

# Decision Notice

---

**Decision 260/2016: Mr X and Argyll and Bute Council**

---

## **Sale of Castle Toward**

Reference No: 201502333

Decision Date: 7 December 2016



Scottish Information  
Commissioner

## Summary

---

On 31 July 2015, Argyll and Bute Council (the Council) was asked for information about the sale of Castle Toward. Following an investigation, the Commissioner found the Council had:

- incorrectly identified some information as falling within the requests which it had not held at the date the request was made
- failed to identify that some of the information requested was environmental information which should be considered under the EIRs
- wrongly applied exemptions in FOISA to some information
- wrongly applied an exemption to information which it did not hold
- failed to respond in full to part of request 13

As the Council had disclosed information – and confirmed no information was held for part of the request – the Commissioner did not require the Council to take any action on most of the failings identified above. However, she required the Council to issue a new response to part of the request.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3), (4) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 17(1) (Notice that information is not held); 18(1) (Further provision as respects responses to requests); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of “environmental information”); 5(1) (Duty to make available environmental information on request)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

## Background

---

1. On 31 July 2015, Mr X asked Argyll and Bute Council (the Council) for information about the sale of Castle Toward. His request was in 13 parts. Only parts 2, 3, 4, 5, 6, 7, 12 and 13 are the subject of this decision. These are set out in full in Appendix 2.
2. The Council responded on 27 August 2015. The Council withheld information covered by parts 2 – 7 under section 36(2) of FOISA (Confidentiality). In relation to part 12 of the request, it provided some explanation, but no recorded information. In relation to part 13, it stated that “there is no comparison of relative merits” (this is understood to indicate that part 13 of the request was based on a misunderstanding and that the Council did not hold any information covered by this part of the request).
3. On 7 October 2015, Mr X wrote to the Council requesting a review of its decision. He stated his reasons for dissatisfaction in relation to the Council’s response to each part of his request. Mr X sought clarity on some of the information provided and the explanations given by the Council.

4. The Council notified Mr X of the outcome of its review on 6 November 2015. The Council upheld its original response and explained that, under FOISA, it was only required to provide information, not to dispute or comment on suggestions or arguments. The Council upheld its use of section 36(2) and stated that, in addition, the exemptions in sections 30(c) (Prejudice to effective conduct of public affairs) and 33(1)(b) (Commercial interests and the economy) would apply to information falling within parts 3-7.
5. In relation to request 12, the Council reiterated the explanation it had previously provided.
6. In relation to request 13, the Council gave notice, in terms of section 17 of FOISA, that it did not hold some of the information covered by this request. It also maintained that there was no comparison of the relative merits of the buyers' bids.
7. On 9 December 2015, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr X was dissatisfied with the outcome of the Council's review: he did not believe that information should have been withheld from him and did not believe the Council when it told him it did not hold information.
8. Mr X was contacted on 15 February 2016 to verify his reasons for dissatisfaction and the matters he wished the Commissioner to investigate. He confirmed on 21 February 2016 that he wished the Commissioner to investigate the Council's responses to parts 2--7, 12 and 13 of his request.

## Investigation

---

9. The application was accepted as valid. The Commissioner confirmed that Mr X made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision.
10. On 22 February 2016, the Council was notified in writing that Mr X had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr X. The Council provided the information and the case was allocated to an investigating officer.
11. The Council provided submissions to the Commissioner on 15 April 2016. It later clarified its submissions on 14 June 2016. The Council now argued that section 18 of FOISA applied to parts 4 and 5 of Mr X's request and that it would neither confirm nor deny whether it held information covered by these requests.
12. During the investigation, the Council was asked whether it could disclose any further information, or respond to Mr X otherwise than in terms of section 18. The Council responded on 9 September 2016 that, as of that date, it was not in a position to disclose any withheld information or to respond otherwise than in terms of section 18 for two parts of the request. The Council stated that it would provide information to Mr X when the sale of Castle Toward was complete.
13. On 17 November 2016, the Council provided Mr X with information in respect of parts 3, 6 and 7 of his request (the sale of Castle Toward now being complete). The Council confirmed that no information was held at the time of Mr X's request in relation to parts 4 and 5 of his request.

14. On 30 November 2016, the Council informed the Commissioner that it no longer wished to rely on section 18 of FOISA in relation to parts 4 and 5 of Mr X's request.
15. During the investigation, Mr X also provided comments and information to assist the Commissioner.

