

# Decision Notice 162/2019

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## **Sport, Physical Activity and Wellbeing Services: cancellation of tender exercise**

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**Applicant: The Applicant**

**Public authority: Stirling Council**

**Case Ref: 201801878**



Scottish Information  
Commissioner



## Summary

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The Council was asked for information about the cancellation of the tendering exercise relating to its Sport, Physical Activity and Wellbeing Services.

The Council advised that the information was exempt from disclosure as it was either subject to legal professional privilege or was commercially sensitive. Some of the information was disclosed during the Commissioner's investigation.

The Commissioner investigated and found that some of the information was subject to legal professional privilege and was exempt from disclosure. However, he found that other information had been wrongly withheld. He ordered the Council to disclose this information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 2 to this decision. Both Appendices form part of this decision.

## Background

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1. On 7 March 2018, the Applicant made a request for information to Stirling Council (the Council). The request was contained in two emails which are set out in full in Appendix 1 to this decision.
2. The Council responded on 2 April 2018. It provided the Applicant with some information that was already in the public domain, but it withheld the remaining information arguing that it was exempt from disclosure under sections 30(b)(i), 33(1)(b) and 36(1) of FOISA.
3. On 18 April 2018, the Applicant wrote to the Council requesting a review of its decision on the basis that it had not provided him with any additional information on the aborted procurement process. He was dissatisfied that the response contained no information that would allow a member of the public to understand why the procurement process was abandoned at such a late stage and at considerable public expense. He argued that the public interest in transparency had been ignored in favour of secrecy.
4. The Council notified the Applicant of the outcome of its review on 14 May 2018. It maintained its position that no further information could be disclosed and it upheld its reliance on the exemptions applied. The Council also indicated that it did not hold any information falling within the scope of request 8.
5. On 2 November 2018, 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 Council's review because he believed it was withholding information for spurious reasons and that it was in the public interest for the information to be disclosed.

## Investigation

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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 29 November 2018, 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 related to its application of exemptions to withhold information from the Applicant.
9. During this investigation, the Council was asked to:
  - (i) reconsider the withheld information, in light of information that the Commissioner was able to access online and
  - (ii) confirm whether its searches had identified all of the information falling within the scope of the request.
10. As a result, the Council:
  - (i) provided the Applicant with information during the course of the investigation that it accepted was not exempt
  - (ii) withdrew its reliance on some of the exemptions applied and
  - (iii) conducted further searches which identified an additional document.
11. The Council's handling of this request is considered in detail below.

## Commissioner's analysis and findings

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12. 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.

### Out of scope information

13. The Council provided the Commissioner with 21 documents that it had identified as being relevant to the Applicant's appeal. Of these 21 documents, the Council explained that documents 1 and 2 did not fall within the scope of the Applicant's request, but were provided to the Commissioner for information purposes only.
14. The Commissioner has reviewed the content of documents 1 and 2 and he is satisfied that they do not fall within the scope of the applicant's request. In light of this, he will not consider these documents in his decision.
15. Of the remaining documents, the Commissioner has carefully considered their content in conjunction with the specific terms of the Applicant's information request and he is satisfied that documents 7, 9, 11, 12, 14, 15, 17, 18 and 19 do not fall within the scope of the Applicant's information request.

16. During the course of the investigation, the Council revised its reliance on the exemptions applied. As a consequence, it was only relying on section 30(b) (prejudice to effective conduct of public affairs) of FOISA in relation to document 11. As the Commissioner has determined that this document falls outwith the scope of this request, the application of section 30(b) will not be considered in this decision notice.
17. In general, these documents contain correspondence between the bidders and the Council and do not appear to fall under the scope of any of the 11 information requests made by the Applicant. The focus of the Applicant's information requests are details of minutes, meetings, legal advice and the scoring of the tenders; not general correspondence to or from the bidders. Given this, the Commissioner will not consider these documents in his decision.

