

Decision Notice 041/2020

Glasgow Winter Gardens closure

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 201901147



Scottish Information
Commissioner

Summary

The Council was asked for information concerning the closure of Glasgow Winter Gardens.

The Council provided some information, and withheld other information which it considered to be commercially confidential. The Council stated it did not hold some other information requested.

The Commissioner investigated and found that the Council had partially breached FOISA in responding to the request. While, by the end of the investigation, the Commissioner found that the Council had correctly withheld some information, he found it had wrongly withheld other information. He also found that the Council had failed to fully identify all relevant information until after his investigation had started, had failed to provide the required notice that some information was not held and had failed in its duty to provide adequate advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 33(1)(b) (Commercial interests and the economy)

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 6 May 2019, the Applicant made a nine-part request for information to Glasgow City Council (the Council) in relation to the closure of the publicly owned Winter Gardens in 2018 which are attached to the People's Palace in East Glasgow. The parts of the request under consideration in this decision notice are as follows:
 - (i) The Council has stated it would cost "between £5 million to £7.5 million" to repair the Winter Gardens. Can the Council outline where this estimate derives and how many quotes were obtained from different sources, listing each by cost? *[Part 3 of request]*
 - (ii) It is cited that £350,000 was spent to "refurbish" the People's Palace. Can the Council particularise what exactly this was spent on, and which company undertook the "refurbishment"? *[Part 5 of request]*
 - (iii) Further to the above, how many separate quotes (with costs) were obtained to undertake this "refurbishment"? *[Part 6 of request]*
2. The Council responded on 15 May 2019.
 - (i) For part 3 of the request, the Council responded in terms of section 17(1) of FOISA, stating that it did not hold the information requested and explaining that these figures were very high level estimates based on similar projects undertaken across the UK.
 - (ii) For part 5 of the request, the Council provided some information on the types of works carried out. It withheld some other information under section 33(1)(b) of FOISA as it considered this to be commercially confidential, and that the public interest favoured non-disclosure.

- (iii) For part 6 of the request, the Council provided some information, explaining who carried out the works and the basis for the costs of the works.
- 3. On 4 June 2019, the Applicant wrote to the Council, requesting a review of its decision on the following basis:
 - (i) For part 3 of the request, he argued that the information provided was false and misleading. He believed detailed information on this should be held and disclosed.
 - (ii) For parts 5 and 6, he argued that these parts should be answered in full.
- 4. The Council notified the Applicant of the outcome of its review on 2 July 2019:
 - (i) For part 3 of the request, the Council upheld its original decision, together with further explanation that the information was passed to the press office based on costs of similar projects undertaken nationwide and estimates made in previous years.
 - (ii) For parts 5 and 6 of the request, the Council upheld its original decision, stating it had responded as fully as possible whilst also taking into account the exemption in section 33(1)(b) to withhold the complete list of works and the total cost involved.
- 5. On 3 July 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he believed it had failed to provide the information requested at part 3, had failed to address the points raised in his request for review, particularly surrounding misinformation, and had failed to properly apply the relevant exemptions, including consideration of public transparency.

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 23 August 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council 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 Council was invited to comment on this application and to answer specific questions. These focused on the searches carried out by the Council to identify and locate the information requested, and the Council's justification for withholding some information under the exemption in section 33(1)(b) of FOISA.
- 9. As the Council was withholding some information under an exemption which is subject to the public interest test, the Applicant was also invited to provide submissions on the public interest in disclosure of the information, but provided no further comments.
- 10. During the investigation, the Council changed its position in relation to some of the information withheld under section 33(1)(b) (pertaining to part 5 of the request). It withdrew reliance on the exemption and disclosed this information to the Applicant on 24 October 2019.

11. On 6 November 2019, having identified further information falling within the scope of part 5 of the request, the Council wrote to the Applicant. It disclosed some of this further information, and informed the Applicant that the remainder was considered exempt from disclosure under section 33(1)(b) of FOISA. The Council also provided an additional level of descriptive detail as to what each element of work comprised, explaining that this was not information that previously existed, but rather was information created to assist the Applicant in understanding the scope of the work in more detail. The Council also confirmed, in terms of section 17(1) of FOISA, that it did not hold the information on quotes sought in part 6, and explained why.
12. The Council provided submissions to the Commissioner.

