



Scottish Information
Commissioner

**Decision 014/2005 - Mr Steven Jarvis and Perth & Kinross
Council**

**Applicant: Mr Steven Jarvis
Authority: Perth & Kinross Council
Application: 200500488
Date of Decision: 18 July 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 014/2005 – Mr Steven Jarvis and Perth & Kinross Council

Request for specifically itemised property services files – partial release of certain information withheld under section 33(1)(b) section 30(c) - public interest applied

Facts

Mr Steven Jarvis asked to inspect specifically itemised property services files held by Perth & Kinross Council. In a subsequent email he asked for a record of any documents that would be removed or destroyed from these files prior to inspection.

Mr Jarvis was dissatisfied with the response he received from Perth & Kinross Council to his initial request and to his subsequent request for review. Mr Jarvis lodged an application with the Commissioner to obtain the information he had requested.

Outcome

The Commissioner found that Perth & Kinross Council (the Council) had not dealt with Mr Jarvis's request for information fully in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that it had breached section 1(1) of FOISA in withholding certain information from Mr Jarvis. The Commissioner ordered release of this information.

Appeal

Should either the Council or Mr Jarvis wish to appeal against my decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.



Background

1. On 12 January 2005 Mr Jarvis wrote to the Council asking to inspect specifically itemised property services files. The Senior Freedom of Information Officer at the Council responded to Mr Jarvis's email on 13 January 2005 arranging a provisional date of 24 January 2005 when Mr Jarvis could inspect the specified files at the Council offices (this date was subsequently changed to 31 January 2005.) Mr Jarvis responded to this email on 13 January 2005 confirming his agreement to the proposed date and asking for a record of any documents that would be removed or destroyed from these files prior to inspection. On 21 January 2005, the Council wrote to Mr Jarvis indicating that a date had been arranged for him to inspect the files specified in his email of 12 January. The Council indicated that a number of documents in file reference 33007 02 7241 would not be provided for inspection. The Council indicated that these items were considered to be exempt information in terms of FOISA. The Council listed the 11 documents that would not be available for inspection as follows:
 1. Letter to Perth & Kinross Council Property Management Services dated 19 April 2004
 2. Letter to Perth & Kinross Council Property Management Services dated 20 August 2004
 3. Letter to Perth & Kinross Council Property Management Services dated 18 September 2003
 4. Letter to Perth & Kinross Council Property Management Services dated 20 April 2004
 5. Letter from Perth & Kinross Council Property Management Services dated 18 May 2004
 6. Letter from Perth & Kinross Council Property Management Services dated 10 September 2004
 7. Letter from Perth & Kinross Council Property Management Services dated 22 September 2004
 8. Letter from Legal Services to Property Management Services dated 12 May 2004
 9. Letter from Property Management Services to Legal Services dated 14 May 2004
 10. Letter from Property Management Services to Legal Services dated 21 July 2004
 11. Letter from Legal Services dated 22 July 2004.



2. In its notice of refusal the Council categorised the documents as follows indicating the exemptions that it considered applied:

Letters 1-4 were exempt information in terms of sections 30, 33 and 36

Letters 5-6 were exempt information in terms of sections 30 and 33

Letters 8-11 were exempt information in terms of section 36.