### **Information disclosed to the Applicant**

18. During the investigation, the Council indicated that it was prepared to disclose documents 10 and 20 to the Applicant, along with part of document 13. The Council was asked to provide this information to the Applicant and it was also advised that some of the remaining information it was withholding from the Applicant was in the public domain, at the time of his information request.
19. The Council subsequently provided the Applicant with the information contained in documents 3, 4, 10 and 20, along with parts of documents 5, 6 and 13. The Council withdrew its reliance on the exemptions it had previously applied to this information.
20. As the Council has disclosed this information to the Applicant, the Commissioner must conclude that the Council was not entitled to initially withhold this information as exempt under section 33(1)(b) and 36(1) of FOISA.
21. The Commissioner will consider the Council's handling of the Applicant's information request and its dealings with his office later in his decision.

### **Withheld information**

22. The only information that falls within the scope of the Applicant's information request and which is still being withheld by the Council are parts of documents 5, 6 and 13 and the entirety of documents 8, 16 and 21.

### **Section 36(1) - Confidentiality**

23. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council has applied this exemption to information in documents 8, 13, 16 and 21.
24. Among the types of communication which fall within this category are those which are subject to legal professional privilege.

#### *Legal advice privilege*

25. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply, certain conditions must be fulfilled:
  - (i) the communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the Council

- (ii) the legal adviser must be acting in his/her professional capacity and
  - (iii) the communications must occur in the context of the legal adviser's professional relationship with his/her client.
26. The Council has argued that the information contained in documents 8, 13, 16 and 21 constitutes confidential communications between client and lawyer, and in particular legal advice provided by the legal advisers to the Council which is of a confidential nature. The Council explained that the information was given by or sought from their in-house solicitor in their capacity as a professional legal adviser to the Council. It confirmed that the advice was provided in the context of the solicitor's professional relationship with the Council, as client.
  27. The Council submitted that, if this information was to be disclosed, it would undermine the long-standing ability of lawyers to be able to provide confidential advice to their clients.
  28. Having considered the content of all of the information withheld, the Commissioner is satisfied that the information contained in documents 8, 13, 16 and 21 relates directly to seeking and obtaining legal advice from a professional legal adviser, acting in that capacity.
  29. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.
  30. The Commissioner is satisfied that the information contained in documents 13, 16 and 21 remained confidential at the time the Council responded to the Applicant's information request and requirement for review (and that it remains so now). However, the Commissioner is not satisfied that the information in document 8 has the quality of confidence required by the exemption contained in section 36(1) of FOISA.
  31. The Commissioner notes that the substantive content of document 8 recounts a discussion held with an external third party. As this information has been shared with an external source and, indeed, has largely been made public by the Council, it is no longer confidential and cannot meet the requirements outlined above in paragraph 28. Given this, the Commissioner must find that the information contained in document 8 is not covered by legal advice privilege. He will consider whether the information contained in document 8 is covered by litigation privilege later in his decision.
  32. As the Commissioner is satisfied that the information contained in documents 13, 16 and 21 is covered by legal advice privilege, he is not required to consider whether this information would also attract protection by virtue of litigation privilege.
  33. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information in documents 13, 16 and 21 is exempt under section 36(1), the Commissioner must go on 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.

#### *Public interest test*

34. The Council submitted that, having considered all of the circumstances of this case, it concluded that the public interest lies in favour of maintaining the exemption. The Council recognised that there is a public interest in promoting open and transparent government, and to inform public debate. However, on this occasion, it found these factors to be outweighed

by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients. The Council argued that it was in the public interest to ensure that Council officials are able to receive legal advice in confidence, like any other public or private organisation or individual.

35. The Applicant argued that the Council's decision to abandon the procurement process seems to have little to do with achieving "Best Value" and was, instead, the result of a political decision taken by Councillors. The Applicant referred to the Council minute of 9 February 2017, which indicated that the Councillors had unanimously decided that they did not want to award such a tender to a private sector operator.
36. The Applicant believed that legal advice was commissioned to find a route to abandon the tender, in order to deliver a political result demanded by the Councillors. The Applicant noted that, since the Commissioner's investigation had begun, he had received numerous follow up emails from the Council, disclosing information that should have been disclosed to him at the time. He argued that he has no confidence, even now, that the Council has correctly disclosed the right information to him. For all of these reasons, the Applicant contended that there should be full disclosure regarding the legal advice sought and obtained.

