

# Decision Notice

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**Decision 189/2015: Mr John Eustace and Glasgow City Council**

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**Advertising site contract**

Reference No: 201501285

Decision Date: 10 December 2015



Scottish Information  
Commissioner

## Summary

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On 27 April 2015, Mr Eustace asked Glasgow City Council (the Council) for the terms and conditions of a recent contract between the Council and Clear Channel UK Ltd (Clear Channel) for the provision of advertising sites within the Council area.

The Council provided information on the length of contract and the number of sites, but withheld information on the financial benefits it received, stating that disclosure would or would be likely to prejudice substantially the commercial interests of Clear Channel and the Council. Following a review, Mr Eustace remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that that the Council had correctly withheld information in terms of section 33(1)(b) of FOISA, and that the public interest in maintaining the exemption outweighed that in disclosure of the information under consideration.

## 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 27 April 2015, Mr Eustace made a request for information to the Council. He requested the terms and conditions of the “recent contract” between the Council and Clear Channel for the provision of advertising sites within the Council area. Specifically, Mr Eustace asked for information about the length of contract; the number of sites contracted, and their description; and the “financial benefits” forthcoming to the Council from this contract.
2. On 1 May 2015, Mr Eustace clarified that he sought information about the contract announced by Clear Channel in January 2015, which was initially for 5 years.
3. The Council responded on 1 June 2015 and provided information on the length of contract and the number of advertising sites. The Council withheld financial 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 Clear Channel or the Council. The Council explained that the information was obtained through a confidential tendering process and disclosure would undermine faith in that process. The Council explained why it believed the public interest favoured withholding the information.
4. On 8 June 2015, Mr Eustace wrote to the Council requesting a review of its decision. He believed that disclosure of the information would not prejudice commercial interests, and that the public interest favoured disclosure. He supplied information on advertising that he had obtained from another public authority through a freedom of information request. Mr Eustace believed that disclosure would assist other public authorities with similar contracts, and took the view that this would be in the public interest, by “saving or supporting public funds”.
5. The Council notified Mr Eustace of the outcome of its review on 6 July 2015. The Council provided a link to a Committee report of 11 December 2014: *The Provision of Bus Shelter Advertising, Cleaning and Maintenance*. With reference to this report, the Council cited

section 25(1) of FOISA. The Council continued to withhold information about financial benefits under section 33(1)(b) of FOISA. While it recognised the general public interest in openness and transparency, the Council took the view that the public interest in protecting its own and Clear Channel's commercial interests outweighed the public interest in disclosing the information.

6. 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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7. 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 before applying to her for a decision.
8. 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.
9. 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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10. 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.

### Interpretation of request

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable in this case. Section 1(3) of FOISA provides that a Scottish public authority is not obliged to respond to an information request if it requires further information in order to identify and locate the information an applicant has requested, and has told the applicant so (specifying what further information is needed).
12. Mr Eustace requested the terms and conditions of the recent contract between the Council and Clear Channel for the provision of advertising sites within the council area. His request was:

*I am conducting a study on media costs and establishing if councils are getting fair reward in exchange for providing media opportunities. I would like to know the terms and conditions of the recent contract between GCC and a company called Clear Channel for the provision of advertising sites within the council area. Specifically. The length of contract? The number of sites contracted, and of what description? What financial benefits are forthcoming to GCC?*

13. The investigating officer asked Mr Eustace if he had intended his request to be for the full contract. Mr Eustace replied, on 4 November 2015, that:

*I am requesting that the whole contract be revealed inasmuch length of time, value in total or by year to conclusion. The cost of placing adverts by the council and the level of discount the media owner might offer the council is of little real interest. It's the totality of the contract and its life.*

14. The Council submitted that Mr Eustace only wanted certain parts of the contract, rather than the contract as a whole. Although Mr Eustace had used "terms and conditions of the recent contract" to introduce his request, he had specified the information he wanted by using the word "specifically". The Council did not think there had been any need for clarification on the information which Mr Eustace intended to be covered by his request, and commented that, had it thought so, it would have sought clarification on this point. The Council also pointed out that Mr Eustace's requirement for review was specific in wanting the financial implications of the contract and that Mr Eustace had not expressed dissatisfaction at not having obtained the full contract.
15. In interpreting information requests, the Commissioner believes that the words used in the request should generally be given their plain, ordinary meaning.
16. Mr Eustace's request asks for the terms and conditions of a contract, but the Commissioner accepts that he went on to specify which information he required from the contract. The Commissioner accepts the Council's submission and finds that the Council interpreted Mr Eustace's request in a reasonable manner, and considered all the information falling within the terms of the request.

