are likely to be disregarded through the publication of initial drafts. Disclosure would expose early and immature thinking which would be likely to undermine the stakeholders trust in the Scottish Government, inhibiting their willingness to be frank and open in any future campaigns.
23. The Ministers also argued that disclosure of the draft posters could lead to further instances of discrimination, given the emotive content of the draft. To support this argument, the Ministers provided the Commissioner with an internal email from an individual who had commented on the draft posters (before Mr N made his information request), suggesting that the draft text could lead to further instances of abuse or discrimination.

The Commissioner's findings on section 30(c)

24. Having considered the nature and content of the withheld information, together with the Ministers' submissions and the comments made by Mr N, the Commissioner accepts that disclosure of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs, by inhibiting stakeholders from fully participating in similar campaigns in the future and by increasing the risk of discrimination to particular communities in Scotland.
25. The Commissioner has taken account of Mr N's arguments, particularly his suggestion that, as the draft posters were shown to external stakeholders they were not part of an internal government decision making process, but were instead part of a relatively public process,

with the implication being that there is little harm in their disclosure. The Commissioner notes that the information being withheld from Mr N has been shared with Police Scotland and the attendees of a stakeholder group, which was comprised of representatives from each of the five hate crime characteristics (race, religion, sexual orientation, disability and transgender identity).

26. The draft posters do not comprise confidential government information or cabinet papers. They were developed with the purpose of being used in a publicity campaign and the drafts were viewed by the above mentioned third parties (they were not allowed to take them home) prior to their alteration and approval. However, just because the information was shared with third parties during the development phase of the campaign does not mean that the information is not in any way sensitive, or that it should be publicly disclosed in response to Mr N's request.
27. The Commissioner has carefully considered the wording of the draft posters and he accepts that disclosure could increase the levels of harm experienced by certain communities in Scotland. The Ministers have provided the Commissioner with emails from some of their staff, commenting on the draft and impact of the posters, and it is clear that the original wording of the posters raised considerable concerns. The Commissioner notes that the Scottish Government acted on these concerns and the contentious text was removed from the finalised, published versions of the posters.
28. The Commissioner has not seen any of the feedback on the draft posters that would have been given by attendees of the stakeholder group, but he considers it reasonable to presume that at least some of it would have mirrored the concerns raised internally by Scottish Government officers. The Commissioner considers it likely that publication of the draft text would, rightly or wrongly, implicate the stakeholders in the development and approval of the draft text. In both instances, the Commissioner considers it likely that the stakeholders would feel aggrieved that they were associated with draft text which they had expressed concerns about and which had led to changes being made.
29. In the circumstances, the Commissioner considers that if the draft text of the posters was to be disclosed it could negatively impact on the stakeholders' trust in the Scottish Government and their subsequent willingness to be actively involved in other campaigns or policy developments. If this occurred, the Commissioner is satisfied that it would, or would be likely to, prejudice the effective conduct of public affairs and that the Ministers were entitled to apply the exemption in section 30(c) of FOISA to this information.

Public interest test

30. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
31. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

Submissions from the Ministers

32. The Ministers acknowledged that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. They also recognised the public interest in relation to the reduction of hate crime in Scotland.
33. However, the Ministers argued that there is a greater public interest in allowing Ministers and officials a private space within which to communicate as part of the process of explaining and refining their campaign to promote awareness and encourage hate crime reporting before reaching a settled view. The Ministers argued that this was important in order to enable all options to be properly considered in confidence with stakeholders such as Police Scotland, so that good decisions can be taken based on fully informed advice and evidence, such as that provided by Police Scotland staff.
34. The Ministers argued that disclosure of early iterative versions would be likely to undermine the full and frank discussion of issues between the Scottish Government and these stakeholders in future, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

Submissions from Mr N

35. Mr N submitted that the issues of hate crime and bigotry are highly significant in Scottish public discourse and political activity. He argued that it is in the public interest for potentially inappropriate content shown by Ministers to external stakeholders to be made available for wider public scrutiny.

Commissioner's conclusions

36. The Commissioner accepts there is a general public interest in ensuring transparency and accountability, particularly when the Scottish Government is developing a public information campaign with the involvement of external stakeholders. The hate crime campaign was widely publicised and clearly was designed to have an impact on the people of Scotland. The Commissioner notes that there was significant media coverage of the published posters in the finalised campaign, not all of which was positive. He also recognises the controversial nature of the Scottish Government campaign and he acknowledges that high-impact media campaigns will bring an expectation of openness and transparency, particularly in relation to how the publicity materials were developed.
37. However, the public interest in the disclosure of the information (the draft posters) must be balanced against the public interest in withholding the information. The Commissioner has accepted that disclosure would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, because the information could dissuade stakeholders from participating in similar campaigns in the future and because disclosure of the text could increase the levels of discrimination faced by certain community groups in Scotland. That would not be in the public interest. Although there is a public interest in the disclosure of the information, the Commissioner does not consider it strong enough to outweigh the public interest in maintaining the exemption. On balance, therefore, the Commissioner is of the view that the public interest in withholding the information outweighs the public interest in disclosing it.
38. The Commissioner therefore finds that the Ministers were entitled to withhold the information under section 30(c) of FOISA.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr N.

Appeal

Should either Mr N or the Scottish Ministers 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

10 May 2019

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.

...

- (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-

...

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

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