

# Decision Notice 104/2022

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## Fees charged to the US Military

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**Applicant: The Applicant**

**Public authority: Glasgow Prestwick Airport Limited**

**Case Ref: 202000058**



Scottish Information  
Commissioner

## Summary

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GPA was asked about the fees it charges the US Military. GPA provided the Applicant with some information, but withheld other information on the basis that disclosure would prejudice its commercial interests. It also told the Applicant it did not hold some of the information asked for.

The Commissioner found that GPA had failed to notify the Applicant that it did not hold some of the information falling within the scope of his request, but found that GPA was entitled to withhold information under section 33(1)(b) of FOISA.

## 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); 17(1) (Notice that information is not held); 33(1)(b) (Commercial interest 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 17 September 2019, the Applicant made a request for information to Glasgow Prestwick Airport Limited (GPA). He asked GPA for;  
*All information it holds, including, but not limited to contracts, agreements, minutes, memos, emails, letters, and other correspondence and documentation, relating to fees it charges incoming US military aircraft on stopovers and layovers at the airport.*
2. He clarified that it should include, but not be limited to, information referencing the waiver of “service fees” to incoming US military aircraft at Glasgow Prestwick Airport. For reference, these “service fees” may also be known as “aircraft handling” fees or “ramp fees”, and the disclosure should also apply to information referencing these terms.
3. He further clarified that the information should include, but not be limited to, any legal advice GPA has sought or received in deciding to waive these fees, and any correspondence with the Scottish Government and/or Transport Scotland regarding the waiving of these fees.
4. GPA responded on 15 October 2019. It gave him notice, under section 17(1) of FOISA, that it did not hold any legal advice, and it withheld information falling within the scope of the request under section 33(1)(b) of FOISA.
5. On 21 October 2019, the Applicant wrote to GPA requesting a review of its decision. He did not agree that the information falling within the scope of his request should be withheld under section 33(1)(b) of FOISA, and he argued that the public interest favoured disclosure.
6. GPA notified the Applicant of the outcome of its review on 18 November 2019, and it upheld its previous reliance on section 33(1)(b) of FOISA. GPA noted that the Applicant had not challenged its application of section 17(1) of FOISA to his request for legal advice, and so it did not conduct a review of this part of the request.
7. On 30 December 2019, GPA provided the Applicant with a further review of his request. It provided him with some information falling within the scope of the request but with some information redacted under section 33(1)(b) and 38(1)(b) (Personal information) of FOISA.

8. The Applicant wrote to the Commissioner on 8 January 2020, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of GPA's review because he did not accept that the information it had disclosed was relevant to his request and he was not satisfied with the redactions made under section 33(1)(b) of FOISA. The Applicant also expressed dissatisfaction that GPA had not identified what documents, if any, it was continuing to withhold.

## **Investigation**

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9. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 14 January 2020, GPA was notified in writing that the Applicant had made a valid application. GPA was asked to send the Commissioner the information withheld from the Applicant. GPA provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. GPA was invited to comment on this application and to answer specific questions. These related to its reasons for withholding information under section 33(1)(b) of FOISA.

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

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12. 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 him by both the Applicant and GPA. He is satisfied that no matter of relevance has been overlooked.

### **Information held by GPA**

13. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
14. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what information is actually held by the public authority (or was, at the time the request was received).
16. In its letter to the Applicant, dated 30 December 2019, GPA provided him with redacted versions of five emails and two invoices, with the information redacted under section 33(1)(b) and 38(1)(b) of FOISA.