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

17. The Council relied on section 33(1)(b) of FOISA to withhold information about what could be described as the "financial benefits," i.e. the actual advertising income received from Clear Channel, but also the relevant clause from the contract that detailed such financial arrangements and information about the rates on which the income was calculated.
18. 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.
19. 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.
20. In his application, Mr Eustace argued that councils need to reduce the costs and increase revenue and part of this can be achieved by improving the commercial value of bus shelters.
21. The Council explained that the commercial interests in question were its own and those of Clear Channel. The Council said these interests were commercial because they specifically relate to a commercial trading activity, in this case the ongoing sale and purchase of advertising space for the purpose of revenue generation.

22. The Commissioner accepts that both the Council and Clear Channel have commercial interests relating to the withheld information.
23. The Council took the view that substantial prejudice to its commercial interests was likely to occur during any retendering exercise, if the information was disclosed. The Council stated that the withheld information related to a live contract of a relatively short term (the contract could be retendered from as early as 2020). The Council highlighted that the short length of the Council's contract with the company differed from the much longer contracts which some other councils have in place in relation to bus shelter advertising. It pointed out that in a case highlighted by Mr Eustace, in which similar information had been disclosed by another public authority, the contract in question ran for a period of 20 years.
24. The Council stated that due to the short length of the its contract with Clear Channel, the information on how much the company pays to the Council is likely to retain its relevance when the contract is being re-procured. The information could give the company's competitors an unfair advantage as they would have details of the company's current successful bid. This would be likely to affect the Council's ability to secure best value, as potential suppliers would have a strong indication of the level of bid which may secure this advertising contract. The Council argued that this could result in suppliers submitting a less competitive bid. The Council was of the view that the optimal way for it to achieve best value is through the blind bidding process, which would be comprised if the withheld information was released.
25. In addition, the Council argued that disclosure could also lead to a reduction in the number of suppliers willing to bid for future work due to concerns about future disclosure of their commercially sensitive information. The Council considered that this would be likely to substantially affect the Council both during a retendering exercise of the contract in question and in other future tender exercises.
26. In addition, Clear Channel had advised the Council that disclosure of the withheld information would substantially affect their commercial interests (the Council evidenced this with an email from the company). The Council submitted that disclosure of the withheld information would place the company at a commercial disadvantage. The information could be used by the company's clients in an attempt to secure a lower price for their advertising. The information would also permit other advertising suppliers to undercut the company in future tendering exercises and so significantly harm the company's commercial interests.
27. Mr Eustace supplied information he had obtained from two different UK public authorities in response to similar information requests, which included the type of financial information he had asked the Council to provide. He also cited a decision<sup>1</sup> by the (UK) Information Commissioner (the ICO) which required disclosure of similar information under the Freedom of Information Act 2000.
28. In respect of the information obtained by Mr Eustace from other public authorities, the Council said it was not aware of the full facts and circumstances relating to the contracts in question and, in the absence of these details, the Council was unable to determine if the information released by another authority was comparable to the information request in this instance. The Council highlighted the increased sensitivity of commercial information over a short length of contract, which it said applied in this case.