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 him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Information held and whether the Council held any further information

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 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 by section 1(4). This is not necessarily to be equated with information an applicant believes 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. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

Searches

17. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held and which fell within the scope of parts 3, 5 and 6 of the request.
18. The Council explained that, on receipt, the request was forwarded to its Property and Land Services (PALS), Development and Regeneration Services (DRS) and Neighbourhoods and Sustainability (NS) departments for a response to be collated and issued.
19. The Head of Development (PALS) was identified as the appropriate officer to handle the request, given that he had a detailed and working knowledge of the project and had been actively involved in responding to enquiries and information requests on the People's

Palace/Winter Gardens. As he could easily identify whether the Council held information for parts 3, 5 and 6, and whether this could be disclosed, no further searches were considered necessary for these parts.

20. For part 3, the Head of Development (PALS) contacted the Council's press office, which had issued the statement about the estimate figure. The press office carried out searches, but was unable to identify any recorded information on how this estimate was arrived at. The Council provided the Commissioner with an email chain in support of its position that the first mention of the estimate figure in question was in the initial draft of the press statement. The Council submitted that it therefore appeared that this estimate figure had been included in the press statement following discussions with Council officers.
21. For part 5, the Council submitted that, during the investigation, further discussions with the relevant department had resulted in the identification of further relevant information, held in a "Priced Bill of Quantities" document. The Council provided this information to the Commissioner, apologising for this oversight.
22. The Council submitted that the Head of Development (PALS) had confirmed that the only information falling within the scope of part 5 was held within the "Final Outturn" tab of the spreadsheet (disclosed to the Applicant on 24 October 2019), and in the "Priced Bill of Quantities" (partially disclosed to the Applicant on 6 November 2019).
23. For part 6, the Council explained that, given that the works were carried out either in-house by the Council or by City Building LLP (one of the Council's Arms' Length External Organisations, or ALEOs), it did not require to obtain quotes for this work. The Head of Development (PALS) confirmed there was no requirement to carry out searches for quotes, as it was unlikely in the circumstances that any quotes would be held without his knowledge.
24. In conclusion, given the Head of Development (PALS)'s knowledge and expertise in this project, the Council was satisfied that no further searches were necessary, as he could explain in detail why some information (for parts 3 and 6) was not held, or could identify that which fell within scope (for part 5).

Part 3 of request

25. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and his application, in which he provides reasons as to why he considers the Council should hold the information requested (i.e. from where the estimate figure derived).
26. In his request for review, the Applicant referred to the Council's mention of the estimate figure being provided by "the Press Office", arguing that the Council appeared to have deliberately provided false and misleading information.
27. In his application to the Commissioner, the Applicant contended that the information conveyed appeared to have been based on falsely created data. Referring to the "very high level estimates" that were used to derive a "quote" for the Winter Gardens repair, he argued that having asked twice for these estimates to be particularised, twice the response had been to refer him to some vague "similar projects" of which no examples or details were provided.
28. In its submissions to the Commissioner, the Council stated it had instructed structural surveys to determine the extent of the works required at the Winter Gardens. It referred to its response and review outcome, where it had explained that the officers who instructed the report were experienced technical professionals with specialist knowledge (including the Head of Development (PALS) and his team), and they estimated the cost of the repairs

based on that knowledge, experience and the findings in the reports. The Council submitted that this was a very high level estimate based on other projects of a similar nature and scale, and that this had been explained to the Applicant under its duty to advise and assist.

29. The Council further submitted that the structural survey documents were factual condition surveys, documenting the condition of the building with some recommendations, but did not contain a cost estimate for the works. The Council confirmed the survey report had been disclosed to the Applicant in response to his initial request.
30. The Council was satisfied that there was no specific document or report that contained the figure in question, or which detailed it to be the exact cost of the repairs: the figure was an estimate and the information requested was not held.
31. In respect of the number of quotes obtained, with costs, the Council maintained it did not hold this information. It submitted it had explained to the Applicant that it undertook certain construction and maintenance works through City Building LLP, using an agreed schedule of rates in the relevant maintenance contract to determine costs of works. As such, there was no requirement for the Council to seek quotations for works of this nature, in line with procurement rules.
32. In conclusion, the Council was satisfied that it did not hold any of the information requested in part 3.
33. Having considered the relevant submissions, the Commissioner accepts that the Council took adequate, proportionate steps in the circumstances to identify and locate any information it held which was relevant to this part of the request. He accepts that any such information would have been identified using the searches described by the Council. He also accepts the explanation provided by the Council as to why it considers the information is not held. He is therefore satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request) hold any further information falling within the scope of part 3 of the request.
34. The Commissioner therefore finds that the Council was correct to inform the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested for part 3.