17. The Applicant has not challenged GPA's decision to withhold personal data under section 38(1)(b) of FOISA.
18. At the beginning of his investigation, GPA submitted that all employees who were currently, or had been, involved in discussions or correspondence with the US Military regarding fees and charges reviewed the information they held. GPA explained that was primarily two employees who had previously been (or still were) the main point of contact for the US Military. GPA explained that these two individuals had searched emails, notes, minutes, and other documents and no further information (in addition to that identified in its letter of 30 December 2019) was held. GPA contended that no contract existed between itself and the US Military.
19. In further correspondence, GPA provided details of the searches it had undertaken. It explained that both employees searched all of their emails, including the archived email folder, and that every single email was checked manually; it did not rely on key word searches or folder selection. In total, employee 1 searched approximately 22,000 emails and employee 2 searched approximately 4,500 emails.
20. GPA submitted that it has never had any correspondence or any advice from the Scottish Government, Transport Scotland or any other government body, with regards to fees or the waiving of fees for any customer, including military customers. GPA also contended that it held no legal advice that fell within the scope of the Applicant's information request, nor were any relevant notes or minutes held.
21. The Commissioner questioned GPA on whether it had identified all of the information that fell within the scope of the request. The Commissioner noted that, while GPA had only identified five emails and two invoices as falling within the scope of the requests, he considered that GPA was likely to hold more information than that identified. He required GPA to conduct additional searches and to provide him with the results of those searches. The Commissioner also asked GPA to confirm whether it held any Memorandum of Understanding (MoU), or technical agreement/arrangement, which set out the terms and conditions of use of the airport, including charging procedures (even if they did not list the specific fees).
22. In response, GPA explained that the two invoices previously identified were part of an email response and were picked up in the email search that was carried out with regard to the request. GPA submitted that invoices were not part of the original request, however, as they were incorporated into emails that were part of the request it provided them to the Commissioner. GPA stated that it did not have a MoU or Ground Handling Agreement (which the Commissioner referred to as a "technical agreement") in place with the US Military for ground handling services. GPA noted that ground handling services were referred to in the request for information as "apron or ramp handling services".
23. The Commissioner was unclear why invoices had been excluded from the searches undertaken by GPA and he asked it to explain its reasons for concluding that invoices were not captured by the request. In relation to ground handling services, the Commissioner noted GPA's arguments that it did not have a specific agreement with the US Military. However, he suggested that there would be standard Terms and Conditions for the use of ground handling services which would be applied to users who do not have their own bespoke agreement with GPA. He asked GPA to provide him with a copy of the standard terms and conditions for the use of ground handling services.
24. In response, GPA submitted that, after some internal investigation, it determined that its finance team was not asked for input when information was collated in response to the

original request. GPA submitted that this oversight was due to human error. However, the result of this oversight led to invoices not being included within the material deemed relevant to the request, apart from the two invoices which were attached to emails that were identified during the email search.

25. GPA contended that the invoices were in no way intentionally withheld from the response to the Applicant's request, but it accepted that the omission of these invoices did not fully reflect the information that was held. GPA noted that it had instigated refresher training for staff involved in FOI responses, with the aim of preventing such a mistake happening in the future.
26. In further correspondence, GPA notified the Commissioner that it held approximately 1,500 invoices that fell within the scope of the request, and it provided him with a sample of 20 of the invoices, so he could check whether they met the terms of the request.
27. GPA also submitted that it did not have an MoU or Ground Handling Agreement in place with the US Military (referred to in the FOI request as "apron or ramp handling services"). GPA explained that a standard tariff price list does exist for operators of aircraft looking to use make use of GPA's ground handling services. It submitted that customers making use of such services are charged on a pay-as-you-use basis, according to the services they require.
28. GPA explained that its standard tariff charges comprise two categories of levy:
  - Airport Authority Charges, which include landing charges, navigation charges, passenger, terminal charges, fire category upgrades and aircraft parking charges. GPA noted that these charges are all published on its website; and
  - GPA's Handling Charges, which include charges for services such as aircraft ground handling; ground power units; catering and transport. The fees levied in respect of these charges are not published on its website and are considered to be commercially sensitive information in terms of section 33(1)(b) of FOISA.
29. GPA provided some general background on how airport charging works and the agents that are involved.
30. GPA noted that, while Airport Authority Charges are usually calculated and framed by airports using their own commercial discretion, the services to which Handling Charges relate are usually outsourced by commercial airports to third parties, with whom the airports customers would contract with for the provision of such services. GPA went on to explain that FBOs will typically be third party agents operating at the airport, providing a range of handling services (rather than the airport providing such services itself). The third-party handling agents and FBOs set and levy the charges for their services. They would not, ordinarily, publish the rates they charge their customers.
31. GPA explained that the Airport Authority Charges published by airports are not necessarily the rates that all its customers pay. The airport will likely have individual customer rates that are not published due to their commercial sensitivity. The same principle applies to handling agents and FBOs, in that they will have standard schedule of charges and customer specific charges, none of which would be typically be published.
32. GPA noted that, in December 2013, it was purchased by the Scottish Government. At that time "handling" services were delivered by the airport, and not a third party, but FBO services were provided by third party agents. Since January 2015, GPA began to provide the FBO services "in house".

