

Decision Notice 175/2019

Social Security Directorate People Survey 2018

The Applicant

Public authority: The Scottish Ministers

Case Ref: 201900966



Scottish Information
Commissioner

Summary

The Applicant asked the Ministers for a copy of the Social Security Directorate People Survey 2018. The Ministers withheld the information on the grounds that disclosure would prejudice the effective conduct of public affairs.

The Commissioner investigated and found that the Ministers had wrongly withheld the information. He required the Ministers to disclose the information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 30(c) (Prejudice to the 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 4 March 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant requested the results for the Social Security Directorate People Survey 2018 (the People Survey)
2. The Ministers responded on 1 April 2019 and withheld the information under section 30(c) of FOISA on the grounds that disclosure of team-level reports could result in low participation and/or manipulated responses in future surveys.
3. On the same day, the Applicant wrote to the Ministers requesting a review of their decision on the basis that they had not demonstrated the link between disclosure of the information and the harm suggested. He argued that the harm described was hypothetical and the argument made would apply as equally to its internal distribution as to external. The Applicant provided an example of what he deemed a similar survey, which had been publicly disclosed by the Ministers.¹
4. The Ministers notified the Applicant of the outcome of their review on 26 April 2019. They stated that the intended audience for the People Survey were the leadership within the Scottish Government and that public disclosure of the results would adversely affect the willingness of staff to complete future surveys with candour. They submitted that staff would self-censor their responses to avoid giving the public an adverse opinion of their particular business area and, by extension, their own professional standing.
5. On 12 June 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he did not accept that disclosure would cause the serious harm to public affairs that the Ministers were suggesting. He believed that their views amounted to simply an assumption.

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2019/03/foi-19-00374/documents/attachment/attachment/govscot%3Adocument/FOI%2B19-00374%2B-%2BSocial%2BSecurity%2BAgency%2BImplementation.pdf>

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 18 July 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. 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 this application and to answer specific questions. These related to their application of section 30(c) of FOISA and how disclosure would cause the degree of harm specified by this exemption.
9. The Applicant was also asked to provide any submissions he wished to make on the disclosure of the information and on the public interest.
10. Both the Applicant and the Ministers provided the investigating officer with submissions.

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 the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

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

12. 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 be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
13. This exemption applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
14. The Commissioner has previously stated that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.

Submissions from the Applicant

15. The Applicant reiterated that a similar survey from the agency side of the social security programme, Social Security Scotland, had been released to him earlier in the year regarding the Social Security Agency Implementation team, which was then part of the overall Directorate, and that this survey had since been published on the Social Security Services website alongside a staff and clients insight research paper, as a means to inform the public of the operation of the new agency.
16. He did not believe that disclosure of the survey information he was currently seeking would, or would be likely to, cause serious harm to public affairs and that this was simply an assumption by the Ministers. He indicated that the terms of the survey are made clear to staff and are rigorously constructed so that disclosure can take place without harm, or a chilling effect, being caused. He also argued that the advice provided to staff did not limit the audience of the survey.

