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Commissioner  
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# Decision Notice 279/2024

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## Hate Crime campaign – third party costs

Authority: Police Service of Scotland  
Case Ref: 202400790

### Summary

The Applicant asked the Authority for the fees paid to a video production company and to a comedian for services provided in relation to two videos published online as part of its Hate Crime campaign. The Authority withheld the information on the basis that disclosure would prejudice its own commercial interests and those of the third parties concerned. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. In April 2023 (and subsequent to the [passing of the Hate Crime and Public Order \(Scotland\) Bill in 2021](#)<sup>1</sup>) the Authority launched a [Hate Crime campaign](#)<sup>2</sup>, which included an animated video and a video presented by a comedian.

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<sup>1</sup> <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56364821>

<sup>2</sup> <https://www.scotland.police.uk/what-s-happening/campaigns/2023/hate-crime/>

2. On 1 April 2024, the Hate Crime and Public Order (Scotland) Act 2021 (the Hate Crime Act) [came into force](#)<sup>3</sup>. The Hate Crime Act, and the Authority's Hate Crime campaign, were, at that time, the [subject of public debate](#)<sup>4</sup>.
3. On 21 March 2024, the Applicant made a request for information to the Authority. They asked for:
  - With regard to the Hate Monster campaign, how much did it cost to develop?
  - Was any external company brought in to help develop it? If so, name them.
  - How much were the external company paid?
  - A comedian featured on the webpage for the Hate Monster campaign and currently features on the Authority's YouTube channel. Was he was paid for this? If so, how much?
4. The Authority did not respond to the information request.
5. On 25 April 2024, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
6. The Authority notified the Applicant of the outcome of its review on 16 May 2024. The Authority provided further context to its 2023 Hate Crime campaign and stated that it was unrelated to the introduction of the Hate Crime and Public Order (Scotland) Act and otherwise responded as follows:
  - for part (i) of the request, it provided the total advertising spend of its Hate Crime campaign (£50,864.79) and explained that the Hate Monster video comprised only one element of this campaign. It also disclosed the creative development cost of the Hate Monster video (£3,300) and production and other associated costs (£7,767.28).
  - for part (ii) of the request, it confirmed the name of the external video production company that had provided production assistance
  - for parts (iii) and (iv) of the request, it withheld the information requested under the exemption in section 33(1)(b) of FOISA.
7. On 6 June 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review in relation to parts (iii) and (iv) of their request because they disagreed with the Authority's application of the exemption under section 33(1)(b) of FOISA and considered the public interest favoured disclosure of the withheld information.

## Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

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<sup>3</sup> <https://www.bbc.co.uk/news/uk-scotland-68703684>

<sup>4</sup> <https://www.bbc.co.uk/news/uk-scotland-68570614>

9. On 27 June 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld and the case was subsequently allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to its reasons for applying the exemption in section 33(1)(b) of FOISA.
11. The Applicant was also provided with an opportunity to submit any further comments as to why they considered disclosure of the withheld information was in the public interest.
12. During the investigation, the Authority indicated that it also wished to rely on the exemption in section 38(1)(b) of FOISA for information withheld in relation to parts (iii) and (iv) of the Applicant's request.

## **Commissioner's analysis and findings**

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

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

14. Section 33(1)(b) of FOISA provides that information is exempt information if 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). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. There are certain elements an authority needs to demonstrate are present when relying on this exemption. It must establish:
  - whose commercial interests would (or would be likely to) be harmed by disclosure
  - the nature of those commercial interests, and
  - how those interests would (or would be likely to) be prejudiced substantially by disclosure.
16. 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.

### ***The Applicant's submissions***

17. The Applicant disputed the Authority's claim that disclosure of the withheld information would damage the commercial interests of the Authority itself or of third parties bidding for Authority contracts in future.
18. The Applicant noted that the value (and detail) of a large number of Scottish public authority contracts were available on the Public Contracts Scotland website. The Applicant identified 90 such contracts related to the Authority itself. The Applicant explained that, on this basis, it was therefore impossible to understand why the Authority had withheld the specific contract values requested in this case.

19. The Applicant further submitted that it was unlikely that the Authority would hire a comedian again in future (and thus there was little risk that disclosure of their fee would in any way be relevant in future commercial negotiations).