33. GPA explained that it would not routinely provide the ground handling “standard tariff price list” to customers; instead, it would provide a quote to the potential customer for the services, if requested, and that customer would not have access to the full list of standard tariff prices.
34. GPA provided the Commissioner with a copy of the “standard tariff price list”, which it is withholding under section 33(1)(b) of FOISA.
35. In addition to the standard charges, GPA submitted that it has customer specific charges for several of its customers including military customers. GPA explained that the US Military are not charged at the “standard tariff” rate, but are charged at the rate the airport has set specifically for the US Military.
36. GPA also provided the Commissioner with a copy of the “US Military” price list which it is withholding under section 33(1)(b) of FOISA.
37. GPA explained that the pricing which the US Military are charged is not subject to yearly negotiation but has evolved through discussion between itself and US Military units over time. GPA submitted that, if US Military Units choose to land at the airport, they are charged for the services they have used at the prices set by GPA.
38. GPA noted that, while the US Military price list sets out the specific pricing to be charged, this pricing can, on occasion, be deviated from. GPA indicated that there are commercial factors to be considered which may lead to the charges on the pricing list being departed from. GPA submitted that this can take the form of a reduction in the rate charged, or a waiver in respect of certain charges or a combination of both. Any departure from the pricing list would be done on a case by case basis and in the exercise of GPA’s commercial discretion and judgment. GPA contended that a reduction in charges or waivers of fees are often necessary to secure business in what is a highly competitive market.
39. GPA noted that, before the Covid-19 global pandemic (in the time period covered by the request), the relationship with the US Military was largely driven by conversations and discussions which would take place at an individual unit level, rather than with the US Military as a whole.
40. The Commissioner asked GPA about any evidence it holds of waivers or fee reductions that were offered to the US Military. The Commissioner noted that GPA’s position appeared to be that it would verbally agree a reduction in charges or fee waivers with the US Military but would not retain a written note of the agreement. The Commissioner questioned this approach. He noted that, if no records are kept, if there were any personnel changes (of those involved in making such an agreement) either party would be vulnerable to the terms of their agreement being disregarded or denied (as no written evidence would exist to prove otherwise). The Commissioner suggested that there must be correspondence, notes, minutes of meetings or telephone calls where the terms of the charging or waivers were recorded, and he noted that he had not been provided with any such information.
41. In its response, GPA submitted that a decision to waive fees, or offer discounts to customers such as the US Military, is a decision which would not require Board approval. It maintained that there are no meeting notes held in respect of the waiving of fees or agreed discounts.
42. GPA noted that the decision to waive fees for a specified period or an agreed discount would be communicated internally and the change reflected on the invoicing system. It recognised that any such decisions may, on occasion, have been confirmed to the Military Unit concerned by way of an email. These emails would be between the GPA Business Development Manager and the US Military.