Part 5 of request

35. In its submissions, the Council explained that the information in the "Final Outturn" tab of the spreadsheet (disclosed to the Applicant on 24 October 2019) gave a high level breakdown of the entire project.
36. As set out above, during the investigation, the Council identified further information falling within the scope of this part of the request (the "Priced Bill of Quantities"). The Council submitted that this information gave a detailed breakdown of the costs of works, and that its partial disclosure to the Applicant on 6 November 2019 (with cost information redacted under section 33(1)(b)) would provide the Applicant with an overview of the detailed works carried out by City Building LLP without disclosing the itemised costs associated with the works. The Council apologised that this was not provided at an earlier stage.
37. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the information held by the Council and falling within the scope of this part of the request was capable of being identified by the searches carried out by the Council. As a result, he is satisfied that, by the end of the investigation, the Council

had taken adequate, proportionate steps to establish the extent of information held that was relevant to the request.

38. However, by only identifying some information falling within the scope of part 5 of the request after his investigation had started, the Commissioner finds that the Council failed to fully comply with section 1(1) of FOISA in that respect.

Part 6 of request

39. The Council submitted it had advised the Applicant that the works were not refurbishment activity (as stated in his request), but were essential works necessary to re-open the People's Palace independently of the Winter Gardens, and that the physical works were carried out by City Building LLP based on an agreed schedule of rates. As City Building LLP was an ALEO, there was no requirement for the Council to obtain quotes. The Council further submitted it would be unlikely that any quotes had been sought without the knowledge of the Head of Development (PALS), given that the works were carried out by City Building LLP.
40. In conclusion, the Council confirmed it did not hold the information requested, recognising it should have issued a response in terms of section 17(1) of FOISA.
41. The Council accepted that its review response to part 6 was not as clear as it could have been. While its initial response explained who had carried out the works, and on what financial basis, it did not inform the Applicant that it did not hold the information he was looking for. The Council also accepted that, at review stage, in providing a composite response covering parts 5 and 6, it mistakenly applied section 33(1)(b) to both of these parts of the request.
42. In its further response of 6 November 2019, the Council confirmed to the Applicant, in terms of terms of section 17(1) of FOISA, that it did not hold the information on quotes sought in part 6. It included explanation that, in line with procurement rules, as works were carried out either in-house by Council departments, or by City Building LLP (the ALEO), there was no requirement to seek quotations from other contractors in these circumstances. The Council apologised if this was not made clear in its previous responses.
43. Having considered the relevant submissions, the Commissioner accepts that the Council has provided adequate explanation as to why it did not hold the information requested for part 6 and why, in the circumstances, no searches were considered necessary. He is therefore satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request) hold any information falling within the scope of part 6 of the request.

Section 17(1) – Notice that information is not held (part 6 of request)

44. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. In this case, the Council did not provide the Applicant with such notice in respect of part 6 of his request.
45. Given that the Council did not hold the information requested in part 6, it had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
46. As the Council failed to provide such a notice to the Applicant, the Commissioner finds that it failed to comply with the requirements of section 17(1) of FOISA.

47. However, given that the Council has provided a further response to the Applicant, stating it does not hold the information requested in part 6, together with an apology, he does not require the Council to take any further action in response to this failure.