*The Authority's submissions*

20. The Authority confirmed that it wished to maintain reliance on section 33(1)(b) to withhold the fees paid to the video production company and comedian.
21. The Authority considered the withheld information comprised a specific part of the contract between it and the third parties (i.e. the value of that contract) and that the commercial interests of itself and the third parties would be affected were the information to be disclosed.
22. The Authority explained that it had not consulted the third parties concerned in this case as it considered, given its own commercial interests were engaged, their views would not alter its position in favour of disclosure of the withheld information.
23. The Authority submitted that the withheld information was provided to it in each instance via an open tendering process in the expectation that it would not be publicly disclosed. The Authority also stated that the information was not, to its knowledge, otherwise publicly available.
24. The Authority submitted that many suppliers offered police forces and similar public authorities significantly discounted rates, because of the positive reputational impact of working with such bodies or in recognition of the fact such contracts were funded by public money. The Authority argued that disclosure of the withheld information would likely lead to bodies, businesses or individuals seeking to engage the third parties and their services using the fee(s) paid by the Authority (which may have been agreed at a reduced rate) as a baseline, which would have a damaging impact on the third parties.
25. The Authority considered disclosure of the fees paid to the third parties would also provide competitive advantage to their direct competitors in tendering exercises (i.e. would permit "undercutting") and would generally prejudice the third parties' ability to secure further work at competitive pricing.
26. The Authority further argued that the third parties' fees not being publicly available afforded them full discretion to charge competitively by demand (which it submitted was right and fair). The Authority submitted that the third parties should not be denied the opportunity to effectively market and price their services in future simply by virtue of having previously worked with a public authority and having their fees disclosed to the world at large in response to an information request under FOISA.
27. The Authority also submitted that disclosure of the withheld information would, or would be likely to, prejudice substantially its own commercial interests for the following reasons:
  - suppliers would be discouraged from working with the Authority (for fear their charges would be disclosed to the world at large), which would negatively impact the Authority's ability to attract the widest possible range and quality of suppliers
  - suppliers would price services based on what they considered the Authority had paid in the past as opposed to the "true value" of the services in question (which could be lower), thereby costing the Authority more money unnecessarily

- in these circumstances, the Authority's ability to purchase the most efficient and cost-effective services, and in so doing seek best value for public money, would be prejudiced substantially.

#### *The Commissioner's view*

28. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
29. Having done so, the Commissioner is satisfied that the withheld information is commercial in nature and that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. He accepts that the Authority has identified commercial interests relating to itself and to the video production company and the comedian.
30. Having identified these commercial interests, the Commissioner must consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information.

#### Substantial prejudice to the Authority's commercial interests

31. It is a matter of fact that the agreements with, and fees paid to, the video production company and the comedian have not been published on the Public Contracts Scotland website. The Commissioner therefore considers it likely that their expectations regarding disclosure of the withheld information are likely to be different to suppliers whose contracts with the Authority were published in such a manner.
32. As these specific fees have not been otherwise disclosed, the Commissioner accepts, in the specific circumstances of the case, that the harm to the Authority's relationship with the third parties in question, and with prospective third parties more generally (who would also have no expectation of disclosure of information provided to the Authority in such circumstances), would, or would be likely to, result in the substantial prejudice claimed by the Authority.
33. It is often easier to accept a causal link between disclosure of information and the claimed prejudice to commercial interests where an issue is ongoing (e.g. such as retendering of a contract). The Commissioner considers it reasonable to accept that the Authority will engage in contracts in the foreseeable future as part of different campaigns that will be similar enough to those engaged in this case (e.g. the Authority has [a dedicated "Campaigns" section](#)<sup>5</sup> on its website that sets out previous campaigns that are similar in nature to the Hate Crime campaign).
34. In the circumstances, the Commissioner accepts, on balance, that disclosure would be likely to jeopardise the Authority's ability to secure best value in future contracts, on the basis that companies would be less likely to participate in the tender process, for fear that their confidential commercial information would be publicly disclosed.

#### Substantial prejudice to the video production company's commercial interests

35. In the Commissioner's view, the fee charged by the video production company for "production services" in respect of the Hate Monster video is highly likely to remain relevant to its future commercial activity (including negotiations and tendering exercises associated with such work).