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560159/fs\\_50588962.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560159/fs_50588962.pdf)

29. The Commissioner notes that although the contract between Clear Channel and the Council is of relatively short duration, compared to some contracts which Clear Channel has with other public authorities, it is not due to be re-tendered for a number of years. She considers that this lessens the likely harm to the Council's commercial interests. However, the Commissioner accepts that disclosure of the financial agreement between Clear Channel and the Council would, or would be likely to, harm Clear Channel's commercial interests. She has taken into account that the company may be tendering for other contracts in the near future. The Commissioner accepts that the Council was entitled to withhold information showing its financial agreement with Clear Channel.
30. The Commissioner notes that Mr Eustace asked for information about the financial benefits to the Council. His request, in the form originally submitted to the Council, did not cover information about how those benefits are calculated, or how they are paid. The Commissioner has therefore disregarded the Council's arguments relating to clause 4 of its contract with Clear Channel, which specifies how the financial benefits are calculated and paid. This information is not covered by Mr Eustace's request.

#### *Public interest test*

31. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, 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).
32. Mr Eustace argued that the public interest is best served by disclosure. He stated that there is great disparity in the revenue which councils obtain from the principal advertising contractors, and indicated that disclosure of information would identify the opportunity for councils to generate revenue from bus shelters and other street furniture advertising. He argued that withholding information relating to the procurement or outsourcing of public services appeared to contradict the principal rules of tender under EU law, in relation to non-discrimination, equal treatment, transparency and proportionality.
33. Mr Eustace referred an Office of Fair Trading (OFT) report *Street Furniture advertising: Recommendations to local authorities*<sup>2</sup>. He indicated that he had made similar requests to UK public authorities and had successfully obtained the information, and referred to a decision by the ICO (as previously cited) which ordered the disclosure of similar information.
34. The Council acknowledged that there is a public interest in openness and transparency in local government, but submitted that, on this occasion, the public interest in openness and transparency was outweighed by the public interest in maintaining the exemption.
35. The Council agreed with Mr Eustace that "it is in the public interest for best practice in the procurement/outsourcing of public services to be shared between councils" but did not consider that release of the withheld information would assist in this regard. It highlighted that disclosure of the information under FOISA was disclosure to the public and not merely to Mr Eustace or another local authority.
36. The Council found there was a strong public interest in avoiding prejudice to its own commercial interests and in being able to achieve best value in commercial matters. The Council argued this is of particular relevance in view of the ongoing budget pressures across

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284448/OFT1415.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284448/OFT1415.pdf)

local government. In addition, the Council argued that there is a substantial public interest in avoiding significant harm to Clear Channel's commercial interest by disclosing information which is likely to prejudice the company's ability to compete in future procurement exercises and to affect its ability to secure the best price from its clients. The Council submitted that there is a strong public interest in ensuring that companies which tender for public work are able to compete on an equal footing with their competitors.

37. In considering the public interest in favour of disclosure, the Commissioner recognises 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 agreement with Clear Channel on the financial aspects of the contract – which is clearly an important aspect of any such contract. It is in the public interest to ensure effective oversight of public funds, and disclosure of the information withheld from Mr Eustace could enable such oversight.
38. The Commissioner also recognises a public interest in ensuring that value for money is achieved and seen to be achieved by Scottish public authorities. She accepts that (as argued by Mr Eustace) there is some public interest in the disclosure of information would allow authorities to compare the contracts they have with Clear Channel or other advertising companies, which may lead to savings to the public purse. However, she also 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 the best value for the authority. Similarly, she agrees with the Council that there is a strong public interest in ensuring that companies that tender for public work are able to compete on an equal footing with their competitors.
39. The Commissioner has already acknowledged the risk of substantial prejudice to commercial interests in this case, if the withheld information is disclosed, and accepts that there is a public interest in avoiding such prejudice.
40. 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 to commercial interests may result, the Commissioner does not believe that this would be justified on public interest grounds in this case. Mr Eustace has made reasonable arguments for disclosure in the public interest. However, the Commissioner believes that, on balance, the public interest in this case favours maintaining the exemption, as the public interest in disclosure is outweighed by the public interest in avoiding substantial prejudice to commercial interests.
41. The Commissioner therefore finds that the Council was correct to withhold information under section 33(1)(b) of FOISA.

## Decision

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The Commissioner finds that Glasgow City Council (the Council) complied 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 entitled to withhold information under the exemption in section 33(1)(b) of FOISA.

## **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.

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

**10 December 2015**



## Appendix 1: Relevant statutory provisions

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### 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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