

# Decision Notice 152/2021

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## Flat rate fee paid to insurance claims handler

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**Applicant: The Applicant**

**Public authority: Fife Council**

**Case Ref: 202100450**



Scottish Information  
Commissioner

## Summary

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The Council was asked for the cost, to the Council, of the flat rate fee / claim paid to its insurance claims handler. The Council withheld the information on the basis that it was commercially sensitive. The Commissioner investigated and found that the Council had complied with FOISA in responding to the request.

## Relevant statutory provisions

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

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 31 August 2020, the Applicant made a request for information to Fife Council (the Council). The information requested was:  
*Fife Council refer third party claims to – claims handler – Gallagher Bassett. Please advise cost to Fife Council - of the flat rate fee / claim paid to Gallagher Bassett.*
2. The Council responded on 8 September 2020. It withheld the information under section 33(1)(b) (Commercial interests and the economy) of FOISA, on the basis that disclosure would substantially prejudice commercial interests.
3. On 16 September 2020, the Applicant wrote to the Council requesting a review of its decision, arguing that section 33(1)(b) could only apply where disclosure would, or would likely, cause substantial prejudice, where there was at least a significant probability that this would occur, and where a genuine link between the harm and disclosure existed. He asked the Council to fully explain its arguments for non-disclosure.
4. The Council notified the Applicant of the outcome of its review on 13 October 2020, fully upholding its original decision. It explained that the information was commercially sensitive, and that disclosure would substantially prejudice the commercial interests of both the Council and the claims handler, through breaching the Council's contractual obligations and exposing it to litigation or a damages claim, and through disadvantaging the claims handler's position in any future tendering process, none of which was in the public interest.
5. On 8 April 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he believed the public interest favoured disclosure of the information.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.

7. On 21 April 2021, the Council was notified in writing that the Applicant had made a valid application, and it was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These focused on its justification for withholding the information requested under section 33(1)(b) of FOISA.

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

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9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

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

10. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
11. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
  - (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
  - (ii) the nature of those commercial interests and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
12. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

#### *Commercial interests*

13. In its submissions to the Commissioner, the Council confirmed that it still wished to withhold the flat rate fee for claims paid to its insurance claims handler under section 33(1)(b) of FOISA.
14. By way of background, the Council explained that insurers reserve the right to deal with all claims themselves, or appoint a claims handler. It stated that Risk Management Partners (RMP), the Council's insurers, delegated claims handling authority to Gallagher Bassett, who charged a flat rate fee relevant to the class of claim, for each and every claim referred to it.
15. The Council clarified that, in a case such as that described by the Applicant (i.e. where his claimed was "timed out"), the Council would still incur the flat rate fee charged by Gallagher Bassett, and that a flat rate fee was paid for all claims reported, whether settled or not.

16. In its submissions to the Commissioner, the Council stated that the commercial interests of its insurers (RMP), the claims handler (Gallagher Bassett) and the Council itself would be impacted by disclosure of the information.
17. The Council submitted that the insurers considered the information in the relevant contracts to be confidential and commercially sensitive. In support of this, the Council explained that, in its Motor Insurance tender submission, RMP stated its bid was commercially sensitive and disclosure might disadvantage it in bidding for future contracts. In its Third Party Insurance Claim Handling tender submission, RMP stated its response was confidential and commercially sensitive. The Council provided the Commissioner with extracts of the confidentiality statements in both the Motor Insurance Contract and the Liability Insurance and Claims Handling Contract in evidence of a contractual obligation of confidentiality. The Council also provided the Commissioner with extracts of the FOI statements in both contracts which required the Council to consult with the insurers should disclosure of any information in the contracts be pursued.
18. The Council believed that disclosure of the information could impact the commercial interests of all parties in relation to future tenders and, further, there would be a cost to the Council in the event that RMP considered taking legal action (for breach of contract) as a result of disclosure of the information.
19. Having considered the Council's submissions on this point, the Commissioner is satisfied that the information is commercial in nature, and the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b). He recognises that successful parties in a tendering process must be able to enter into contracts with the authority for the provision of the relevant services, which stipulate the relevant terms and conditions and associated financial information. The matters recorded in such contracts will generally be commercial in nature (as the Commissioner is satisfied that matters under consideration here are).
20. The Commissioner accepts that the Council has identified commercial interests relating to its insurers and claims handler, which could be adversely impacted should disclosure of the information disadvantage it in bidding for future contracts.
21. The Commissioner also accepts that the Council has identified commercial interests relating to itself, should disclosure of the information lead to litigation being raised by the insurers as a result of disclosure.
22. Having identified these commercial interests, the Commissioner must now go on to consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the information.

*How would disclosure prejudice these commercial interests?*

23. In its submissions to the Commissioner, the Council submitted that disclosure of the information (the flat rate fee) would likely impact on Gallagher Bassett in competing for public sector business against other contractors. As set out in its review outcome, the Council argued that by providing competitors with this information, this would, or would likely, substantially prejudice Gallagher Bassett's commercial interests by disadvantaging its standing in future tenders relating to the contract.