3. In its letter of 21 January 2005 the Council did not indicate which subsection and/or paragraph of each section applied to the information withheld, nor did it expand on why each exemption applied to each document withheld. Further the Council did not set out its analysis of the public interest where this applied to the exemptions cited. An annex was attached to the letter of 21 January 2005 which set out the whole section of each exemption referred to in the letter.
4. Mr Jarvis made a request for review on 31 January 2005 when he went to inspect those documents which had been disclosed. The Council responded to Mr Jarvis's request for review on 10 February 2005.
5. In its notice of review, the Council indicated that its FOI Team had originally determined that disclosure of items 1-7 would prejudice substantially the commercial interests of the Council; would inhibit substantially the free and frank exchange of views for the purpose of deliberation and would prejudice substantially the effective conduct of public affairs. The review confirmed this decision. The Council indicated that correspondence listed 8-11 had been exempted under the belief that a claim to confidentiality of communications could be maintained in legal proceedings and its disclosure would constitute a breach of confidence. The review upheld this position in relation to items 9-11. However, the Council accepted that this exemption did not apply to item 8 because the writer of this letter was not acting in the capacity of legal adviser to the Council. The Council did not consider that any other exemption applied and therefore the letter was released and attached to the notice of review.
6. The Council indicated that it did not consider that it would be in the interest of the public to release the remaining information. It argued that its Property Management Services have to maintain the confidence of potential developers and their agents. The author of the review report was satisfied that the Council's continuing ability to operate in the property market would be jeopardised if the information was disclosed.
7. On 10 February 2005, Mr Jarvis applied to me for a decision following his dissatisfaction with the notice issued by the Council of 10 February. I accepted his application and allocated the application to an investigating officer.



Investigation

8. The Council was invited to comment on the issues raised by this case on 15 March and provide certain information. In particular, it was asked to provide:
 1. A copy of the whole file (reference 33007 02 7241) with the items withheld from Mr Jarvis clearly identified
 2. A detailed analysis of the exemptions applied
 3. Further information about how the review was carried out
 4. Any guidance it had relied on in deciding whether the information requested should be disclosed or withheld
 5. Any internal correspondence relating to the consideration of the request
 6. An indication of why it had considered the request under FOISA and not under the Environmental Information (Scotland) Regulations 2004 (EIRs).

Technical compliance with the Act

9. The Council responded to Mr Jarvis's request for information and request for review promptly and within 20 working days. However, its letter of refusal did not refer to Mr Jarvis's right to seek a review and the fact that any request for review should be made within 40 days of the receipt of the notice. Its notice of review did refer to the right of Mr Jarvis to appeal to me, but did not mention that this should be done within 6 months.
10. The refusal notice and notice of review did not refer to the specific sub-section or paragraph number of the exemptions cited nor did it explain why each exemption applied to each document withheld. Finally, the letter of refusal and notice of review did not set out how the public interest applied in relation to each exemption cited (where appropriate) to each document withheld. In its submissions to my Office, the Council accepted that its letter of refusal had not explained that the public interest test had been applied, but indicated that its process for handling requests had been improved since this request had been received.
11. On sight of the documents withheld it became apparent that the descriptions of the documents in the letter of refusal of 21 January 2005 had not been entirely accurate:

Item 4 - should have read 20 September 2004 and not 20 April 2004



- Item 8 - should have read “Memorandum from Legal Services to Property Management Services dated 12 May 2005, attaching a letter from MacArthur Stewart dated 7 May 2004”
- Item 10 - should have read “Email from Property Management Services to Legal Services dated 21 July 2004, attaching a letter from MacArthur Stewart dated 7 July 2004”

FOISA or EIRs

12. The information withheld concerns a potential property transaction connected with a planning application. Two competing applications have been submitted to the Council for planning consent for supermarkets in Crieff. The Council chose not to determine either application but instead convened a working group to assess the potential for any supermarket in the town and, if so, the merits of alternative sites. The Council has an interest in the land affected by both proposals. Given that this application involved information connected with a planning application it was important at the outset of the investigation to establish whether this case should have been dealt with under FOISA or under the EIRs. The definition of environmental information is very wide and includes information which relates to:
- The state of elements of the environment – such as air, water, soil, land, landscape and natural sites, flora and fauna, including cattle, crops, GMOs, wildlife and biological diversity – and it includes any interaction between them
 - Measures and activities affecting, or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements.
13. Planning matters will concern land and measures affecting or likely to affect land. Therefore, requests for information connected with planning matters should usually prompt authorities to consider whether the request should be dealt with under the EIRs rather than FOISA. However, simply because an information request relates to a planning application, it will not automatically follow that the request will fall under the EIRs. In each case, the authority needs to look at the information withheld and consider whether it falls under the definition of environmental information contained in the EIRs.
14. In its submissions to me, the Council indicated that it had considered the EIRs, but felt on balance this request should be dealt with under FOISA. Having reviewed the information withheld I agree with the Council’s decision. Although the information requested is connected with a planning application which would have an impact on the land, the specific information withheld does not provide information about the state of the land, or measures affecting the state of the land.