Section 33(1)(b) – Commercial interests and the economy (part 5 of request)

48. As explained above, during the investigation, the Council provided submissions to the effect that some information, originally withheld under section 33(1)(b), could now be disclosed. It disclosed this information to the Applicant on 24 October 2019.
49. The Council confirmed it was no longer relying on any exemption to withhold the information now disclosed. It provided no submissions, however, explaining why this information was correctly withheld at the time it dealt with the Applicant's request or requirement for review, so the Commissioner can only conclude that the Council was not entitled to withhold that information at that time. In doing so, it failed to comply with section 1(1) of FOISA.
50. The Commissioner will now consider whether or not the Council was entitled to rely on section 33(1)(b) to withhold the remaining information relating to part 5 of the request (namely the costing information in the "Priced Bill of Quantities").
51. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
52. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
- (i) whose commercial interests would (or would be likely to) be harmed by disclosure
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
53. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
54. In his application to the Commissioner, the Applicant was dissatisfied that the Council had failed to apply the exemption in section 33(1)(b) properly, including the information defined (incorrectly, in his view) as "commercially sensitive". He believed the Council's review had failed to balance the overriding principle of public transparency.
55. In its submissions to the Commissioner, the Council explained that the information in the "Priced Bill of Quantities" comprised the detailed breakdown of costs of work carried out by City Building LLP. It confirmed it wished to withhold, under section 33(1)(b), the detailed pricing information contained in this document.
56. As explained above, the Council wrote to the Applicant on 6 November 2019, disclosing the "Priced Bill of Quantities" with the pricing information redacted under section 33(1)(b). The Council submitted this gave an overview of the detailed works carried out by City Building LLP without disclosing the itemised costs associated with the works.

57. The Council submitted that the information was commercial in nature as it comprised detailed pricing information relating to the works carried out by City Building LLP. It believed disclosure would be likely to substantially prejudice both its own, and City Building LLP's, commercial interests.
58. For its own commercial interests, the Council submitted that the information consisted of the costs, to the Council, relating to a construction project, arguing that this amounted to commercial interests. The Council believed disclosure of the information would likely impact its ability to secure best value in the procurement of similar construction works, as potential suppliers would gain a strong indication of the level of bid that might secure contracts of similar nature and scale, resulting in bidders submitting less competitive bids in future.
59. For City Building LLP's commercial interests, the Council submitted that the information related directly to its commercial trading activities in relation to the provision of goods, materials and construction services, for the purposes of generating revenue. It argued that disclosure of City Building LLP's pricing for certain works would put it at a commercial disadvantage, as this could lead to competitors undercutting their prices in future bids for similar works, were they to gain knowledge of City Building LLP's costings.
60. With regard to third party consultation, the Council explained it had not initially consulted with City Building LLP regarding disclosure of the information. As the information comprised detailed pricing of City Building LLP's rates, the Council was satisfied that disclosure would be likely to substantially prejudice the commercial interests of both parties. However, during the investigation, the Council obtained, and provided evidence of, third party views from City Building LLP on disclosure of the information. City Building LLP confirmed that it considered its costings, rates and other commercial information to be commercially confidential.
61. Having considered the submissions from both parties, and the withheld information itself, the Commissioner notes that the information includes detailed pricing information relating to the specific works carried out on this project. In his view, this information gives a valuable insight into the detailed costs applied by City Building LLP in carrying out specific pieces of work, set out under broader headings of work, which could be used by competitors to their commercial advantage. However, he is not persuaded (on the basis of the submissions provided) that disclosure of the information would harm the Council's commercial interests to the same extent.
62. In the circumstances, the Commissioner is satisfied that disclosure of the remaining withheld information would, or would be likely to, prejudice substantially the commercial interests of City Building LLP, by placing them at an unfair commercial disadvantage.

Public interest test – section 33(1)(b)

63. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner is therefore required to 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.
64. In the Applicant's view, decisions were being taken without public consultation, illustrating a secretive agenda driven by internally-driven and undisclosed motivations. This, he believed, gave rise to the overriding need for all data to be made public knowledge.
65. The Council acknowledged the public interest in openness and transparency in the information requested.