43. However, GPA submitted that such correspondence would not be routinely retained, as the invoice itself would be sufficient for audit purposes and would be retained in line with GPA's records retention policy.
44. GPA's record retention policy recommends that emails should only be retained for as long as is absolutely necessary and that good practice would be for a six monthly trawl to be carried out and unnecessary emails deleted. In practice, GPA submitted that its employees receive twice-weekly automated reminders to delete unnecessary emails to assist with its data storage management. GPA noted that any emails or documents which need to be retained are archived, and items which are no longer required are irretrievably deleted.
45. GPA submitted that any internal and external emails confirming the waiving of fees, or any other one-off discount, would have been routinely deleted as part of this process, on the basis that the invoice was retained for audit purposes.
46. GPA reiterated that all correspondence which is held, and which falls within the scope of the Applicant's request, has been identified and provided to the Commissioner.

#### *Commissioner's conclusions*

47. The Commissioner has carefully examined GPA's submissions on whether it has identified all of the information falling within the scope of the Applicant's request. While he considers it unfortunate that information recording the decision to waive fees has not been retained, he accepts that the invoice is considered to supersede any such correspondence or notes.
48. The Commissioner cannot require authorities to record information, he can only determine whether or not information is held, and if it is, whether it should be disclosed. In this case, he is satisfied, on the balance of probabilities, that GPA holds no information relating to any decisions it has made to waive fees or offer discounts to the US Military.
49. GPA has explained that its disappointing failure to identify a considerable number of invoices (which also fall within the scope of the request) was a result of human error. While human error can never be eliminated, having clear policies and processes for conducting searches can significantly reduce its likelihood.
50. The Commissioner has reviewed the content of the two price lists provided by GPA, and which GPA consider to be exempt in terms of section 33(1)(b) of FOISA. He is satisfied that both documents fall within the scope of the Applicant's request. However, given the terms of the Applicant's request, and the clear relevance of these two price lists, the Commissioner is, dissatisfied that this information was not identified and located at the time of the request for information and review.
51. The Commissioner notes that GPA has implemented refresher training for staff and has apologised for its failure to identify all relevant information. As a result, the Commissioner does not require it to take any further action in relation to its failure to identify and locate information falling within the scope of the request.
52. However, as GPA failed to identify and locate all of the information falling within the scope of the Applicant's request, including the price list for the US Military, its Standard Tariff Price List and a considerable number of invoices, the Commissioner must find that GPA failed to comply with section 1(4) of FOISA.
53. In addition, as GPA initially claimed that it held information about waived fees offered to the US Military, but that it was exempt from disclosure under section 33(1)(b) of FOISA, it is clear that adequate searches were not conducted until after the Applicant had applied to the

Commissioner. Consequently, GPA failed, as required by section 17(1) of FOISA, to notify the Applicant that it did not hold some of the information falling within the scope of his request.

### **Withheld information**

54. The Applicant was notified of the existence of the newly identified individual invoices and he agreed to exclude them from the scope of his request. He noted that the transactions were already a matter of public record. As the Applicant has excluded the invoices from the scope of his request, the Commissioner will not consider them any further in this decision notice.
55. The information that the Commissioner will consider in this decision comprises;
  - 5 emails
  - 2 invoices (which were attached to emails)
  - US Military price list for 2019/2020, and
  - the GPA Standard Tariff price list (also referred to as Prestwick Aviation Services rate for 2019/2020)

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

56. GPA submitted that the withheld information was exempt from disclosure under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is set out in full in Appendix 1. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
57. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
  - 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.
58. In order to evidence that this exemption is engaged, an authority must show that disclosure of the information would, or would be likely to, be the catalyst that would cause the substantial prejudice to a commercial interest. The prejudice must be substantial, in other words of real and demonstrable significance.

#### *Submissions from the Applicant*

59. In his submissions, the Applicant argued that it was not sufficient for GPA to allege the mere possibility of detriment to its commercial interests and those of third parties as a consequence of disclosure. It must prove this is likely to occur. He argued that GPA's argument for the application of the exemption is speculative in nature, with no evidence to explain how the prejudice required would be manifested should the information be disclosed.
60. The Applicant submitted that, in GPA's response to his request, it did not provide any detailed explanation or evidence to justify its view that Belfast International Airport, for



example, is a commercial competitor, especially in the relatively niche area of providing fixed base operations to inbound US Military flights.