Submissions from the Council

15. The Council was invited to provide a detailed analysis on how each exemption cited applied to each item withheld. It did not do this, however, and instead made general submissions about the exemptions and how they applied to the documents withheld.
16. The Council argued that to disclose details of unconcluded property transactions could prejudice the commercial interests of third parties with whom the Council transacts and was liable to “seriously” prejudice the Council’s own interests as a corporate body requiring to operate in the commercial property sector. It considered that there was a genuine risk that persons and companies would be reluctant to enter into negotiations with the Council if they could not be assured that certain information was held in confidence, including information concerning unconcluded deals. In this case there were rival bids affecting different areas of land in which the Council had an interest. The disclosure of the information sought through this application could also prejudice those interests in the alternative scheme, or indeed could be to their commercial advantage. In either event, the Council argued, this would be an unfair result.
17. The Council drew attention to the 2004 edition of the *Rules of Conduct of the Royal Institution of Chartered Surveyors* (an extract was enclosed). This provides that except with the client’s consent or as required by enactment or court order, a member shall not disclose advice given to the client nor information concerning the client’s affairs. The Council acknowledged that in the present case the Council was the client and therefore entitled to agree to a disclosure. Nonetheless the Council considered it might assist the investigation to note that the starting point for the surveyor is that information as to the client’s affairs should be held in confidence.
18. The Council provided correspondence with one of the parties to several of the documents withheld. The Council had written to the third party to ask for its views on disclosure of the information. In its response the third party argued that its correspondence should be treated as confidential in nature. It argued that the letters had been submitted on the basis of its client’s wish to enter into negotiations with the Council and the disclosure of sensitive information at this juncture was considered prejudicial to its client’s interest. The third party indicated that following the conclusion of negotiations it would have no objection to the information being released. In response to this letter, The Council indicated that sections 30, 33 and 36 would be applied to this correspondence which would not be disclosed.



19. The Council indicated in its submissions that although the public interest test had not been applied in relation to its original response to Mr Jarvis, it concluded that the public interest test applied to the 10 documents withheld. The Council argued that its Property Management Services had to maintain the confidence of potential developers and their agents and that their continuing ability to operate in the property market would be jeopardised if the information requested was disclosed.
20. In further correspondence, I again asked the Council to provide a detailed analysis of each exemption applied to each document. It was also asked to cite the specific paragraph and/or subsection number that applied in relation to each exemption. Section 33 contains several quite different exemptions and failure to indicate by the authority which subsection applies will mean that it is not clear to Mr Jarvis why the information has been withheld.
21. Section 33(1)(a), for example, exempts information which constitutes a trade secret. By contrast section 33(1)(b) exempts information which would prejudice substantially the commercial interests of any person. Section 33(2)(a) exempts information which would prejudice substantially the economic interests of the whole or part of the United Kingdom and section 33(2)(b) exempts information which would prejudice substantially the financial interest of an administration in the United Kingdom.
22. The Council was asked to indicate in each case how the substantial prejudice test had been applied and how the public interest test had been applied in relation to each exemption, where appropriate.
23. In its response, while the Council cited the specific subsection or paragraph number applied in its response, it did not expand on the application of the public interest, referring instead to earlier correspondence with my Office. The Council indicated that it could not provide a detailed analysis of the substantial prejudice test in relation to each exemption applied on the basis that it had not carried out this analysis when the request was originally received and therefore could not purport to do so now.
24. The Council indicated that the following subsections or paragraphs applied to the documents withheld.
 1. Document 1 – section 30(c), section 33(1)(b)
 2. Document 2 – section 30(c), section 33(1)(b)
 3. Document 3 – section 30(c), section 33(1)(b)
 4. Document 4 – section 30(c), section 33(1)(b)
 5. Document 5 – section 30(c), section 33(1)(b)
 6. Document 6 – section 30(c), section 33(1)(b)
 7. Document 7 – section 30(c), section 33(1)(b)
 8. Document 8 – released
 9. Document 9 – section 36(2)(a) and 36(2)(b)