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

---

16. 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 X and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

17. In this case, the Council responded to the request, and conducted its review, under FOISA. Where information is "environmental information" for the purposes of regulation 2(1) of the EIRs, public authorities have a duty, under regulation 5(1), to make the information available when requested to do so. This is subject to various restrictions and exceptions in the EIRs.
18. The investigating officer asked the Council if it had considered whether any part of the request fell to be dealt with under the EIRs, and whether it believed any of the information requested by Mr X was "environmental information", as defined by the EIRs.
19. The Council commented that the information covered by parts 2 to 7 of the request (which related to the proposed sale of Castle Toward and the terms of the contractual negotiations relating to the sale) was not environmental information, and that it was appropriate to respond to those parts of the request under FOISA. The Council commented that parts 12 and 13 of the request could have been dealt with under the EIRs; however, as it held no information, it would have refused the request under regulation 10(4)(a) of the EIRs (information not held).
20. Having considered the nature of the withheld information and the terms of Mr X's request, the Commissioner is satisfied that the majority of the information falling within the request is not environmental information as defined within regulation 2(1) of the EIRs, and that, for the most part, the Council correctly responded to Mr X under FOISA rather than the EIRs.
21. However, request 12 asked for information about an Environmental Information Assessment (EIA). This information clearly falls within definition (c) of environmental information in regulation 2(1) of the EIRs, and so part 12 of the request should have been considered under the EIRs.
22. As the Council did not address this part of the request under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

### **Part 2 of the request: the preferred bidder**

23. In part 2 of his request, Mr X asked for information about the preferred bidder for Castle Toward. He provided the Commissioner with information which, he believed, indicated that the preferred bidder was a commercial company, not the individuals named by the Council in its review response.
24. After investigation, the Commissioner is satisfied that the information provided by the Council in its review response was correct and that, in this respect, the Council complied fully with

Part 1 of FOISA in responding to this part of Mr X's request. Accordingly, she has not considered this part of the request in the remainder of this decision.

### **Parts 3, 6 and 7: payment of sale price, due diligence, etc.**

25. Parts 3, 6 and 7 of Mr X's request relate to the terms of the proposed sale of Castle Toward and what action the Council had taken to ensure compliance with those terms. The Council withheld the following information:
  - a report to Council (document 1: "the Report")
  - a letter and offer (document 2: "the Offer")
  - a qualified acceptance (document 3); and
  - a letter from the agents of the purchasers (document 4).
26. Section 1(1) provides that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. Section 1(4) stipulates that the information to be given by the authority is that held by it at the time the request is received (with further provision not relevant here).
27. The Commissioner does not regard documents 3 and 4 as containing information falling within the scope of Mr X's request. These documents are dated before Mr X's requirement for review, but were not held by the Council when it received his request. Therefore, the information in documents 3 and 4 does not fall within the scope of Mr X's information request, and the Commissioner has not considered it further.
28. The Council took the view that documents 1 and 2 fell within the scope of parts 3, 6 and 7 of Mr X's request.
29. The Commissioner finds that some, but not all, of the information in the document 1 falls within part 3 of the request. Some information within document 2 also falls within part 3: this information is, in essence, the price offered for Castle Toward and how it is to be paid.
30. In relation to parts 6 and 7 of Mr X's request, the Council took the view that the information in paragraphs 4.3 - 4.7 of the document 1 could fall within scope, although much would depend on what Mr X meant by "due diligence" or by "steps taken to ensure the purchaser will complete its plans."
31. Section 1(3) of FOISA allows a Scottish public authority to ask a requester to clarify their request where it is reasonable to do so. Although the Council did not seek any clarification, it might have helped both it and Mr X if it had done so. Nonetheless, the Commissioner accepts that it was reasonable for the Council to conclude that the information in paragraphs 4.3 – 4.7 of document 1 falls within the scope of parts 6 and 7 of the request.
32. The Commissioner therefore finds that the Council holds information falling within the scope of parts 3, 6 and 7 of the request. While Mr X now has this information (having received it from the Council in November 2016), he was not provided with the information when he asked for it. The Commissioner will now go on to consider whether the Council was correct to refuse to disclose this information when it responded to Mr X's request.

