

# Decision Notice

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**Decision 007/2016: Mr John Eustace and Dundee City Council**

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**Bus shelter advertising contract**

Reference No: 201501291

Decision Date: 18 January 2016



Scottish Information  
Commissioner

## Summary

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On 30 May 2015, Mr Eustace asked Dundee City Council (the Council) for information about a contract between the Council and a company for the provision of advertising sites on bus shelters within the Council area. The Council withheld the information in terms of section 33(1)(b) of FOISA, stating that disclosure would, or would be likely to, prejudice substantially the commercial interests of both the company and the Council. Following a review, Mr Eustace remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had not been entitled to withhold the information covered by Mr Eustace's request. She required the Council to disclose this information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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

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1. On 30 May 2015, Mr Eustace made a request for information to the Council, as follows:
  - *What is the nature and length of any contract between the council with a named supplier of bus shelters carrying advertising?*
  - *What number of these shelters are owned by the advertising supplier and what number are owned by the Council?*
  - *What are the financial benefits to the Council annually and over the life of the contract?*
  - *Are these payments made on a regular basis and if so when?*
  - *Does the council receive any discounts on advertising it purchases and if so what percentage?*
2. The Council responded on 5 June 2015 and withheld the requested information in terms of section 33(1)(b) of FOISA, stating that disclosure would, or would be likely to, prejudice substantially the commercial interests of the companies [sic] involved and of the Council.
3. On 11 June 2015, Mr Eustace wrote to the Council requesting a review of its decision. He did not agree that disclosure of the information would prejudice commercial interests, or that disclosure would not be in the public interest. Mr Eustace made some observations on how public authorities might benefit from disclosure of the information he had requested – broadly, that councils would be able to compare costs to see if they could get better value for similar contracts. He asked the Council to reconsider disclosure of the information he had requested.
4. The Council notified Mr Eustace of the outcome of its review on 9 July 2015. The Council acknowledged that it has a duty to secure value for money, but stated that disclosure of the information would prejudice, rather than assist, the Council in this regard. The Council said

that the requested information related to ongoing contracts and would be of clear assistance to a potential supplier. It reiterated that disclosing the information would, or would be likely to, prejudice substantially the commercial interests of the Council and those who wish to do business with the Council. It provided reasons for its view.

5. On 10 July 2015, Mr Eustace applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Eustace stated he was dissatisfied with the outcome of the Council's review because he did not believe the exemption applied or that the public interest favoured withholding the information.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Eustace made a request for information to a Scottish public authority and asked the authority to review its response to that request requests before applying to her for a decision.
7. On 5 August 2015, the Council was notified in writing that Mr Eustace had made a valid application. The Council was asked to send the Commissioner the information withheld from him. 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 answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

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

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9. 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 her by both Mr Eustace and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Information held by the Council**

10. As part of his request, Mr Eustace asked for "the financial benefits to the Council annually and over the life of the contract".
11. The Council initially provided the Commissioner with an estimated figure which the advertising company (Clear Channel UK Ltd) had paid for hang-on units (i.e. attached to bus shelters) in the year to February 2015. The Council stated that it was not possible to estimate the total payable over the life of the contract due to variable factors such as possible changes to the number of hang-on units, or increases in the Consumer Prices Index which would affect the rent paid.
12. During the investigation, the Council was asked to provide the Commissioner with figures for the income it had received from Clear Channel UK Ltd for each year from the start of the contract until now. The Council supplied this information. The Council also provided an estimate of the income it would receive between March 2014 and the date when the contract terminates.
13. The Commissioner considers that this information is covered by Mr Eustace's request.
14. The Council confirmed it holds information covered by all other parts of Mr Eustace's request.

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

15. The Council relied on section 33(1)(b) of FOISA to withhold the information covered by all five parts of Mr Eustace's request. Section 33(1)(b) provides that information is exempt from disclosure under FOISA if it would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is subject to the public interest test in section 2(1)(b) of FOISA.
16. An authority relying on this exemption must be able to show 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 by disclosure of the information. 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 be (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.
17. In his requirement for review, Mr Eustace argued that councils have a responsibility to seek to reduce the costs of providing day to day services and this can be partly achieved by improving the commercial value of bus shelters. He believed disclosure of the information he had asked for would enable councils to do this. Mr Eustace said that other councils or authorities had responded in full to similar requests, thus identifying significant differences in the treatment of councils by suppliers. He thought it:

*"...most unlikely, if at all, that an individual council interests may be harmed by disclosure, quite the reverse in fact as it will most likely show some councils have been very badly treated and significant revenue lost."*
18. The Council explained that the commercial interests in question were its own and those of Clear Channel UK Limited. The Council said these interests were commercial interests because they specifically relate to a commercial trading activity: the ongoing sale and purchase of advertising space for the purpose of revenue generation. The Council submitted that disclosure would be likely to adversely affect the income which the Council receives under similar contracts in future. It would also adversely affect the contracting company's ability to secure renewal of its contract with the Council.
19. The Council stated that Mr Eustace had asked for information relating to an ongoing contract. It argued that this information would be of clear assistance to a potential supplier who would be able to offer just over the accepted contractual price when the contract becomes due for renewal. This would remove the potential for the Council to secure anything substantially above the current contractual price.
20. The Council also argued that disclosure would be likely to remove any chance that the current contracting company would be successful in renewing their contract. Competitors would gain an unfair advantage from information about the company's current successful prices with the Council, which could lead to the company being marginally outbid by one of their competitors. The Council said:

*"Advertising is a highly competitive industry and this would be likely to substantially damage the commercial relationship the Council has with its current purchaser."*