10. Document 10 – section 36(2)(a) and 36(2)(b)
 11. Document 11 – section 36(2)(a) and 36(2)(b)
25. The failure of the Council to provide a detailed analysis of the exemptions applied prompted my Office to send an initial assessment to the Council setting out our views on this case. The initial assessment set out the facts of the case as understood by my investigating officer and the submissions that my Office had received to date. The initial assessment also made it clear what was expected of an authority when applying exemptions to information it wishes to withhold and that unless the Council could provide me with information which would justify its reasoning then I may have to order release of all of the information withheld.
26. As a result of the initial assessment the Council further reviewed the documents previously withheld and decided to release certain information to Mr Jarvis. This involved the full release of certain documents and the partial release of others. Where information was withheld the Council set out the exemptions which applied and explained why they applied. The position was as follows:
- 1) Document 1 – partial release
 - 2) Document 2 – partial release
 - 3) Document 3 – full release
 - 4) Document 4 – partial release
 - 5) Document 5 – partial release
 - 6) Document 6 – partial release
 - 7) Document 7 – Partial release
 - 8) Document 8 – full release
 - 9) Document 9 – full release
 - 10) Document 10 – full release
 - 11) Document 11 – full release
27. The Council provided Mr Jarvis with complete documents where there had been full release and redacted versions where there had been partial release.
28. In relation to the remaining information withheld, the Council made the following submissions:

Section 33(1) (b) – substantial prejudice to commercial interests

29. The Council submitted that section 33(1)(b) applies to the following information:
- Document 1 – paragraphs 4 and 5
Document 2 – paragraphs 5 - 8; paragraph 9, single word



Document 4 – paragraphs 2 – 3; paragraph 4, one sentence; paragraph 5, one sentence and phrase

Document 5 – paragraph 2, last sentence;

Document 6 – paragraph 3, second part; paragraphs 4 and 5; paragraph 6, majority

Document 7- the vast majority of the document

30. The Council indicated that it considers section 33(1)(b) applies to the above information on the basis that it affects the commercial interests of both parties. Whilst the information affects the commercial interests of both parties, the Council advised that it did not consider that the developer's interests would be substantially prejudiced by the disclosure of this information.
31. On the other hand, the Council indicated that it considers that its own commercial interests would be substantially prejudiced by the disclosure. It indicated that the Property Management Division has stated that it would be unable to continue to perform its functions in any meaningful way if information was disclosed prior to the conclusion of negotiations. This would follow from the unwillingness of other parties to enter into negotiations with the Council fearing the premature disclosure of their interest or position.

Section 30(c) – substantial prejudice to public affairs

32. The Council submitted that section 30(c) also applies to the same information withheld under section 33(1)(b)
33. The Council submitted that it is required to operate in the commercial property market and a key feature of this market is the requirement to maintain the confidentiality of negotiations prior to their conclusion. The information is, therefore, relevant to the conduct of the general business of the Council.
34. The Council argued that the disclosure of this information prior to the conclusion of the negotiations would be considered a breach of confidence (in its common usage) by both the developer and by the Council's Property Management Division. The anticipated outcome of this would be an unwillingness of other developers and agents in the commercial property market to deal with the Council, fearing premature disclosure of negotiations. The Council submitted that the staff in the Property Management Division would be in an untenable position in terms of future negotiations since they would be unable to commit to the confidentiality of negotiations as expected by their peers.
35. As a consequence, the Council submitted that the release of this information at this time would substantially prejudice the effective conduct of its affairs.