### **Section 36(2) - Confidentiality**

33. The Council indicated that it had withheld information relating to parts 3, 6 and 7 of the request from documents 1 and 2 under section 36(2) of FOISA.

34. The Commissioner has not found any information in document 2 which is covered by parts 6 and 7 of the request. She has therefore concluded that the exemption in section 36(2) of FOISA was wrongly applied to this information.
35. The Commissioner has considered whether section 36(2) was correctly applied to information in document 2 which relates to part 3 of Mr X's request, and information in document 1 which relates to parts 3, 6 and 7 of the request.
36. The exemption in section 36(2) of FOISA contains a two-stage test, both parts of which must be fulfilled. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
37. Document 2, the offer, was clearly obtained by the Council from another person, i.e. the agents acting for the purchaser. The Commissioner is therefore satisfied that the first part of the test has been evidenced.
38. Document 1 is a report produced by the Council. The Commissioner does not accept that, in its entirety, it is information which was obtained from another person. She does not accept that section 36(2) can apply to any information in the report which relates to parts 6 and 7 of the request, as this is not information obtained from another person. However, she accepts that information in the report which relates to part 3 of the request was originally provided by the agents acting for the purchaser. She will consider only the information in document 1 which is covered by request 3, in relation to the exemption in section 36(2) of FOISA, as this is the only information which meets the test of being obtained from another person.
39. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence, actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled. As the Commissioner has stated in previous decisions, there are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - the information must have the necessary quality of confidence
  - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
  - unauthorised disclosure must be to the detriment of the person who communicated the information.

*Necessary quality of confidence*

40. First, the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already. The Council submitted that the document 2 was not in the public domain, nor readily accessible to the public or other organisations. The Council stated that it contained an explicit statement of confidentiality regarding the disclosure of details from the missives.
41. The Commissioner accepts that the information covered by part 3 of the request was not in the public domain at the time of the request, nor readily accessible to the public or other organisations. Information about the offer was included within document 1, but this, a report to Council, clearly had a limited circulation and was marked as not for publication.

42. Mr X drew the Commissioner's attention to the following:
- An article in The National (27 June 2015) which said the sale price was understood to be £1.5m<sup>1</sup>
  - An article in the Dunoon Observer confirming the £1.5m sale price<sup>2</sup>
  - An article in The National (5 May 2016)<sup>3</sup> indicating a sale price of £1.1m, with a further £0.5m to be paid after planning consents were obtained.
43. It is therefore clear that, at the time Mr X made his request (31 July 2015), there was information in the public domain which gave a figure for the price to be paid for Castle Toward.
44. The article published on 5 May 2016, to which Mr X referred, states that payment was to be made in instalments; however, this article appeared a considerable time after Mr X made his request.
45. The Commissioner is satisfied that, although reports about the price offered by the buyer were in the public domain at the time of Mr X's request, other information relating to the offer was not common knowledge and could not readily be obtained by Mr X through any other means. Consequently, she is satisfied that this information had the necessary quality of confidence *at the time of his request*, and even at the time when the Council reviewed its response to his request. This is the point at which the Commissioner must decide whether the exemption applies.

*Obligation to maintain confidentiality*

46. The Council submitted that the information obtained from the agents contained information provided in confidence to the Council; this was clearly stated in the information itself. The Council's view is that there was a general expectation between the parties that the terms of missives would remain confidential until the sale had been completed. The Council referred to the Commissioner's decision in *Decision 048/2007 Mrs Stella Stephen and Aberdeenshire Council*<sup>4</sup> and said that the missives had not been concluded when Mr X made his request. On the basis of *Decision 048/2007*, it was appropriate to refuse to disclose the information. The Council quoted paragraph 28:

*"I am satisfied that in the context of the type of commercial sale of land proposed between Aldi and the Council, there would be a general expectation between the parties that the terms of missives would remain confidential until they were finalised. At the point where Mrs Stephen's request for information was received by the Council (and when the Council carried out its review), I am therefore satisfied that the agreed sale price held the necessary quality of confidence, and that it had been supplied in a context which imposed a duty of confidentiality, at least until the missives were concluded."*

---

<sup>1</sup> <http://www.thenational.scot/news/castle-at-centre-of-community-buyout-controversy-is-sold-to-developer-for-just-15m.4548>