61. The Applicant contended that there must be at least a significant probability that substantial prejudice would occur in order for the exemption to be properly applied. He maintained that there must also be a genuine link between disclosure and the harm; it cannot simply be a remote or hypothetical possibility.
62. The Applicant argued that GPA failed to take into account the effect of the passage of time when assessing whether disclosure of information would, or would be likely to, cause substantial prejudice. He stated that it was his understanding that the fee transactions in question date as far back as 2017.
63. The Applicant referred to the specific text in GPA's responses to him, which seemed to imply that information concerning its financial transactions with the US Military is not in the public domain, when it already is. The Applicant explained that information is available via publicly accessible websites maintained by the US Government, and a series of articles written for a UK national newspaper. The Applicant noted that, where information is in the public domain, it will not generally be appropriate to apply the exemption in section 33(1)(b).
64. The Applicant referred to specific websites to support his arguments, noting that an extensive record of spending at GPA on aviation fuel by the US Defence Logistics Agency (DLA) can be accessed online via the US Government procurement website, [USA Spending](#)<sup>1</sup>. He argued that similar information relating to GPA's imminent new deal to supply the DLA with aviation fuel over the period October 2019 to September 2024 is also publicly available on the US Government website, [Contract Opportunities](#)<sup>2</sup>, which provides a breakdown of various procurement contracts.
65. The Applicant also pointed out that the cost of various fees charged by GPA to inbound aircraft, including landing and navigation websites, is clearly set out by GPA on its website in the form of a [public accessible document](#)<sup>3</sup>.

#### *Commercial interests*

66. GPA submitted that the commercial interests that would (or would be likely to) be harmed by disclosure of the information, are its own interests, and those of the Scottish Government. GPA explained that, although it is owned by the Scottish Government, it is a commercial entity that operates at arms-length. GPA argued that the commercial terms it has agreed with all of its customers is commercially sensitive information that it would not publicly disclose. GPA submitted that it would also not disclose the commercial agreements it has in place with scheduled aviation customers, and that other airports will not publicly disclose this information, for the same reasons.
67. Having considered GPA'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 GPA, like all FBO's, must be able to create and negotiate bespoke price lists in order to attract and keep customers and that securing business from military customers is a competitive endeavour.

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<sup>1</sup> <https://www.usaspending.gov/>

<sup>2</sup> <https://sam.gov/content/opportunities>

<sup>3</sup> <https://www.glasgowprestwick.com/wp-content/uploads/2019/04/Standard-Charges-April-2019.pdf>

68. The Commissioner accepts that GPA has identified commercial interests relating to itself, which could be adversely impacted should disclosure of the information disadvantage it in bidding for future custom.
69. 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?*