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<sup>5</sup> <https://www.scotland.police.uk/what-s-happening/campaigns/>

36. The Commissioner therefore considers that disclosure of the fee charged by the video production company would provide significant insight into the pricing model of the video production company (particularly as the Hate Monster video, to which the work undertaken related, remains publicly available).
37. As rehearsed earlier, disclosure under FOISA is disclosure to the world at large. In the circumstances, the Commissioner considers that disclosure of the withheld information in this case would allow rivals competing for similar work as the video production company to be informed by the video production company's fee (and to accordingly adjust their pricing), thereby providing other bidders in competitive bidding exercises with a competitive advantage.
38. With this in mind, the Commissioner accepts that disclosure of the withheld information would place the video production company at a competitive disadvantage in negotiating future contracts and would, or would be likely to, prejudice its commercial interests to a significant extent.

#### Substantial prejudice to the comedian's commercial interests

39. The Commissioner accepts that the fee paid to the comedian is not publicly available and he considers that it was reasonable to consider (at the date of the review outcome) the fee to be "current" in commercial terms.
40. The Commissioner recognises the Applicant's view that the Authority is unlikely to employ the services of a comedian again and that disclosure of the fee would therefore not prejudice their commercial interests to a significant extent.
41. In the circumstances, the Commissioner considers, in contrast to his view regarding the video production company, that it is less likely that the comedian will tender in future for similar work with either the Authority or other public authorities. He also accepts that disclosure of the withheld information would provide less insight into the comedian's rates when they are, for example, performing stand-up comedy.
42. However, it is well established that comedians perform other commercial work (e.g. compering events, paid speaking work and, as in this case, fronting part of a social media campaign). As rehearsed earlier, the Authority's use of third parties to front social media campaigns and perform in related videos is not without recent precedent and other Scottish public authorities have also engaged comedians to front social media campaigns.
43. In view of the above, the Commissioner accepts that disclosure of the comedian's fee would enable competitors in future competitive tenders to "undercut" the comedian and enable those interested engaging the comedian's services for commercial work to create a benchmark fee that they would be willing to accept, which would impede their ability to undertake effective negotiations.
44. In the circumstances, the Commissioner considers, on balance, that disclosure of the comedian's fee would place the comedian at a competitive disadvantage in negotiating future contracts for commercial work and would, or would be likely to, prejudice their commercial interests to a significant extent.

#### Conclusion

45. In summary, the Commissioner agrees that disclosure of the information withheld in relation to parts (iii) (the fee paid to the video production company) and (iv) (the fee paid to the

comedian) of the Applicant's request would, or would be likely to, substantially prejudice the commercial interests of the Authority, the video production company and the comedian.

46. In the circumstances, therefore, the Commissioner is satisfied that the withheld information is of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was correctly applied on that basis.

### ***The public interest test***

47. Section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, he is now 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.

### ***The Applicant's submissions***

48. The Applicant submitted that the public interest clearly favoured disclosure of the withheld information for the following reasons:
- taxpayers had a right to know how public money was spent, particularly at a time of constrained public sector budgets
  - policing levels were at an historically low level and disclosure was necessary to permit public discourse on the appropriateness of the expenditure in question
  - there had been much public debate in relation to the tone and content of the "Hate Monster" campaign, which they submitted had been highly controversial and meant disclosure was in the public interest
  - the Authority's decision to spend public money on a comedian, as opposed to preventing and detecting crime, was by itself of sufficient public interest to justify disclosure of the information withheld in relation to part (iv)
49. The Applicant further submitted that the context in which the campaign sat (i.e. its proximity to the Hate Crime Act) supported disclosure of the withheld information, particularly given the Hate Crime Act was highly contentious and a matter of serious public debate and concern.