<sup>2</sup> [http://www.dunoon-observer.com/index.php?option=com\\_content&view=article&id=9220%3Acastle-toward-sale-agreed-in-principle-to-local-businesswoman&Itemid=19](http://www.dunoon-observer.com/index.php?option=com_content&view=article&id=9220%3Acastle-toward-sale-agreed-in-principle-to-local-businesswoman&Itemid=19)

<sup>3</sup>

[http://www.thenational.scot/news/14902927.Confusion\\_over\\_Latin\\_line\\_in\\_\\_\\_1\\_1m\\_bid\\_for\\_Castle\\_Toward/](http://www.thenational.scot/news/14902927.Confusion_over_Latin_line_in___1_1m_bid_for_Castle_Toward/)

<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600652.aspx>



47. The Council referred to the contract and an explicit statement (express condition) of confidentiality regarding the disclosure of details of the missives prior to completion, except in specific circumstances. The Council's view is that none of these circumstances has arisen.
48. The Commissioner is satisfied that the information was received in circumstances which imposed an obligation upon the Council to maintain confidentiality.

*Unauthorised disclosure which would cause detriment*

49. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
50. The Commissioner accepts that there was a general expectation between the parties that the missives would remain confidential until the sale had been completed. She accepts that disclosure of information from the missives before the sale had been completed could have caused detriment to the parties, for example as a result of the potential purchaser withdrawing from the sale.
51. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence have been met in this case.

*"The public interest defence"*

52. The exemption in section 36(2) is not subject to the public interest test in section 2 of FOISA. However, public interest considerations are relevant when applying this exemption: there may be a public interest defence to actions of breach of confidentiality where enforcing an obligation of confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern.
53. The Council's position was that none of these factors are present in relation to this request and there is no reasonable basis to conclude that the Council would have a defence to an action of breach of confidence on public interest grounds in the event that it disclosed the information.
54. The public interest defence is different from the public interest test required by section 2 of FOISA. However, the arguments made by Mr X on the public interest arguments are relevant here. Mr X believes it is in the public interest for the information to be disclosed as:
  - it would make the Council's actions fully transparent, particularly given its rejection of the previous community buy-out offer
  - elected representatives such as Community Councillors and Argyll and Bute Councillors are unable to get details of the terms of the sale
  - the Council is both the landowner and responsible for dealing with planning applications. He is concerned about reports of a payment of £0.5m being conditional on the granting of planning consent by the Council.
55. The Commissioner has considered the arguments presented by both parties. While acknowledging that there is a clear public interest in transparency and effective scrutiny, she is not persuaded in this case that the arguments advanced in support of disclosure are sufficiently evidenced to create a public interest defence which would give the Council a defence to an action of breach of confidence in the event that it disclosed the information.



She is satisfied that, *in the circumstances existing at the time of the request*, the Council was entitled to withhold details of how the sale price was to be paid under section 36(2) of FOISA.

### **Section 30(c) – Prejudice to effective conduct of public affairs**

56. The Council applied the exemption in section 30(c) to parts of documents 1 and 2. As the Commissioner has accepted that the exemption in section 36(2) was correctly applied to information which falls within part 3 of the request, she will not consider whether section 30(c) was also correctly applied to the same information. Accordingly, she will only consider whether section 30(c) was correctly applied to information which was covered by requests 6 and 7.
57. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
58. The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
59. In its review response, the Council stated that the disclosure of information relating to the discussions and negotiations around the proposed sale of any property, prior to the conclusion of the sale, would substantially prejudice the effective conduct of public affairs of the Council.
60. The Council has not specified in detail the nature of the public affairs involved. In its review response, it stated that the "fundamental principle of the Council's approach would be to protect public assets" and its arguments relate generally to its role in the sale of Council-owned property, and the ability to ensure best value in this process.
61. However, the Council's submissions in respect of this exemption lack clarity and detail, and fail to supply evidence to justify its decision. Simply put, the Council has failed to supply sufficient reasoning or evidence to show that section 30(c) should apply to the information withheld from Mr X (i.e. the information in documents 1 and 2 which falls within parts 3, 6 and 7 of Mr X's request).
62. Having decided that the Council has not provided the sufficient detail to for her to uphold the exemption in section 30(c), the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA in respect of section 30(c).