#### *Commissioner's view on the public interest*

37. The Commissioner has considered carefully the representations made by both the Applicant and the Council when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
38. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way towards providing that transparency and accountability. He is aware of the media coverage generated by the abandoned procurement process, and the high level of public interest in the Council's decision to initiate and then cancel the tender exercise.
39. However, there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)*<sup>1</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
40. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. The Commissioner is aware that the procurement exercise which was abandoned was a significant matter of interest and concern to the local community. The Commissioner notes that a public petition was launched during the procurement exercise and was signed by just over 1,800 people. This clearly indicates that there were many people in the community who had an interest in the procurement process.

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<sup>1</sup> [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

41. In addition, it is clear that launching and then cancelling the tender exercise at such a late stage in the process would have incurred costs for the Council. It is reasonable for the public to want to understand all of the decision making around the tender exercise, including the details of any legal advice that was requested or obtained.
42. However, having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. He has reached this conclusion bearing in mind the importance attached by the courts to maintaining confidentiality of communications on administration of justice grounds.
43. Consequently, he accepts that the Council correctly withheld the legal advice contained in documents 13, 16 and 21 under section 36(1) of FOISA.

#### *Litigation privilege*

44. Another aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
45. Communications *post litem motam* are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s, or prospective opponent/s, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
46. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
47. The timing of the creation of the information will be relevant to whether litigation privilege applies. A general apprehension of future litigation or the possibility someone might, at some point in the future, raise a court action, is not sufficient.
48. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
49. The Council has argued that the information in document 8 constitutes confidential communications between client and lawyer in relation to legal proceedings (litigation) and is therefore exempt under section 36(1) of FOISA. The Council argued that disclosure would undermine the ability of the Council and its legal representatives from discussing, in confidence, matters relating to litigation. The Council submitted that document 15, which the Commissioner has found to be outwith the scope of the Applicant's information request, contains evidence that litigation was being considered.

#### *Document 8*

50. The Commissioner has considered the content of document 8. He notes that document 8 was created on 9 February 2017, six days before document 15.
51. The Commissioner cannot accept that document 8 was created in contemplation of litigation when the Council was not aware that litigation might be pending until six days after document 8 was created.

52. Accordingly, the Commissioner finds that the contents of document 8 are not subject to litigation privilege and they cannot be withheld under section 36(1) of FOISA.
53. As the Council has not applied any other exemption to document 8, the Commissioner finds that the Council must disclose this document to the Applicant, with personal data redacted (names and contact details).

### **Section 33(1)(b) – Commercial interests and the economy**

54. The Council withheld information parts of documents 5 and 6 under section 33(1)(b) of FOISA. This exemption 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 a Scottish public authority). Section 33(1)(b) of FOISA is set out in full in Appendix 2. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
55. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
  - (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.
56. 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.
57. In its submissions, the Council argued that disclosure would harm the commercial interests of those who had bid for the tender as well as the commercial interests of the Council itself.
58. The Council argued that disclosure of the information it is withholding in documents 5 and 6 would, or would be likely to, cause substantial prejudice to the commercial interests of the two bodies who bid for the abandoned tender. The information contains details of the bidders and their bids and the Council considers the information to be commercially sensitive. The Council provided the Commissioner with two documents (documents 1 and 2) that each bidder had filled in when they had made the initial bid. These documents asked the bidder to identify the information they considered to be sensitive, and to identify the reasons for that sensitivity. In both cases, the bidders identified the information contained in documents 5 and 6 to be sensitive, and they argued that disclosure would substantially prejudice their commercial interests.
59. The Council submitted that disclosing this information would be likely to give rival bidders an advantage for similar procurements, either with the Council or elsewhere, which would substantially prejudice their ability to submit bids in the future and so could significantly harm their commercial interests. In addition, the Council argued that simply disclosing the names of the bidders is also likely to substantially impact on the bidders' commercial interests, as it has already been previously disclosed that neither bidder provided "Best Value". It submitted that disclosure could impact on the bidders' ability to secure future procurement contracts elsewhere, because of reputational damage.