### ***The Authority's submissions***

50. The Authority accepted that the introduction of the Hate Crime Act had generated a significant amount of public interest in both the subject of Hate Crime and the Hate Monster campaign itself.
51. The Authority also recognised that disclosure would allow increased accountability in relation to the way in which it spent public funds.
52. However, the Authority considered that there was no public interest in disclosure of information which would:
- be commercially unfair to the two suppliers concerned (which it noted were either a one-person business or an individual)
  - dissuade companies from engaging with the Authority, in the belief that conducting business with it would result in disclosure of their confidential information (in so doing, limiting the expertise on which the Authority could draw)

- permit suppliers to price services at a level they considered the Authority was prepared to pay rather than the “true cost”, which it submitted may be lower
  - impact the Authority’s ability, as a publicly funded organisation, to obtain best value for money for services procured.
53. The Authority explained that the Hate Crime campaign, which included the Hate Monster, ran for six weeks in spring 2023 and was not related to the introduction of the Hate Crime Act on 1 April 2024. The Authority stated that the campaign had attracted no controversy, until the introduction of the Hate Crime Act in April 2024, despite it having been in existence for approximately 12 months by that point.
54. The Authority further submitted that the public interest in the withheld information had, to a significant extent, been satisfied by disclosure of the overall costs associated with the Hate Crime campaign. The Authority considered this transparency, and the level of detail already provided, in relation to these costs satisfied the public interest and did so in a manner which did not prejudice substantially either its commercial interests or those of the third parties concerned.
55. In summary, the Authority concluded that the factors favouring non-disclosure, outweighed the public interest in disclosure of the withheld information.

*The Commissioner's view on the public interest*

56. The Commissioner has carefully considered the submissions from both parties, together with the withheld information and media reporting at the date of the review outcome.
57. The Commissioner finds the Applicant’s public interest arguments strong and he agrees that there is public interest in examining the Authority’s expenditure on the Hate Crime campaign.
58. The Commissioner finds this to be a case where the public interest is finely balanced. However, having considered the competing public interest arguments and the specific circumstances of this case, he finds that the balance of the public interest lies in maintaining the exemption in section 33(1)(b) of FOISA.
59. The Commissioner considers the public interest in the Hate Crime Act to be separate to, and distinct from, the public interest in disclosure of the withheld information – which relates to the Hate Monster video and the video presented by the comedian which formed part of the Authority’s six-week Hate Crime campaign undertaken 12 months prior to the Hate Crime Act coming into force.
60. The Commissioner recognises the various criticisms which accompanied the Hate Monster video, including, in the context of the funding pressures referenced by the Applicant, those relating to the expenditure involved. However, in assessing where the balance of the public interest lies, he accepts that the public interest in disclosure of the fee paid to the video production company was largely satisfied by the Authority’s disclosure of detailed costs specifically relating to that video.
61. On that basis, the Commissioner does not consider that disclosure of the fee paid to the video production company (which, he has accepted, would, or would be likely to, cause substantial prejudice to the commercial interests of the video production company) is necessary to satisfy the public interest he has identified.
62. By contrast, the Authority has not disclosed specific figures relating to the fee paid to the comedian for their services in relation to the video they presented.



63. However, the Commissioner is, on balance, also satisfied that the public interest favours withholding the fee paid to the comedian. Having conducted his own searches, he notes that criticism of the Authority's Hate Crime campaign, such as it exists, relates to the Hate Monster video and the content of the Authority's Hate Crime campaign webpage. He has identified no specific criticism, debate or reference to the comedian's video.
64. While recognising the public interest in transparency in relation to scrutiny of the Authority's expenditure, the Commissioner considers that the public interest in disclosure of the fee paid to the comedian has been met, to some extent, by the Authority's disclosure of the campaign's total advertising cost.
65. In the circumstances, the Commissioner considers there to be no overriding public interest in disclosure of the fee paid to the comedian (disclosure of which he has already accepted would, or would be likely to, substantially prejudice their commercial interests).
66. On balance, the Commissioner concludes, therefore, that the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure in respect of the withheld information falling within parts (iii) (the fee paid to the video production company) and (iv) (the fee paid to the comedian) of the Applicant's request. Consequently, he finds that the Authority was entitled to withhold this information under section 33(1)(b) of FOISA.
67. As the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 33(1)(b) of FOISA, he is not required to go on to consider the application of the exemption in section 38(1)(b) that the Authority also relied upon.

## **Decision**

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

## **Appeal**

Should either the Applicant or the Authority 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.

**Euan McCulloch**  
**Head of Enforcement**

**3 December 2024**