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Commissioner  
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# Decision Notice 049/2023

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## IMPACT Centre Project

**Applicant: The Applicant**

**Authority: Scottish Ministers**

**Case Ref: 201901103**

### Summary

The Authority was asked for correspondence between it and stakeholders regarding the IMPACT Centre project. The Authority withheld some information. During the investigation, the Authority disclosed further information and identified additional information (which they supplied in a redacted form). The Commissioner found that the information disclosed during the investigation should have been disclosed earlier, but that the remaining information was exempt from disclosure.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner)

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

1. This decision involves the proposals for a new concert hall and performance venue to be developed at St Andrew Square, Edinburgh. Part of the funding secured for the International Music and Performing Arts Charitable Trust (IMPACT) Centre was being delivered as part of the Edinburgh and South East of Scotland City Region Deal (the City Region Deal). The IMPACT Project was also being supported, and partially funded, by Dunard Fund, a charitable trust based in Edinburgh. The Authority provided funds for the City Region Deal.

2. In August 2018, IMPACT Scotland submitted a planning application for planning permission to the City of Edinburgh Council (the Council). Planning permission was granted by the Council on 30 April 2019. However, following a judicial review, a revised planning application was made to the Council. It was approved in November 2021.
3. On 1 February 2019, shortly before the Council granted the original planning permission, the Applicant made a request for information to the Authority. The Applicant requested all correspondence between or involving the Authority and/or its employees with stakeholders regarding the IMPACT Centre project from 1 January 2017.
4. The Authority responded on 28 February 2019. It explained that some information was available on its and on other authorities' websites and gave the Applicant links to where the information could be found. The Authority told the Applicant this information was exempt from disclosure under section 25(1) (Information otherwise accessible) of FOISA as it was already reasonably accessible to her. The Authority withheld other information under sections 28(1) (Relations with the United Kingdom), 30(b)(ii) (Prejudice to effective conduct of public affairs), 33(1)(b) Commercial interests and the economy) and 38(1)(b) (Personal information) of FOISA.
5. On 12 April 2019, the Applicant wrote to the Authority requesting a review of its decision. The Applicant did not believe that the exemptions in sections 30(b)(ii) and 33(1)(b) of FOISA applied. (She did not question the Authority's reliance on the other exemptions.) The Applicant also asked whether the full business case (FBC) formed part of the information withheld from her.
6. The Authority notified the Applicant of the outcome of its review on 15 May 2019. The Authority maintained its original decision without modification. With respect to the FBC, the Authority explained that it did not consider it to fall within the agreed scope of this request. However, the Authority directed the Applicant to its response to an earlier request and stated it considered that the exemptions applied at the time still applied.
7. On 27 June 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of Authority's review because she believed the information withheld was not exempt, and that the public interest favoured disclosure of the information.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. The Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.
11. On 12 November 2019, the Authority confirmed that it no longer sought to rely on section 33(1)(b) of FOISA and provided the Applicant with an additional response, supplying further information and apologising for the delay. On review of the information, the Authority

maintained its reliance on section 30(b)(ii) and also determined that some of the information fell outwith the scope of the request.

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

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***FOISA or the EIRs?***

13. As noted above, the Applicant's request related to the proposals for a new concert hall and performance venue to be developed at St Andrew Square, Edinburgh. The Authority dealt with the request under FOISA. Although the Applicant did not suggest that the Authority should have responded to her request under FOISA, rather than under the Environmental Information (Scotland) Regulations 2004 (the EIRs), the Authority was asked by the investigating officer if it had considered whether the request fell within the EIRs, and, if it did, to explain why it had decided that the request fell to be dealt with under FOISA.
14. The Authority acknowledged that the IMPACT Centre project would have an environmental impact, but the information held by it was, it submitted, in the main, limited to the financial considerations of funding and the negotiation and aggregation of that funding rather than design, planning or tendering policies or processes in relation to the build. The Authority believed that FOISA was the appropriate legislation for the request.
15. "Environmental information" is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.
16. In past decisions, the Commissioner has accepted that information about planning application will generally be environmental information for the purposes of the EIRs.
17. In this instance, however, having reviewed the information in question, the Commissioner is satisfied that the FOISA was the correct legislation to use in responding to the Applicant's request. Information that relates to planning (in the broadest sense) may fall within the definition of environmental information by virtue of being related to measures, including administrative measures such as policies, legislation, plans, programmes, environmental agreements and activities. However, the information withheld by the Authority does not fall within any of these aspects, and is more aptly described, as the Authority has done, as "financial considerations of funding and the negotiation and aggregation of that funding."
18. Given that the withheld information focusses on funding arrangements, the Commissioner is satisfied that it was reasonable for the Authority to deal with the case under FOISA rather than under the EIRs. For the avoidance of doubt, the Commissioner is, in any event, satisfied that the outcome would be the same regardless of which legislation the request was considered under.