60. The Council also argued that disclosure of the information being withheld in documents 5 and 6 could substantially prejudice its own commercial interests in current and future procurements, and would negatively impact on how it conducts future procurements and contract negotiations. The Council explained that the withheld information relates to how the Council evaluates the information provided within the bids. It argued that disclosure would prejudice its ability to conduct fair and open procurement processes, because prospective bidders, if privy to the assessment methodologies and discussions, would have an unfair advantage over other bidders.
61. The Council contended that this would undermine the integrity of the Council's process and would likely result in potential bidders for future procurements being reluctant to risk investing the significant resources required to prepare and submit bids as they would be concerned that the process could be cancelled. In particular, the Council argued that disclosure would result in fewer bids being submitted from smaller concerns for high value procurements, leaving it with fewer "Best Value" bids being submitted, and resulting in higher contract costs, which would negatively impact on the Council's financial interests.

*Commissioner's conclusions on section 33(1)(b) of FOISA*

62. The Commissioner has, in the first instance, considered whether the Council and the two bidders have relevant commercial interests. Commercial interests will generally relate to any commercial trading activity an organisation undertakes, such as the ongoing provision, sale and purchase of goods and/or services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that the activities under consideration here, involving the provision of leisure facilities in an environment open to competition, are commercial in nature. As such, he is satisfied that both the Council and the two bidders have relevant commercial interests.
63. Having reached this conclusion, the Commissioner must now go on to consider whether the commercial interests he has identified would, or would likely to, be prejudiced substantially by the disclosure of the information.
64. The Commissioner has considered the arguments put forward by the Council, but he is not persuaded that the likely effect of disclosure would be any of the consequences suggested. He is not, therefore, satisfied that disclosure would - or would be likely to - prejudice substantially the commercial interests of the Council or the two bidders.
65. The Commissioner notes that before the Applicant made his information request, the names of both bidders were in the public domain and the Council had already announced that neither of the submitted bids met its "Best Value" criteria. Therefore, any reputational damage that might result from the disclosure of the bidders' names and the Council's public statements that neither met "Best Value" would have occurred prior to the Applicant's request being made. In addition, information about the tender exercise, including the method statements is available on the Public Contracts Scotland website<sup>2</sup>. The procurement exercise was closed in February 2017 and the Applicant did not make his request for information until March 2018.
66. The Commissioner notes that after the Council cancelled the procurement exercise, it announced in February 2018<sup>3</sup> that its leisure facilities would be run by a new charitable trust that would be run by Active Stirling, with the Council functioning as the sole member of the

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<sup>2</sup> [https://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=SEP257680](https://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=SEP257680)

<sup>3</sup> <https://www.dailyrecord.co.uk/news/local-news/stirling-council-agrees-new-deal-11997815>

charity. Given this change in approach, it seems unlikely that the Council will be repeating the tender exercise any time soon. The Commissioner is satisfied that the evaluation criteria (and financials) contained in the tender documents are so unique to this particular procurement exercise, that he cannot see how disclosure would harm the commercial interests of the Council or the two bidders.

67. In addition, the Commissioner does not agree that with the Council's arguments that disclosure would advantage some bidders in the future, but not others. The Council appears to suggest that if some future bidders were privy to its assessment methodologies and discussions, they would have an unfair advantage over other bidders. The Commissioner would note that any information disclosed under FOISA is disclosed to the wider public, so all future bidders would have access to the same information, therefore he cannot accept that some bidders would be disadvantaged.
68. The Commissioner acknowledges the Council's concerns that disclosure may dissuade future bidders from investing the significant resources required by a high value procurement exercise, for fear that the process could be cancelled. However, he notes that it is already public knowledge that this particular tender exercise was cancelled, and he does not accept that the fear of cancellation will be increased by disclosure of the information being withheld in documents 5 and 6.
69. In all the circumstances of the case, therefore, it is the Commissioner's view that the harm claimed by the Council is not likely to occur as a result of disclosure of the information in question. He is not satisfied that disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of the Council or the two bidders, as has been claimed. He cannot, therefore, accept that the information is exempt from disclosure under section 33(1)(b) of FOISA.
70. As the Commissioner has found that the exemption in section 33(1)(b) was wrongly applied to the withheld information, he is not required to go on to consider the public interest in disclosing the information or maintaining the exemption. He requires the Council to provide the Applicant with the information in documents 5 and 6 that it was withholding under this exemption.