24. The Council confirmed that this information was not publicly available, and that the tender award notice did not contain this level of detail, rather it set out the overall contract costs (i.e. the sum of the premiums for insurance policies, annual claims handling and account management fees). In evidence of this, the Council provided the Commissioner with copies of the relevant Award Notices on Public Contracts Scotland's website where the total costs of the relevant contracts were published. The Council explained that there was no way of splitting this sum among the separate categories.
25. The Council explained it had sought comment from its insurers on the disclosure of the information, both at review stage and during the Commissioner's investigation. These set out that RMP believed that disclosure would prejudice its commercial interests, namely its trading activity (e.g. the ongoing sale of claims handling services for the purpose of revenue generation), which normally takes place in a competitive environment. Should information on pricing be made public, RMP believed this would impact its ability to succeed in future tenders with significant financial implications. As RMP run many such tenders annually, information on pricing models (which are agreed afresh at each annual renewal), would be of huge benefit to its competitors.
26. Turning to its own commercial interests, the Council stated (in its review outcome) that, as the contract demands the information detailed therein to be treated as commercially sensitive, it was contractually obliged not to disclose any of the information without the consent of the insurers. That being the case, disclosure by the Council would breach its contractual obligations, and would likely expose it to litigation and/or a damages claim, resulting in a cost to the Council in the event that RMP considered taking legal action.
27. The Council further submitted that disclosure would prejudice its own commercial interests in relation to future tenders. It argued that this was a specialised, competitive area, and there were adequate concerns about the quality of service that would be provided, and the reputational damage to the Council, through making the information available to competitors through public disclosure.

#### *The Commissioner's views*

28. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
29. The Commissioner is satisfied that the information requested is not publicly available. He recognises that disclosure of the flat rate fee into the public domain would allow other commercial competitors to gain unfair advantage in competing for future tenders for this area of work, by being able to undercut on price. With this in mind, he accepts that disclosure of the information would place the Council's insurers at a competitive disadvantage in negotiating future tenders and would, or would be likely to, prejudice its commercial interests to a significant extent. In reaching this conclusion, he has taken account of the fact that the relevant fees are agreed annually on renewal.
30. The Commissioner accepts that the insurers consider the withheld information confidential and are clear in their position on harm as a consequence of disclosure. In the circumstances, public disclosure of this information would be likely to impact on the Council's relationship with its insurers. This would be likely to jeopardise the Council's commercial interests substantially, were the insurers to take legal action against the Council for breach of contract, at a financial cost to the Council.

31. The Commissioner also acknowledges the harm to the Council in relation to future tenders, in terms of the quality of service being provided (through competitors focusing their bids mainly on price) and through reputational damage to the Council (through competitors refraining from participating in fear their information would not be kept confidential). He accepts these factors would, or would be likely to, prejudice the Council's commercial interests substantially.
32. The Commissioner notes the Applicant's comment, in his application, that public sector contracts should include a provision for FOISA. It is clear from the Council's submissions and supporting evidence that this was indeed the case here.
33. In conclusion, the Commissioner is satisfied that the information relating to the flat rate fee was of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was correctly applied on that basis.

*Public interest test*

34. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, he is now therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
35. In his application to the Commissioner, the Applicant commented that, having made a claim to the Council, he had been informed his claim was "timed out" and could not be pursued. He stated that the Council had informed him that, due to the terms of the contract with its insurers, all claims had to be referred to a claims handler, at a cost to the Council, regardless of merit. His case had been forwarded to the case handler who, in turn, confirmed the Council's position, at a cost to the Council.
36. The Applicant believed that Council contracts which involved, in his view, unnecessary expenditure of taxpayers' money was of significant public interest and, in this case, the public interest overrode commercial confidentiality, through being able to hold authorities to account for spending decisions.
37. In its submissions to the Commissioner, the Council identified the following factors which it had taken into account when considering whether the public interest favoured disclosure:
  - Openness and transparency in showing how public money is spent, as the Council is required to ensure it manages its business to the best of its ability in relation to public expenditure.
  - Public scrutiny of how much is spent on various aspects of Council business.
38. The Council believed these factors should be balanced against the following:
  - The harm to RMP and Gallagher Bassett through disclosure of the information.
  - The harm to the Council in future tenders, in terms of future quality of service in this area, and the reputational damage caused through making the information available to competitors.
  - The cost to the Council in the event that RMP considered taking legal action.

39. The Council believed that the public interest in being able to tender for and provide a service adequate to requirements (for which full details of costs were publicly available) was outweighed by the harm to the process through disclosure of the level of detail requested. It concluded that the public interest in disclosing the information was outweighed, in this case, by that in maintaining the exemption.
40. The Commissioner has considered the submissions from both parties, together with the withheld information, which comprises the flat rate fee incurred by the Council for referring insurance claims to the claims handler. Recognising the general public interest in the disclosure of information held by Scottish public authorities, the Commissioner acknowledges that disclosure, in this case, would provide clarity on the costs involved, and satisfy the public interest in transparency and accountability, by allowing effective scrutiny of whether the public authority is obtaining value for money.
41. However, the Commissioner is also of the view that the disclosure of the information in question would give competitors a valuable insight into the specific rates charged by the Council's insurance claims handler for the referral of individual claims, thus giving them unfair commercial advantage. He considers there is no public interest in placing a particular organisation at a commercial disadvantage, simply as a result of having entered into a commercial contract with a public body to provide a service, as a result of a formal tender process, where disclosure of certain financial information has a consequential impact on its ability to continue to participate fairly in a competitive market.
42. In addition, the Commissioner considers the public interest in disclosure is met, to some extent, by the publication of the financial information relating to the overall contract cost, and by the Council's explanation of the process, in which it confirmed that all claims reported to the claims handler incur a cost to the Council, regardless of whether or not they are settled, or whether they are "timed out" (as in the Applicant's case).
43. The Commissioner has already acknowledged the submissions made by the Council in support of maintaining the exemption, and has already concluded that disclosure of the withheld information in this case would, or would be likely to, prejudice the commercial interests of the insurers, the claims handler and the Council. That would not be in the public interest.
44. Having balanced the public interest for and against disclosure, the Commissioner concludes that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure in respect of the withheld information under consideration here. The Commissioner therefore finds that the Council was entitled to withhold the financial information relating to the flat rate fee under section 33(1)(b) of FOISA.

## Decision

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

## **Appeal**

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Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

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

**4 October 2021**



## 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.

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- (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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