### ***Information disclosed during the investigation***

19. As noted above, the Authority disclosed additional information to the Applicant during the investigation. In the absence of submissions to the contrary, the Commissioner must find that the information was not exempt from disclosure and that the failure to disclose it at an earlier stage was a breach of Part 1 of FOISA.

### ***Exemptions where no dissatisfaction raised by Applicant***

20. The Applicant did not express dissatisfaction about information which the Authority withheld under the exemptions in sections 28 or 38(1)(b) of FOISA. The Commissioner has therefore not considered the information withheld under either of these exemptions.

### ***Relevant timing***

21. The Commissioner must consider whether the Authority was justified in withholding information at the time of the request or, at the latest, at the date of the review. Therefore, although circumstances have “moved on”, he cannot take those changes into account.

### ***Business cases***

22. The Authority was asked to clarify its position with regards to the FBC. The Authority explained that business cases go through an iterative three stage process:
  - (i) strategic outline (SOC)
  - (ii) outline (OBC) and
  - (iii) full (FBC).
23. The Authority receives and comments on versions of the business case at each of these stages. The Authority confirmed that it held the OBC at the date of the request (1 February 2019), but not the FBC.
24. The Authority confirmed that it considered the OBC to fall within the scope of this request. It acknowledged that the OBC was not fully considered at the time of dealing with the request and apologised for the omission. The Authority then reconsidered the OBC.
25. The Authority supplied a redacted copy of the OBC to the Applicant on 9 March 2021. The Authority apologised for the delay in giving the additional information to the Applicant. It redacted information from the OBC (and associated appendices) on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA.
26. The Commissioner has also considered the Authority’s explanations as to why a FBC was not held at the time of the request. Given these explanations, the Commissioner is satisfied that a FBC was not held by the Authority at the time of this request.

### ***Information falling outwith the request***

27. During the investigation, the Authority told the Commissioner that, having re-examined the information held, it had determined that some information previously identified did not in fact not fall within the scope of this request.
28. The request was for correspondence between the Authority or its employees and stakeholders. The Authority considered that documents 11, 13, 18, 20, 22, 25-30, 33, 34 and 38-40 consisted of *internal* communications and therefore fell outwith scope as they did not comprise correspondence with stakeholders and had not been shared outwith the Authority. The Authority apologised that this was not been identified at an earlier stage.
29. Having studied these documents, and the wording of the request, the Commissioner is satisfied, for the reason given by the Authority, that these documents do not fall within the scope of the Applicant’s request.

30. The Commissioner cannot therefore consider that information further in this decision, but will now go on to consider whether the exemptions in section 30(b)(ii) and 33(1)(b) apply to the information which has not been disclosed to the Applicant.

### **Section 30(b)(ii) - Prejudice to effective conduct of public affairs**

31. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The chief consideration is not whether the information constitutes opinion or view, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and, therefore, of real and demonstrable significance.
32. Each request must be considered on a case by case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

#### ***The Applicant's submissions***

33. The Applicant was dissatisfied with the Authority's application of section 30(b)(ii). Her dissatisfaction centred largely around the Authority's reference to the "commercial sensitivity" of the information withheld. She said that the IMPACT Project was due to receive substantial public funds, primarily as part of the City Region Deal. This would involve funding from the UK and Scottish Governments, as well as the Council. The IMPACT Project, however, was not a private, commercial project: it was a project under the City Region Deal, for which the Authority was a key sponsor. It was not, therefore, in competition with any other commercial entity whereby release of information would be advantageous to commercial rivals or competitors.
34. The Applicant also suggested that developers of a project that is not private or commercial, and which will rely upon considerable funding, should not expect that discussions or correspondence with the Authority will be beyond the scope or scrutiny of the public.

#### ***The Authority submissions***

35. The Authority submitted that section 30(b)(ii) applied to some of the information as this exemption recognised the need for officials to have a private space to discuss issues and options with external stakeholders before the Authority reaches a settled public view. Disclosing the content of discussions with IMPACT Scotland and the Council, in regard to the support for the IMPACT Centre, would, or would be likely to, substantially inhibit such discussions in the future, because these stakeholders will be reluctant to provide their views fully and frankly if they believe that those views are likely to be made public, particularly while this capital project is progressing through the Council's planning process.
36. The Authority also argued that disclosure of candid views exchanged between it and IMPACT Scotland, The BIG Partnership and the Council would significantly weaken its negotiating position for other projects and other city region and growth deals. There were

eight city region and growth deals in active negotiation between it, UK Government, local authorities and wider regional partners. Premature disclosure of discussions pre-deal, including free and frank views on the progress of the project and before a project is delivered, would, the Authority submitted, be likely to undermine the full and frank discussion of issues, such as financial issues between it and stakeholders. This would undermine decision-making processes and stakeholder trust.