21. The Council cited the following decisions from the Commissioner in support of its position, but did not explain why it considered these decisions to be of particular relevance to the current case:
- *Decision 005/2010 - Leckie and Leckie Limited and the Scottish Qualifications Authority*<sup>1</sup>
  - *Decision 233/2006 - Mr Mike Portlock and Glasgow City Council*<sup>2</sup>
  - *Decision 027/2006 - Mr Gordon Ross and Caledonian MacBrayne Limited*<sup>3</sup>
22. The Council confirmed that it had contacted Clear Channel UK Ltd for a view on disclosure of the requested information in terms of FOISA. Clear Channel UK Ltd considered there was no requirement to disclose financial information relating to tendered rents and revenue share as such information was commercially sensitive. Clear Channel UK Ltd said that disclosure of the tendered amounts would impact adversely on its future commercial activities.
23. The Council's submission focuses on the possibility that a competitor would be able to adjust its bid in the knowledge of the financial agreement Clear Channel UK Ltd has with the Council. It has not explained how all the information which Mr Eustace asked for would be of use to a competitor in this respect. The Commissioner has not received any arguments or evidence from the Council relating specifically to Mr Eustace's request for information about the nature and length of the contract; the number of advertising sites and whether they are owned by the Council or the advertising company; whether payments are made regularly and on what basis; and the percentage discount the Council receives, if any.
24. The Commissioner is not persuaded that disclosure of such information would give a significant advantage to a competitor bidding for similar contracts in the near future. The Council has not provided any evidence to show why this would be the case. In the circumstances, the Commissioner cannot accept that disclosure of this information would, or would be likely to, prejudice substantially the commercial interests of the Council or of Clear Channel UK Ltd. She finds that the exemption in section 33(1)(b) of FOISA was wrongly applied to this information, and requires the Council to provide it to Mr Eustace.
25. In relation to Mr Eustace's request for information about the financial benefits the Council receives from the contract, the Council put forward several arguments for the Commissioner to consider.
26. The Council argued that disclosure of the information covered by Mr Eustace's request would give Clear Channel UK Ltd's competitors an unfair advantage, as they would have details of the company's successful prices with the Council.
27. The Council also argued that disclosure would affect the Council's ability to secure best value as potential suppliers would have a strong indication of the level of bid which might secure a similar advertising contract, and would submit less competitive bids. Additionally, disclosure could lead to a reduction in the number of suppliers being willing to bid for future contracts due to concerns about the public disclosure of commercially sensitive information. The Council commented that the advertising industry is "one of the most cut-throat and competitive" in the UK. It feared that advertisers may begin to move away from advertising in

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200900582.aspx>

<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200501687.aspx>

<sup>3</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200501993.aspx>

public spaces and make approaches instead to private owners, affecting the Council during future tendering exercises.

28. The Commissioner first considered whether the commercial sensitivity of this information might have diminished because of the passage of time since the contract was agreed. The time-sensitivity of certain commercial information is recognised in 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 EIRs)<sup>4</sup>. The Commissioner's published guidance<sup>5</sup> on the exemption in section 33(1)(b) of FOISA explains that in general, commercial sensitivity is likely to diminish over time.
29. The Council has stated that the contract is ongoing, but (as far as the Commissioner can discern) it has not made public any information about its start date, termination date, possible renewal date (if any), etc. Such information is relevant in considering the potential effect of disclosure, and whether the exemption in section 33(1)(b) should be upheld. Given that the Council has withheld information about the duration of the contract, the Commissioner cannot state all her reasoning without revealing information which the Council has withheld. However, it is fair to say that the contract was not recently agreed. Having taken account of the length of the contract and when it was agreed (information provided to the Commissioner in the Council's submission), the Commissioner does not find that these factors add weight to the argument that the information on the financial benefits to the Council is likely to provide Clear Channel UK Ltd's competitors with a significant advantage, or that disclosure of the information would affect its ability to secure a competitive rate for other contracts in the future.
30. Mr Eustace did not ask for the contract itself, and the Commissioner does not consider that his request covers information about the unit price agreed with Clear Channel UK Ltd. The Commissioner considers that Mr Eustace's request for "financial benefits" should be interpreted as a request for the annual income received by the Council from this contract.
31. The Commissioner is not persuaded by the Council's argument that disclosure of the information in this case is likely to prevent the Council from securing best value in relation to other contracts. The contract is not recent, and is not due to end imminently. Companies bidding for Council contracts should be aware that information held by the Council is subject to FOISA and, where relevant, the EIRs. The Council has presented no evidence to support its assertion that companies would be deterred from bidding for other contracts if the information in this case was to be disclosed.
32. The Commissioner does not accept that disclosure of the withheld information would, or would have been likely to, prejudice substantially the commercial interests of either the Council or Clear Channel UK Ltd. As the Commissioner has found that the exemption in section 33(1)(b) was incorrectly applied, she is not required to consider the public interest test in section 2(1)(b) of FOISA.
33. The Commissioner therefore requires the Council to provide Mr Eustace with the information covered by his request.

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<sup>4</sup> <http://www.gov.scot/Resource/0046/00465757.pdf> (See paragraphs 8.3.1. and 8.6)

<sup>5</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

## **Decision**

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The Commissioner finds that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Eustace. The Council was not entitled to withhold the information under the exemption in section 33(1)(b) of FOISA.

The Commissioner requires the Council to provide Mr Eustace with the information he requested by 4 March 2016

## **Appeal**

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Should either Mr Eustace 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**

**18 January 2016**

### 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.

...

#### 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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