#### *The Council's handling of the request*

71. During his investigation, the Commissioner established that the Council failed to identify all of the information that was relevant to the request. He notes that one document was only identified after many months of correspondence with the Council and he is concerned by the poor quality of the searches undertaken by the Council. This was a failure to comply with section 1(1) of FOISA.
72. As well as not identifying all of the relevant information, the Council wrongly identified other information as falling within the scope of the request. The Commissioner has had to exclude these documents from this decision. The Commissioner is concerned with the Council's analysis and understanding of the scope of the Applicant's request.
73. Furthermore, during the investigation, it became clear that the Council was seeking to withhold information that was already in the public domain, and had been at the time of the Applicant's request. Some of this information was published on the Council's own website.
74. The Commissioner understands that the Council has experienced staff turnover and that a number of staff who may have had knowledge of this case had left, and new staff were required to deal the request and with his investigation.

75. However, withholding information that is published on the Council's own website suggests that the Council did not undertake basic tasks in this case. Identifying that some of the withheld information was published on the Council's website did not require prior corporate knowledge of the case, but simply required someone to carry out thorough searches. It may be that the Council simply assumed that the information it originally identified was accurate and did not need to be double-checked or assessed in anyway during the Commissioner's investigation, but this was clearly not the case.

## Decision

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The Commissioner finds that Stirling Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner was entitled to withhold information under section 36(1) of FOISA.

However, by failing to identify all of the information falling within the scope of the request until during the Commissioner's investigation and by wrongly withholding other information under sections 36(1) and 33(1)(b) of FOISA, the Council failed to comply with Part 1 and, in particular, with section 1(1).

The Commissioner requires the Council to provide the Applicant with:

- the remaining information in documents 5 and 6 and
- document 8, subject to the redaction of personal data and contact details

by 14 December 2019.

## Appeal

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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.

## Enforcement

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

**Margaret Keyse**  
**Head of Enforcement**

**30 October 2019**

## Appendix 1: Emails of 7 March 2018

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### **Email 1: Sent to the Council on 7 March 2018 at 13:47**

I should be grateful if you would provide with the following information under freedom of information act legislation in connection with the aborted tender to run the city's sports facilities:

1. Copies of external legal advice obtained regarding the aborted procurement operation
2. Details of any meetings (whether those meetings were held in person, or via any phone or other electronic means) held with external lawyers regarding the aborted procurement operation
3. Meeting notes, minutes, or any formal or informal record of any meetings (whether those meetings were held in person, or via any phone or other electronic means) held with external lawyers regarding the aborted procurement operation
4. Details of any meetings (whether those meetings were held in person, or via any phone or other electronic means) held with internal lawyers regarding the aborted procurement operation
5. Meeting notes, minutes, or any formal or informal record of any meetings (whether those meetings were held in person, or via any phone or other electronic means) held with internal lawyers regarding the aborted procurement operation
6. Details of any meetings (whether those meetings were held in person, or via any phone or other electronic means) held regarding the aborted procurement operation
7. Meeting notes, minutes, or any formal or informal record of any meetings (whether those meetings were held in person, or via any phone or other electronic means) regarding the aborted procurement operation.
8. Details of any meetings or communications including any meeting notes, minutes or any formal or informal record of any meetings (whether those meetings were held in person, or via any phone or other electronic means) held with Audit Scotland regarding the aborted procurement operation
9. Details of any legal advice (internal or external) regarding the council's liabilities to the other bidders due to the aborted procurement operation.
10. All details of the internal scoring of the other bidders in comparison to the incumbent bidder, together with any internal documents produced and used to summarise and/or compare the various bids.

Many thanks.

### **Email 2: sent to the Council on 7 March 2018 at 14:07**

I should be grateful if you could provide me with the following information under freedom of information act legislation in connection with the aborted tender to run the city's sports facilities:

Audit Scotland's recent report on Stirling Council stated:

"However, Councillors decided that neither of the two bids submitted as part of the extensive tender process met the best value criteria and as a result, the contract award was rejected".

11. I should be grateful if you could provide copies of all information, meetings, and reports which led to this decision directly or indirectly.

### 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.

#### 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).

#### 36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

**Scottish Information Commissioner**

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