70. GPA contended that the commercial terms it operates with its non-scheduled military customers, including the US Military, is equally as commercially sensitive (as the terms used by scheduled aviation customers) and it argued that other FBO's who service military customers, would not disclose that information either.
71. GPA submitted that the nature of those commercial interests relate to its ability to continue to operate competitively in terms of Handling Charges.
72. GPA argued that, if its price list or tariff list (or information derived from these documents) were to be disclosed into the public domain, it would prejudice its ability to compete to provide such services. GPA noted that handling companies are not typically public bodies for the purposes of FOISA. They are, therefore, not subject to the same obligations with regard to information held as GPA. GPA indicated that it is essential that it is able to rely on the exemption contained in section 33 (1)(b) of FOISA to withhold this information, in order to maintain a level playing field with its competitors.
73. GP has argued that, if the information were to be placed into the public domain, it would provide its competitors with a significant competitive advantage and prejudice its ability to compete to provide such services on the best economic terms.
74. GPA submitted that, if the information was publicly disclosed, substantial prejudice to its interests could take several forms.
75. GPA also submitted that disclosure of the terms would impact its relations and negotiating position with customers which could ultimately result in a loss of GPA revenue.
76. GPA explained that all commercial airfields will have one or more FBO, which provides ground handling services, aircraft parking, fuelling, organise hotels, catering, transportation etc if required. It noted that military and general aviation customers could use the services of an FBO at any commercial airfield. GPA argued that all commercial airports are competitors as they all offer FBO services, with Belfast, Glasgow, Shannon, Edinburgh being some of the closest geographically.
77. GPA contended that the market is very competitive, as military customers are not tied to any FBO. The impact of Covid-19 on general aviation means the military market is even more competitive as there is far less traffic and revenue in other areas. GPA argued that the airfield market is no different to any other competitive market, and that disclosure of its customer pricing presents significant commercial risks. It identified risks relating to both customers and competitors having a negative impact on revenue.
78. GPA noted that the Applicant has claimed that GPA did not take into account the passage of time with regard to disclosure. He commented that the requested information on the fees charged dated back to 2017. GPA argued that three years is not a significant length of time, given the commercial climate, and it does not accept that it is a long enough timescale for fees and commercial transactions to differ.

79. GPA noted that the Applicant has argued that, as a substantial amount of information regarding GPA's financial transactions with the US Military is published by various US government websites, the information in this case does not have the sensitivity claimed. GPA rejected this argument. It acknowledged that information is published in relation to its role as an approved supplier of fuel to the US Military. GPA explained that it obtained this role through a competitive tendering process, where it specified a price at which it proposed to charge for the fuel. This price is to be charged throughout the period of the contract and cannot be deviated from. GPA noted that becoming an approved supplier of fuel does not guarantee that any fuel will, in fact, be sold.
80. GPA acknowledged that the US authorities make various pieces of information relating to the fuel approval public, including the dates of aircraft refuelling at approved locations and amount of fuel uplifted. It also acknowledged that such information (relating to this fuel contract) is not commercially sensitive and that it is publicly available.
81. However, GPA contended that the same cannot be said of GPA's tariff lists and pricing, in respect of ground handling and airport fees that they charge customers such as the US Military. GPA argued that those prices are commercially sensitive and are not known by its competitors. GPA submitted that it can alter and amend these prices at its sole discretion in response to changes in market conditions, or in line with a change in business strategy.
82. GPA argued that this is not analogous with the fixed period under which GPA must provide fuel to the US Military in line with the price included in GPA's successful (and public) bid. GPA asserted that it does not consider that public information relating to it being an approved provider of fuel undermines, in any way, its arguments in support of withholding commercially sensitive information under section 33(1)(b) of FOISA.

*The Commissioner's views*

83. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
84. The Commissioner is satisfied that the withheld information is not in the public domain. As noted earlier, the Commissioner is satisfied that GPA operates in a commercial environment in relation to the services it provides to military customers, including the US Military. He recognises that disclosure of the handling fees that GPA charge its customers, including those customers which have a bespoke agreement with GPA, would undoubtedly give an advantage to its competitors and undermine its ability to compete on a level playing field.
85. The Applicant has questioned the arguments put forward by GPA in its response and review outcome, with regard to its claim that other airports are commercial competitors. The Commissioner pressed GPA on this point, and he is satisfied that GPA has demonstrated that it is one of a number of airports in a geographical region, who offer services to military aircraft. The Commissioner accepts that disclosure of GPA's pricing mechanism would enable these competitors to undercut the prices it charges, potentially resulting in a significant loss of custom and revenue for GPA.
86. The Commissioner notes that GPA does not have access to any other airport's customer pricing lists and so it could not rectify this disadvantage, and he cannot see any other way that the harm caused by this disclosure could be reduced.
87. The Commissioner has taken account of the Applicant's comments, that there is already significant information about GPA's dealings with the US Military in the public domain. However, he notes that the particular information captured by the Applicant's request is not in

the public domain. In addition, the Commissioner notes that section 25(1) of FOISA permits authorities to withhold information that is already available to the Applicant by other means, and it is likely GPA would have relied on this exemption if all of the information requested by the Applicant was in the public domain.