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

63. The Council relied on section 33(1)(b) of FOISA to withhold some information from the Report and Offer in relation to information covered by parts 3, 6 and 7 of Mr X's request. The Commissioner will now consider whether section 33(1)(b) was correctly applied to this

information. In doing so, the Commissioner will consider if the use of this exemption was justified at the time of the request.

64. 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.
65. There are a number of elements an authority must demonstrate are present when relying on this exemption. In particular, it must show:
  - Whose commercial interests would, or would be likely to, be harmed by disclosure;
  - The nature of those commercial interests; and
  - How disclosure would, or would be likely to, prejudice substantially those interests. The prejudice must be substantial: in other words, of real and demonstrable significance.
66. The Council submitted that if it was to supply the information then this could be prejudicial to its position in relation to the ongoing negotiations around completion of the sale. The Council explained why delays in completion of the sale could have a cost implication to the Council.
67. "Commercial interests" are not defined in FOISA. The Commissioner's guidance<sup>5</sup> on this exemption states that an organisation's commercial interests will usually relate to the commercial trading activity they undertake, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.
68. The Commissioner is satisfied that the potential prejudice that the Council has identified relates to its own commercial interests and those of the potential buyer. The sale of Castle Toward is a commercial transaction with a monetary value. The Commissioner accepts that any decision by the potential purchaser to withdraw from the sale would have a prejudicial effect on the commercial interests of the Council. She also accepts that delays to completion of the sale – for example, as a result of the buyer expressing concerns about information being disclosed – may incur costs for the Council, which again would have a prejudicial effect on its commercial interests.
69. However, for the exemption to apply, the disclosure of the information in question must be harmful to the Council's commercial interests. In other words, there must be a causal link between disclosure of the information and the harm to the commercial interests. The exemption can be engaged on the basis that either the substantial prejudice "would" occur, or that it "would be likely" to occur. The prejudice must be substantial: in other words, of real and demonstrable significance.
70. 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*<sup>6</sup> (at 8.3.1. and 8.6). The Commissioner accepts that there was a time-sensitivity to the information withheld from Mr X: it was information in respect of a commercial transaction that was not concluded at the

---

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

<sup>6</sup> <http://www.gov.scot/Resource/0051/00510851.pdf>

time of the request. The timing of Mr X's request is of importance in assessing whether this exemption applies, in relation to the contractual situation as of 31 July 2015. This is close to the date of the Report. This is at a time when the sale was not concluded.

71. As the sale was not concluded at the time of Mr X's request, the Commissioner acknowledges that the risks of a potential seller deciding not to conclude a sale would be a relevant consideration. Disclosing the parts of the Report where the offer is considered – what could loosely be termed “due diligence” in its widest interpretation – is the equivalent of putting the information into the public domain: this is the effect of disclosure under FOISA.
72. The Commissioner acknowledges that the Council's actions with respect to the property in question are sensitive, with people holding differing views on the issues of the sale.
73. The Commissioner also acknowledges that there is an increasing expectation and awareness that information provided to public authorities may at some time have to be considered and possibly disclosed in response to information requests made under FOISA.
74. However, the Commissioner accepts that disclosing the parts of the Report which relate to the Council's scrutiny of the offer would disclose information about the offer which the purchaser would have expected to be kept confidential until the sale was concluded.
75. The Commissioner accepts that disclosure of the information at the time of Mr X's request would have been likely to have had a substantially prejudicial effect on the Council's commercial interests, given that disclosure may have made the buyer reconsider whether they wished to go through with the sale in the light of information about the negotiations and their offer being put in the public domain before the sale was concluded. The Commissioner therefore accepts that the information was exempt from disclosure under section 33(1)(b) of FOISA.

#### *Public interest test*

76. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
77. The Council submitted that it was in the public interest to allow the Council to conclude its negotiations and obtain best value. The Council referred to this with respect to the present sale, but also considered that disclosure would be a “dangerous precedent” likely to affect future sales.
78. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She also accepts that disclosure in this case would contribute to the public's understanding of the offer and the terms. Disclosure would provide transparency in relation to the Council's consideration of these terms. The Commissioner agrees with Mr X that it is in the public interest to ensure effective oversight of public action and that disclosure of the information might enable such oversight. She considers that the public interest arguments in favour of disclosure are given more weight by the particular circumstances of this property sale, which followed the Council's rejection of a community buy-out.
79. The Commissioner also recognises a public interest in ensuring that value for money is achieved and seen to be achieved by Scottish public authorities. As she has stated in other

decisions, she accepts that where a public authority is engaged in negotiating or concluding an agreement, it is in the public interest that it is able to do so without its status as a public body impacting significantly on its ability to participate effectively; in particular, by securing best value. There is a strong public interest in local authorities achieving best value in all commercial matters and in ensuring that local authorities utilise all forms of funding as effectively as possible.