37. The Authority believed it was necessary for it to be able to discuss the future development of a range of matters for Edinburgh and other city deals, and to engage in discussions, to ensure that any financial support or other issues are supported and that sufficient research has been undertaken, sought, communicated and developed, to ensure that it was engaging in work that is in the interests of best value before consideration of whether financial funding should be provided and when. Releasing details of discussions about potential financial support, through a City Deal or otherwise, would significantly harm its ability to carry out many aspects of the work, both on this issue and by harming wider ongoing relationships with key stakeholders. This could, in the Authority view, adversely affect its ability to gather all of the evidence they need to make fully informed decisions.

### ***The Commissioner's view***

38. In this case, the Commissioner is satisfied that disclosing the remaining information would, or would be likely to, inhibit substantially such discussions in the future: these and future stakeholders would be reluctant to provide their views fully and frankly if they believe that those views are likely to be made public.
39. The Commissioner accepts that disclosure of candid views exchanged between Authority officials and the other bodies referred to would significantly weaken its negotiating position for other projects. The Commissioner acknowledges that, in this case, a degree of private space is required to retain such necessary exchange of information and views. Premature disclosure of discussions, including free and frank views on the progress of the project and before a project is delivered, would be likely to undermine the full and frank discussion of issues, such as financial issues between the Authority and stakeholders. This, the Commissioner agrees, would undermine the Authority's decision-making processes and stakeholder trust in it.
40. The Commissioner accepts that releasing details of discussions about potential financial support, including through a City Deal or otherwise, would significantly harm the Authority's ability to carry out many aspects of the work on both this issue and by harming wider ongoing relationships with key stakeholders. This could adversely affect the Authority's ability to gather all of the evidence it needs to make fully informed decisions.
41. In all the circumstances of the case, therefore, the Commissioner accepts that disclosure of the information in question would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, as argued by the Authority. As such, he is satisfied that the information under consideration here is exempt from disclosure in terms of section 30(b)(ii) of FOISA.

### ***Public interest test - section 30(b)(ii)***

42. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner is 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.

43. The Applicant argued that, on balance, the public interest lay in disclosing the information. She commented on the substantial public funds involved and submitted that IMPACT was a single project charitable trust not operating in a competitive commercial environment. She also referred to the public nature of the planning process.
44. The Authority acknowledged a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. The Authority believed, however, that on balance there was a greater public interest in allowing it a private space to communicate with external stakeholders. The Authority believed the public interest favoured avoiding weakening its negotiating position in relation to other projects and other city region and growth deals and its own decision-making processes.
45. The Commissioner has considered the submissions from both parties, in the light of the actual information. He recognises there is a genuine public interest in allowing understanding of the processes undertaken by the Authority in fulfilling its functions. The Applicant is correct to emphasise a strong public interest in transparency for a process such as the IMPACT Centre which involves a significant investment by the public purse.
46. However, the Commissioner also recognises the public interest in a public authority being able to hold internal discussions and debate in a private space. He acknowledges that the ability to do so, safe in the knowledge that information will not routinely be publicly disclosed, will be required on occasion to allow open and frank exchanges to support informed decision-making. The Commissioner accepts there is no public interest in disclosing information that would limit such future discussion or debate, particularly where such disclosure would, as he has already concluded, inhibit substantially significantly the quality of the Authority decision-making.
47. On balance, therefore, the Commissioner concludes that the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure of this particular information.

### **Section 33(1)(b) – Commercial interests**

48. The Authority confirmed that it considered the OBC to fall within the scope of this request. It acknowledged that the OBC was not fully considered at the time of dealing with the request and it apologised for this omission. The Authority then reconsidered the OBC and supplied a redacted copy of the OBC to the Applicant. It apologised for the delay in giving the additional information to the Applicant. It withheld certain information under section 33(1)(b) of FOISA.
49. Section 33(1)(b) of FOISA 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). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
50. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
  - 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 substantially by disclosure.

