

# Decision Notice 013/2020

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## Price achieved from sale of Hartwood and Hartwoodhill hospital sites

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**Applicant: The Applicant**

**Public authority: Lanarkshire Health Board**

**Case Ref: 201901323**



Scottish Information  
Commissioner



## Summary

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NHS Lanarkshire was asked for the price achieved from the sale of the Hartwood and Hartwoodhill hospital sites.

NHS Lanarkshire initially considered the information should be withheld as disclosure was likely to prejudice commercial interests. During the Commissioner's investigation it stopped claiming this exemption and disclosed the information to the Applicant.

The Commissioner found that NHS Lanarkshire should have provided the information to the Applicant at the time of his request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 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 11 May 2019, the Applicant made a request for information to Lanarkshire Health Board (NHS Lanarkshire). The information requested was the price achieved from the sale of the sites of Hartwood and Hartwoodhill Hospitals to the Taylor Group.
2. NHS Lanarkshire responded on 11 June 2019. It withheld the information by virtue of section 33(1)(b) of FOISA, on the basis that disclosure would, or would be likely to, prejudice substantially the commercial interests of NHS Lanarkshire. It argued that release of the sales figure would have an impact on the negotiation of future land sales undertaken by the health board.
3. On 17 June 2019, the Applicant wrote to NHS Lanarkshire, requesting a review of its decision on the basis that he had difficulty following the authority's reasoning. He asked NHS Lanarkshire to explain how the release of the information might have an impact on the negotiation of further land sales.
4. NHS Lanarkshire notified the Applicant of the outcome of its review on 16 July 2019. It upheld its original decision that the information should be withheld by virtue of section 33(1)(b) of FOISA. NHS Lanarkshire stated that, in addition to being likely to prejudice the commercial interests of NHS Lanarkshire, the purchasers (Taylor Homes) had also advised that they considered the information to be commercially sensitive.
5. On 7 August 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 stated he was dissatisfied with the outcome of NHS Lanarkshire's review because he believed that each land sale was different, with all land placed on the market having its own unique features. He submitted that it was irrelevant that the price negotiable for one area of land might be influenced by the price actually achieved (or achievable) for another. He also considered the public right to know how much public land had been sold for outweighed any

commercial sensitivities. In addition, the Applicant suggested that the price achieved from the sale of land can usually be found from examination of the Land Register.

## Investigation

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6. 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.
7. On 27 August 2019, NHS Lanarkshire was notified in writing that the Applicant had made a valid application. NHS Lanarkshire was asked to send the Commissioner the information withheld from the Applicant. NHS Lanarkshire provided the information and the case was 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. NHS Lanarkshire was invited to comment on this application and to justify its reliance on section 33(1)(b) of FOISA to withhold the information requested. It was also asked what consideration had been given to the information being otherwise available in the public domain (via the Land Register), as suggested by the Applicant in his application to the Commissioner.
9. The Applicant was also invited to comment on the public interest in disclosure of the information, and he provided his comments in writing to the Commissioner.
10. NHS Lanarkshire initially provided submissions to the Commissioner, explaining why it considered the information was exempt. However, during the investigation, NHS Lanarkshire provided the Applicant with the information falling within the scope of his request and indicated that it no longer wished to rely on the exemption it had previously applied to the requested information.
11. The Applicant confirmed that he had received the information he had requested, but asked that the Commissioner issue a decision for his application.

## 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 NHS Lanarkshire. He is satisfied that no matter of relevance has been overlooked.

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

13. Initially, NHS Lanarkshire submitted that the exemption in section 33(1)(b) of FOISA applied to all the information requested. This exemption 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) 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.
14. 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.
15. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (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.
  16. In responding to the request, the view of the purchaser (Taylor Homes) was sought by NHS Lanarkshire on the effect of disclosure of the purchase price under FOISA. Taylor Homes indicated that they viewed the purchase price as commercially confidential.
  17. In its submissions, NHS Lanarkshire initially argued that disclosure would harm the commercial interests of both itself and Taylor Homes. NHS Lanarkshire viewed the purchase price as commercially sensitive and considered disclosure could have an impact on future land sales, both in terms of the price achievable and potential for deterring bidders if it was felt their financial information could be available in the public domain. However, NHS Lanarkshire acknowledged that the sale price would make its way into the public domain via the Land Register.
  18. After further questions from the investigating officer, NHS Lanarkshire confirmed that the document providing for the sale of the two hospital sites and associated land had been registered with the Registers of Scotland. The document contained the price and title plan. Once the sale appeared on the Register, the title sheet and standard security (to secure any future payments to NHS Lanarkshire that might arise if the site was fully developed in future) would then be in the public domain and accessible via the Land Register. Once registered, NHS Lanarkshire acknowledged that neither it nor the purchaser had any control over when the information would appear on the Land Register.
  19. As stated above, during the investigation, NHS Lanarkshire provided the Applicant with all the information falling within the scope of his request and indicated that it no longer wished to rely on the exemption it had previously applied. Given that disclosure, and in the absence of any further arguments, it follows that the Commissioner must conclude that NHS Lanarkshire was not entitled to withhold the requested information as exempt under section 33(1)(b) of FOISA.
  20. Given that NHS Lanarkshire has now disclosed to the Applicant all the information falling within the scope of the request, the Commissioner does not require NHS Lanarkshire to take any action in respect of this failure, in response to the Applicant's application.

## Decision

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The Commissioner finds that Lanarkshire Health Board (NHS Lanarkshire) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. By wrongly withholding information under section 33(1)(b), NHS Lanarkshire failed to comply with section 1(1) of FOISA.

Given that all of the information falling within the scope of the Applicant's request has been disclosed to him, the Commissioner does not require NHS Lanarkshire to take any action in respect of this failure, in response to the Applicant's application.

## Appeal

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Should either the Applicant or NHS Lanarkshire 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**

**24 January 2020**

### 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.

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#### 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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