80. The Commissioner has also taken account of the submissions made by the Council in favour of maintaining the exemption. She has already acknowledged the risk of substantial prejudice to commercial interests in this case, and accepts that there is a public interest in avoiding such prejudice.
81. The Commissioner has considered all the factors set out above. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice may result, the Commissioner does not believe that this would be justified on public interest grounds in this case, in relation to the specific information which has been withheld under section 33(1)(b) of FOISA. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration.
82. The Commissioner therefore finds that the information was correctly withheld by the Council under section 33(1)(b) of FOISA. It must be stressed that this decision is based on the circumstances existing at the time the Council dealt with Mr X's request or, at the latest, when it responded to his requirement for review.

#### **Parts 4 and 5 of the request: payments, security, etc.**

83. During the Commissioner's investigation, the Council stated that it would no longer rely on section 36(2) of FOISA in relation to parts 4 and 5 of Mr X's request. It submitted that it now considered that it was in the public interest neither to confirm nor deny whether it held information covered by parts 4 and 5 and so it wished to rely on section 18(1) of FOISA.
84. Towards the end of the investigation, the Council decided it no longer wished to rely on section 18. It confirmed to Mr X that it did not in fact hold any information falling within parts 4 and 5 of his request.
85. The Commissioner finds that, at review, the Council wrongly applied the exemption in section 36(2) of FOISA to information which it did not hold, in relation to parts 4 and 5 of Mr X's request.
86. Given that the Council no longer wishes to rely on section 18 in relation to parts 4 and 5 of the request, there is no need for the Commissioner to consider whether it applied.
87. However, the Commissioner is concerned that, having originally told Mr X that it held information which would answer parts 4 and 5 of his request, the Council later attempted to rely on section 18 to neither confirm or deny whether it held the information, only, at a later stage, to confirm that it did not hold the information. This gave a misleading impression to Mr X.
88. The Commissioner would urge the Council to ensure that, in future, its responses clearly indicate what information is (or is not) held and the exemptions which are being applied to the information. The only exception to this should be where section 18 is being applied, in which case the authority should make it clear it is applying section 18.

89. The Commissioner would also remind the Council that exemptions cannot be applied to information which is not held and that, unless the Council is applying section 18, it must make it clear to the requester whether it does or does not hold information.
90. The Commissioner finds that the Council failed to comply with Part 1 of FOISA in responding to parts 4 and 5 of Mr X's request. Given that the Council did not hold any information falling within the scope of these requests (and given that section 18 does not apply), the Council should have notified Mr X, in line with section 17 of FOISA, that it did not hold the information.

### **Request 12: Environmental Impact Assessment**

91. Part 12 of Mr X's request was for information showing whether the Council had carried out an Environmental Impact Assessment (EIA) on the plan for Castle Toward before accepting it.
92. The Council has stated that it does not hold any information covered by this part of Mr X's request. It submitted that it is for the Council, as planning authority, to ensure compliance with the EIA Regulations and, if an EIA was required, it would have to be submitted by the applicant, in support of their application. The Council acknowledged that its review response could have offered a better explanation on this point, and should have made it clear whether this part of the request was refused under either section 17 of FOISA or regulation 10(4)(a) of the EIRs.
93. In all the circumstances of this case, the Commissioner is satisfied (on the balance of probabilities) that the Council does not (and did not, on receipt of Mr X's request) hold information which would answer part 12 of the request, and correctly gave notice of this. Such an EIA would be relatively easy for the Council to identify and locate, given the requirements of the EIA and associated planning legislation, and the knowledge of the Council officers involved in this sale. After investigating, the Commissioner accepts that the Council did not hold the information Mr X sought.
94. Although the Commissioner accepts that the Council was largely correct to respond to Mr X's request in terms of FOISA, she is of the view that a request relating to an EIA (which is clearly environmental information) should have been handled under the EIRs, even if the Council did not hold the information.
95. In failing to respond to part 12 of Mr X's request under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

### **Request 13: "best value"**

96. Request 13 was for information on the criteria the Council uses to determine "best value" in relation to a sale, and for the relative rankings of the community buy-out bid and the bid which was accepted by the Council.
97. In its initial response, the Council told Mr X that there had been no comparison of the relative merits of the two bids. In its submission to the Commissioner, the Council commented that (as its review response explained) the current sale was an open market sale. As it had not received an offer from the community in relation to the current sale, there was no comparison of the relative merits of a bid from the community and the bid which was accepted. Consequently, the Council did not hold information covered by part 13 of Mr X's request.