51. 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.
52. The Authority submitted that disclosure of this particular information would, or would be likely to, prejudice substantially the commercial interests of IMPACT Scotland, a third party which is delivering a venue on behalf of a number of public sector funding partners, including the Authority, the UK Government and the Council. The information being withheld relates to sales, prices, marketing activity and customers, and disclosing this information would be likely to give IMPACT Scotland's competitors an advantage in their business planning which, in turn, would substantially prejudice the tendering process for various promotor and catering operations packages, as well as affecting IMPACT Scotland's ability to develop its programme, sponsorship and business interests, which could significantly harm its commercial business.
53. The Applicant was concerned at the level of redactions made to the OBC and the fact that the redactions had been to prevent giving IMPACT Scotland's competitors an advantage.
54. The Applicant provided detailed arguments as to why the information should be disclosed. In her view, IMPACT Scotland, a charitable body established for a single purpose (the delivery of a concert hall for which there are no other potential providers) does not have competitors and, therefore, no commercial interests. She therefore considered the Authority's reliance on this exemption to be without merit. She also commented that the OBC was to justify the use of substantial funds and also to comply with HM Treasury's "Green Book" (guidance on options appraisal applying to all proposals concerning public spending, taxation, changes to regulations, and changes to the use of existing public assets and resources).
55. The Commissioner has considered the submissions by both parties in light of the content of the information withheld. He accepts that, although it has charitable status, the IMPACT Centre also has commercial interests. In reaching this conclusion, he draws a distinction between details of the wider socio-economic impact of the Centre and the operational aspects of the Centre (including procurement and project planning for the development itself). Having reviewed the information which remains withheld, he is satisfied that it relates to the operational aspects of the Centre to which a commercial interest relates.
56. The Commissioner is therefore satisfied that IMPACT Scotland does have commercial interests in relation to the remaining information does fall within the exemption. The type of information that has been withheld consists of sections on the Financial Case; the IMPACT Illustrative Forecast Trading Accounts and Illustrative Forecast Balance Sheets; information that includes Key Assumptions IMPACT Centre Economic Impact Assessment that relate to catering operations, promoter operations, wider tourism benefits; Illustrative Forecast Trading Accounts and Illustrative Forecast Cash Flow and Balance Sheets.
57. The OBC also has redactions to Appendix VIII – Risk Register. The information (for example, costs, figures, prices and estimates) all relate to the Centre and its proposed future activity. The information in the risk register may be regarded as commercial in this context as many of the risks are in the context of the ongoing project and circumstances which may result in a risk to the completion of the Project. The Authority is correct, the Commissioner believes, to view the information in question as commercial.



58. As mentioned above, in order to rely on this exemption, an authority must also evidence why disclosure would, or would be likely to, prejudice the commercial interests of any person substantially.
59. The Commissioner notes that the information which remains redacted is limited in nature and relates directly to the operational aspects of the business plan as outlined above. The Commissioner recognises how these details, if disclosed, could put competitors in the market place (other venues) at an advantage or provided potential contractors with leverage. The Commissioner is therefore satisfied that disclosure, at the time of this request, would or would be likely to, prejudice substantially IMPACT's commercial interests.
60. Consequently, in this case, the Commissioner is satisfied that the information remaining withheld was properly withheld under this exemption.
61. Having reached that conclusion, the Commissioner is required to consider the public interest test in section 2(1)(b) of FOISA.

*The Commissioner's conclusions on the public interest*

62. In balancing the public interest, the Authority commented that, having considered the public interest test, it had concluded, on balance, that the public interest lay in maintaining the exemption. They recognised that there is a public interest in disclosing information as part of open and transparent government, and to help account for the expenditure of public money. However, in its view, there is a greater public interest in protecting the commercial interests of IMPACT Scotland, to ensure its ability to obtain the best value for public money.
63. The Applicant believed that the public interest lay in the disclosure of the information, for the reasons already set out above.
64. 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 scrutiny of public finances, and particularly in respect of the creation of a structure such as the IMPACT Centre in a historic environment such as Edinburgh.
65. That said, the Commissioner accepts that there is also a public interest in Scottish public authorities being able to achieve best value and maximise returns from the effective management of assets. The Commissioner acknowledges that there is public interest in ensuring that there is fair competition in the commercial environment in which the IMPACT operates and that it would be contrary to the public interest to place IMPACT in a disadvantageous position with respect to its competitors.
66. Having balanced the public interest for and against disclosure, the Commissioner has concluded, in all the circumstances of this case, that the public interest in maintaining the exemption in section 33(1)(b), at the time of the request, outweighs that in disclosure of the information under consideration.

## **Decision**

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

The Commissioner finds that the Authority was correct to withhold information under sections 30(b)(ii) and 33(1)(b) of FOISA.

However, with respect to the information disclosed to the Applicant during the investigation, the Commissioner finds that the information was not exempt from disclosure. Failure to disclose this information in response to the request was a failure to comply with Part 1 of FOISA, in particular section 1(1). He does not require the Authority to take any action in relation to this failure.

## **Appeal**

Should either the Applicant or the Authority 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**  
**22 May 2023**

## **Appendix 1: Relevant statutory provisions**

### **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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **2 Effect of exemptions**

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

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

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

#### **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).

...