Submissions from the Ministers

17. In their submissions, the Ministers argued that the harm envisaged did not hinge on fears that the People Survey respondents might be identified, but rather on their fears of publicly presenting a negative image of the Directorate in which they worked. The Ministers submitted that, if staff were to sanitise their responses to avoid that consequence, it would largely remove any practical value from the People Survey, and so deprive management of a source of information about how individual business areas were operating. This would reduce the ability of management to address concerns and issues that would otherwise have been exposed via the People Survey. The Ministers stated that this would substantially prejudice the effective conduct of their affairs.
18. With regard to the survey carried out by Social Security Scotland, the Ministers explained that this was not part of the overarching Civil Service People Survey which was organised at UK level. It was a standalone survey carried out by Social Security Scotland itself. While they accepted that there were some similarities, the Ministers submitted that differing considerations applied between a one-off survey conducted by a single business area and part of a wider survey that is organised every year. The Ministers concluded that it was therefore possible to reach different conclusions on the question of whether disclosure would be likely to cause substantial prejudice to the effective conduct of public affairs.
19. The Ministers also argued that, even if Social Security Scotland had participated in the Civil Service People Survey, then different considerations would still apply. They argued that, in the context of the People Survey, individual Government departments, executive agencies and certain non-departmental public bodies are “organisational units”. As the People Survey is organised across Great Britain, the Scottish Government is in that context seen as being a single department and its Social Security Directorate is a “sub-organisational unit”. The Ministers submitted that Social Security Scotland, as an executive agency, is a separate organisational unit.
20. The Ministers stated that this distinction was significant because People Survey results were routinely proactively published at an organisational level (the Scottish Government publishes its results²) and so the disclosure of Social Security Scotland’s results of its own survey is consistent with usual practice. However, for sub-organisational units which did not routinely

² <https://www2.gov.scot/Topics/Research/by-topic/public-services-and-gvt/Employee-Survey>

publish their survey results, disclosure was considered likely to substantially prejudice the effective conduct of public affairs.

The Commissioner's findings

21. In reaching a finding on this matter, the Commissioner has considered the submissions put forward to him by both the Ministers and the Applicant. He is cognisant of the report by Audit Scotland entitled "*Social Security Implementing the Devolved Powers*"³ in which the Auditor recognises the importance of understanding how staff members are responding to the conditions in the Directorate. He has also considered the content of both the surveys that are referred to in the foregoing arguments by way of comparison.
22. He notes that the format of both surveys is almost identical right down to the categories and headings of the information asked for. Both surveys also include the same confidentiality guarantee which states "*[The rules under which the survey was conducted] do not allow for the breakdown of the results to the extent where the anonymity of individuals may be compromised*".
23. The Commissioner fails to see the distinction, in terms of potential harm from disclosure, between the publication of a single one-off survey of a particular department and the publication of a "sub-organisational unit" in the context of the wider People Survey where similar, if not identical, factors are considered.
24. The Commissioner has not been presented with any evidence in support of the Ministers' statement that differing considerations apply between a one-off survey conducted by a single business area and one which is part of a wider survey that is organised every year.
25. In addition, the Commissioner is not convinced by the Ministers' submissions that the degree of harm required to meet section 30(c) of FOISA has been demonstrated. The Ministers argued that there was a realistic and likely outcome that people would self-censor in order to prevent the public forming an adverse opinion of their particular business area. The Commissioner finds this difficult to accept given the assurances provided to the respondents and the manner in which the information is collected and presented. He has not been provided with any evidence to suggest that employees would be more circumspect in their views if the resulting impact would be a negative view of their business area. All that has been put forward by the Ministers, as the Applicant has suggested, appears to be assumption. As stressed by the Ministers, the survey is conducted and reported in an anonymous fashion.
26. Having considered the information under consideration, the Commissioner notes that it is presented in a format that individual responses or comments are not identifiable. The Commissioner has not been presented with any cogent argument which would explain why an individual would be less inclined to contribute (in a non-attributable manner) to the Survey as a result of publication of the results, even if those results were negative. Having taken account of the arguments put forward by the Ministers, the Commissioner has not been provided with sufficient evidence to support the application of section 30(c) of FOISA to any of the information contained in the People Survey.
27. Given that the Commissioner is satisfied that the section 30(c) exemption does not apply, he is not required to go on to consider the public interest. The Commissioner requires the Ministers to disclose the information to the Applicant.

³ https://www.audit-scotland.gov.uk/uploads/docs/report/2019/nr_190502_social_security.pdf

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 and, in particular, section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. He finds that the information under consideration was incorrectly withheld under section 30(c) of FOISA.

The Commissioner therefore requires the Ministers to disclose the information as requested by the Applicant by **13 January 2020**.

Appeal

Should either the Applicant 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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

29 November 2019

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.

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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