66. However, the Council believed this should be balanced against the strong public interest in avoiding prejudice to both its own, and City Building LLP's, commercial interests. In the Council's view, there was a strong public interest in ensuring contractors could compete on an equal basis when bidding for work. It also believed there was no public interest in disclosing information that would indicate the level of rates likely to be successful in securing similar future contracts, which would adversely impact the Council's ability to secure best value in commercial matters.
67. The Council concluded that the public interest in disclosing the information was outweighed in this case by that in maintaining the exemption.
68. The Commissioner has considered the submissions from both parties, together with the withheld information, which comprises pricing information relating to the specific types of works carried out by City Building LLP. He recognises there is general public interest in disclosing information held by Scottish public authorities. He acknowledges that disclosure in this case would aid the public's understanding of the Council's decision-making in relation to public expenditure on this project, and would allow scrutiny of whether the Council was obtaining best value in this regard.
69. However, the Commissioner is also of the view that the disclosure of the information in question would give competitors a valuable insight into the pricing structure / rates charged by City Building LLP for each element of work, thus giving them commercial advantage that they would not otherwise have. He considers there is no public interest in placing a particular organisation at a commercial disadvantage, simply as a result of entering into a commercial arrangement with a public authority for the provision of essential construction works.
70. Furthermore, the Commissioner considers the public interest in disclosure is met, to some extent, by the release of some of the information during the investigation, which gives a breakdown of the expenditure against each type of works, albeit at a higher level.
71. On balance, the Commissioner concludes that the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure in respect of the remaining withheld information. Accordingly, he finds that the Council was entitled to withhold this information under section 33(1)(b) of FOISA.

Section 15 – duty to provide advice and assistance

72. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code¹).
73. The Section 60 Code states, at paragraph 5.1.1 in Part 2:

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

a request has been made, whilst the authority is handling the request, or after it has responded.

74. It further states, in section 9.2 in Part 2:

Duty to advise and assist when responding to a request

The obligation to provide advice and assistance continues at the point of issuing a response. For example, if directing the applicant to a website, the authority should take all reasonable steps to direct the applicant to the relevant section.

75. In its submissions to the Commissioner, the Council explained that, in disclosing some of the further information identified during the investigation (i.e. in the "Priced Bill of Quantities"), it had also provided the Applicant with some further, newly created, information under each heading of work to help him understand the nature of works carried out, together with some plans and drawings which (although outwith the scope of the request) showed the nature of the works undertaken.
76. The Commissioner recognises there is no obligation in FOISA for a Scottish public authority to provide any information not captured by the request, or to create any information not already held in a recorded format, in order to be able to satisfy a request. He notes that, on this occasion, the Council appears to have taken this course of action in order to provide a fuller understanding of the information held, and which fell within the scope of part 5. He also notes that the Council made it clear to the Applicant that this additional information did not fall within the scope of the request, but was being provided under its duty to advise and assist. The Council commends the Council for its diligence and clarity on this particular point.
77. However, the Commissioner considers that the Council's review response to parts 5 and 6 was somewhat confusing, in that by providing a composite response covering parts 5 and 6, it appeared to infer it was relying on section 33(1)(b) for both of these parts, and not solely for part 5.
78. By failing to provide separate responses to parts 5 and 6, the Commissioner is of the view that the Council failed to provide sufficient advice and assistance to allow full understanding of its position, at review stage, in relation to each of these parts.
79. In so doing, the Commissioner concludes that the Council failed to comply with its duty under section 15 of FOISA to provide advice and assistance to the Applicant.

Decision

The Commissioner finds that Glasgow City Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to parts 3, 5 and 6 of the information request made by the Applicant.

The Commissioner finds that the Council was correct to inform the Applicant that it did not hold the information requested in part 3 of the request.

However, the Commissioner also finds that:

- (i) the Council wrongly withheld some of the information requested in part 5 of the request under section 33(1)(b) of FOISA (for this part, it was, however, entitled to withhold information identified and withheld during the investigation under this exemption),
- (ii) by only identifying some information falling within the scope of part 5 of the request after his investigation had started, the Council failed to fully comply with section 1(1) of FOISA,
- (iii) the Council failed to fully comply with section 17(1) of FOISA by not providing the requisite notice when responding to part 6 of the request,
- (iv) by failing to provide sufficient advice and assistance to allow full understanding of its responses to requests 5 and 6 at review stage, the Council breached section 15(1) of FOISA, and so failed to comply with Part 1 in these respects.

Given that, by the end of the investigation, the Council had:

- (i) disclosed to the Applicant all of the information requested in part 5 of the request which the Commissioner had found to have been wrongly withheld under section 33(1)(b) of FOISA, and
- (ii) provided a further response to the Applicant in terms of section 17(1) for part 6 of the request,

the Commissioner does not require the Council to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant or the Council 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

27 February 2020

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).
- ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or

- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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