98. Given this explanation, the Commissioner is satisfied (on the balance of probabilities) that the Council does not hold any relative rankings of the sort Mr X is seeking. She accepts that the Council was correct to give notice of this, in accordance with section 17 of FOISA.
99. The Commissioner notes that there are two parts to request 13, and Mr X also asked for information about the criteria used to determine “best value” in a sale. After review, the Council provided Mr X with a link to information on the Scottish Government website about its statutory duty to achieve best value. It also stated that best value allows for consideration of a number of aspects and any decision is dependent on the particular circumstances of each case under consideration. The Commissioner finds that this response did not fully address Mr X’s request: he was clearly interested in information showing what criteria the Council had used in assessing whether the agreed sale of Castle Toward represented best value, and the information provided by the Council did not answer this question.
100. The Commissioner therefore requires the Council to review its response to the first part of request 13, and to provide Mr X with any information about the criteria it used in assessing best value in relation to the sale of Castle Toward. (If the Council does not hold any recorded information on this point, it should give Mr X notice of this.)

**Additional comment**

101. During the investigation, the Commissioner’s office approached the Council to see if it would be willing to disclose any more information to Mr X. The Council declined to do so. The Commissioner is disappointed that the Council refused to disclose some information to Mr X during her investigation. There is substantial evidence that the information in question was published and placed in the public domain during the Commissioner’s investigation. In particular, the Commissioner notes that Audit Scotland reported on the Castle Toward sale in its report Argyll and Bute Council: Annual audit report to Members and the Controller of Audit, and that the information which would answer part 3 of Mr X’s request is included in this published report.

## Decision

---

The Commissioner finds that Argyll and Bute Council (the Council) failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr X.

The Council:

- incorrectly identified some information as falling within Mr X's request which it had not held at the date of his request
- failed to identify that some of the information requested was environmental information which should be considered under the EIRs, and thereby failed to comply with regulation 5(1) of the EIRs
- wrongly relied upon section 30(c) of FOISA to withhold information
- wrongly relied upon section 36(2) FOISA in relation to parts 4 and 5 of Mr X's request, and failed to give notice that it did not hold information
- failed to respond in full to part 13 of Mr X's request

The Commissioner accepted that some information was correctly withheld under section 36(2) and section 33(1)(b) of FOISA. She also accepted that the Council did not hold some information.

The Commissioner requires the Council to respond to the first part of request 13, as indicated in paragraph 100.

The Commissioner requires the Council to take this action by **23 January 2017**.

## Appeal

---

Should either Mr X 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

---

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**

**7 December 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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
  - (b) has told the applicant so (specifying what the requirement for further information is),

then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

#### 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.

...

### **18 Further provision as respects responses to request**

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...

### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

### **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**

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and

- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

# The Environmental Information (Scotland) Regulations 2004

## 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

## Appendix 2: Mr X's information request

---

2. Who or what is the preferred bidder for Castle Toward e.g. is it Mr Punler and Ms Purdie as individuals, is it Kapital Residential Ltd, or is it some other company or group.
3. Is the sale price of £1.5m to be paid in instalments, if so what are the instalments and when will they be paid?
4. If payments are being made in instalments will interest be being charged on the balance and, if so, at what rate.
5. If payments are being made in instalments will a "standard security" be taken in case payments are not made?
6. What due diligence has the Council done to ensure that the purchaser is capable of delivering on its plans?
7. What steps has the Council taken to ensure that the purchaser will complete its plans instead of simply making promises to secure a sale but then failing to deliver on them?
12. Has the Council done any Environmental Impact Assessment on the plan for Castle Toward before accepting it?
13. What criteria does the Council use to determine what is "best value" in a sale and what are the relative rankings of the SCCDC bid and the current bid?

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**