88. In conclusion, the Commissioner is satisfied that the information relating to the fees charged to the US Military, and which is not in the public domain, is of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was correctly applied on that basis.

#### *Public interest test*

89. 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 that was not in the public domain, 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.

#### *Applicant's views on the public interest*

90. The Applicant commented that there is an overwhelming case for disclosure in this instance.
91. He argued that the issue of GPA's financial transactions with the US Military is a matter of widespread and continuing public interest, both at home and further afield. The issue of the fees charged, or not charged, by GPA to inbound US Military flights has been the subject of several debates in the Scottish Parliament, including First Minister's Questions, and the airport's financial ties with the US Defence Department and the US military are central to an ongoing investigation by the House Oversight and Reform Committee in the US Congress. With allegations that fees are being waived by GPA, he contended that it is surely in the public interest to disclose all information GPA holds concerning this.
92. The Applicant referred to GPA's response to his request which stated that "there is public interest in disclosing information as part of an open and transparent organisation and to help account for the expenditure of public money." He argued that the public interest in disclosing the information requested extends far beyond this rudimentary assessment of the factors in favour of disclosure.
93. The Applicant referred to the [Commissioner's guidance](#)<sup>4</sup> on the public interest test, and he argued that disclosure would contribute to ensuring that GPA, as a public authority, is adequately discharging its functions. He also argued that disclosure would contribute to a debate on a matter of public interest. He commented that the Commissioner's advice in this area specifically notes that factors which should not be taken into account when applying the public interest test include "possible embarrassment to government or other public authority officials" and "possible loss of confidence in government or other public authority."
94. The Applicant referred again to GPA's response to his request, and its arguments in favour of maintaining the exemption. In these arguments, GPA stated "there is a greater public interest in protecting the commercial interest of companies which enter into Scottish Government contracts, to ensure that we are always able to obtain best value for money."

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<sup>4</sup> <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx>

95. The Applicant contended that this statement appears vague and unrelated to his specific request: GPA does not make clear who “the companies” are, or how their commercial interests would, or would be likely to be, harmed via disclosure.
96. The Applicant argued that it is not for GPA to decide whether or not to protect the commercial interest of companies entering into “Scottish Government contracts”. He commented that his request under FOISA was directed to GPA, not the Scottish Government. He noted that the airport is operated on a commercial basis and at arm's length from the Scottish Government.
97. The Applicant contended that it is overwhelmingly in the public interest for GPA to disclose information regarding the waiver of “service fees” - also known as “aircraft handling” fees or “ramp fees” to incoming US military aircraft at the airport.
98. He argued that, as the airport is a publicly owned asset, Scottish taxpayers, as well as the 650,099 passengers who flew via Prestwick in the 12 months to June 2019, have a right to know the financial transactions between a loss making airport that is dependent on more than £38m in loans from Scottish Ministers, and one of the world's biggest and best resourced military forces, especially when the issue is subject to debate and investigation in the Scottish Parliament and the US Congress.

#### *GPA's views on the public interest*

99. In its comments, GPA acknowledged that there is a public interest in how it is run with regard to national defence and public and passenger safety. However, it argued that the public interest also lies in GPA being able to protect the fees it charges in order that it can continue to operate on a competitive commercial footing.
100. GPA argued that there were a number of factors that favour maintaining the exemption and which countermanded any arguments in favour of transparency. In particular, GPA noted the potential impact on its ability to deliver competitive and value for money airport services, which are critical to the stated aim of ensuring that GPA remains viable for purchase by a third party. GPA referred to comments made by the Scottish Government's Cabinet Secretary for Transport, Infrastructure and Connectivity in response to a [Parliamentary Question on 5 November 2020](#)<sup>5</sup>, in which he stated,  
  
*Good progress continues to be made by GPA to increase revenue; deliver operating efficiencies; and pursue exciting opportunities for the future. In light of that progress, GPA will shortly place a notice in the Official Journal of the European Union inviting expressions of interest in GPA. Any proposals submitted as a result of the notice would be considered carefully before any decision was taken to divest our shareholding in GPA or any part of it. We will provide an update to Parliament should any credible expressions of interest be received, while respecting the need to maintain confidentiality for commercial reasons.*
101. GPA also argued that disclosure of this commercially sensitive information would adversely affect the viability of the airport to remain competitive against other nearby locations, such as Belfast International Airport, in relation to Handling Charges
102. GPA reiterated its view that disclosure of the terms would impact its relations and negotiating position with customers which would ultimately result in a loss of GPA revenue. This would

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<sup>5</sup> <https://www.parliament.scot/chamber-and-committees/written-questions-and-answers/question?ref=S5W-33019>

not be in the public interest, and GPA considers the public interest test to favour the withholding of this information.

*Commissioner's views on the public interest*

103. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the financial dealings of an entity which is publicly owned. In this case, GPA is owned by the Scottish Government. Therefore, it is clear that Scottish taxpayers have a live stake in GPA's business practices, particularly when those practices may be giving financial benefit to well-resourced customers, such as the US Military.
104. The Commissioner recognises the public interest in understanding the decision-making processes of GPA, particularly when discounts offered to customers may result in a reduction in revenue. Any loss of revenue suffered by GPA will also be suffered by the Scottish taxpayer, given its public ownership.
105. The Applicant is right to note that the airport is a publicly owned asset, one which has obtained loans from the public purse. In fact, as of April 2021, [the Scottish Government has confirmed](#)<sup>6</sup> that GPA has cost the public purse more than £47 million. Given the financial stake in its running, there is clearly a public interest in the disclosure of the information requested by the Applicant.
106. That being said, the Commissioner accepts that there is also a public interest in Scottish public authorities being able to achieve best value and maximise profits in a competitive environment. The Commissioner acknowledges that there is public interest in ensuring that there is fair competition in the commercial environment in which GPA operates.
107. The Commissioner recognises that disclosure of the information in question would give competitors a valuable insight into the customer-specific fees charged by GPA, thus giving them an unfair commercial advantage. It is clear that disclosure of the commercial terms agreed between GPA and the US Military would enable competing airports to offer similar or greater incentives to the US Military, and other customers. If this occurred, the loss of revenue to GPA would be significant and would not be in the public interest. He considers there is no public interest in placing a particular organisation at a commercial disadvantage, simply as a result of it being under public ownership, when other privately-owned airports do not have to disclose similar information. Such disclosure would have a negative impact on GPA's ability to continue to participate fairly in a competitive market.
108. The Commissioner has already acknowledged the submissions made by GPA 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 substantially the commercial interests of the GPA. That would not be in the public interest.
109. The Commissioner concludes, on balance, and in all the circumstances of the case, that 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 GPA was entitled to withhold information relating to the fees charged to the US Military under section 33(1)(b) of FOISA.

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<sup>6</sup> <https://www.gov.scot/publications/foi-202100186560/>

## **Decision**

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The Commissioner finds that Glasgow Prestwick Airport Ltd (GPA) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

GPA's failure to carry out adequate searches to identify the information it held led to it breaching section 1(4) of FOISA. It also led to GPA failing to notify the Applicant, in line with section 17(1) of FOISA, that it did not hold information regarding any waived fees.

The Commissioner finds that GPA was entitled to withhold information under section 33(1)(b) of FOISA.

## **Appeal**

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Should either the Applicant or GPA 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**25 October 2022**

## 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.
- ...

#### 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.
- ...



### **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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