Application of the Public Interest Test

36. Both of the exemptions contained in section 33(1)(b) and section 30(c) are subject to the public interest test. This means that even if the information is covered by either of the exemptions, the information should still be released if the public interest in disclosing the information is greater than the public interest in withholding it. The Council indicated that it recognises that there is a public interest in the disclosure of information in connection with its property transactions. It accepted that the public have a right to know about the Council's use of money and the management of its property resources, particularly those which have a specific impact on the public. The Council indicated that it has a policy of being open and accountable, and individuals have a right to know about the decision-making processes.
37. However, the Council also argued that the information relates to currently incomplete transactions and decisions. The premature disclosure of the information will put at risk the appropriate conclusion of the transactions and the decision-making process as a whole. The public interest will be better served in this instance, it argued, by withholding the information in order to allow the process to run its due course. The Council submitted that appropriate openness and accountability will be achieved by the disclosure of the information following the conclusion of the process.
38. The Council further argued that there is also public interest in ensuring that potential transactions are considered fairly and equitably and in a professional manner by the relevant senior officers and elected members in order to enable appropriate actions to be taken. There is public interest in ensuring that this is done without inappropriate public pressure. The Council indicated that it fully supports the principles of openness and accountability, but recognised that this does not necessarily mean that all Council business should be conducted in full view of the public at all times.
39. The Council recognised that there is particular public interest in this property transaction because of the related planning application. It acknowledged that the planning application is likely to have a significant impact on the retail market in Crieff and the surrounding area.
40. The Council submitted that the planning application will be considered on its planning merits, as will the competing application. The Council, as planning authority, will not, and must not, take into consideration the fact that it owns some of the area affected by the proposals. Any subsequent property transaction will be negotiated by the Council, as a separate process, to achieve the best return for the Council and to best achieve its other objectives such as the provision of its services and facilities.



41. The Council further indicated that there are examples of planning applications being approved, but the subsequent sale of Council property being refused on property management grounds. The reverse also happens, where Council property is sold, but the subsequent planning application is refused.
42. The Council concluded that it does not consider that the public interest in terms of the economic considerations for Crieff would be served by the disclosure of this information.
43. The Council acknowledged that the disclosure of this information could contribute to the current public consultation process regarding the planning applications. However, in practice, it argued this particular information would not inform the debate to any significant degree, since the two processes are separate. Disclosure of the information at this stage is likely to adversely affect the negotiation process. The Council submitted that the public interest is better served by withholding this information while the negotiations continue in the conventional manner.

Submissions by Mr Jarvis

44. Mr Jarvis considers that all of this information should be in the public domain. He reaffirmed this view on receipt of the information partially released. He asked me to reach a decision on the remainder of the information withheld and comment on the way in which the Council has handled his request.

Analysis and findings

45. Given that this is one of my first decisions, I consider it appropriate to make some general observations at the outset before going on to consider the application of the exemptions to the information withheld.
46. The review of the information withheld undertaken by the Council following receipt of my Office's initial assessment is the exercise I expect authorities to carry out when they first receive a request for information. In each case where a public authority receives a request for information under FOISA and the public authority wishes to withhold some or all of the information, applicants need to be informed of the exact exemption in FOISA that applies (in all except one of the exemptions this means that the section and subsection must be cited). The public authority must also explain to the applicant why the exemption applies.



47. When a valid application for a decision is received by my Office the first step for my investigating officer will be to look at how the authority has applied the exemption(s) and the public interest test (where appropriate) to the information withheld and whether it has justified their use. In most cases, my investigating officers will need to go back to the authority to ask it to provide a more detailed analysis of the exemptions. (In all cases my Office is obliged to give the authority an opportunity to comment on the application.) FOISA requires authorities to justify withholding information. Therefore, it is for the authority to demonstrate to me why the information should be withheld.
48. As part of the investigative process, my officers will also carry out their own assessment of any exemptions applied. This will involve looking at the practice in other jurisdictions and any relevant guidance. In the future, this process will also involve looking at any of my earlier relevant decisions.
49. It is impossible for my officers to carry out an independent assessment of the application of the exemptions if it is not clear to them why the authority applied the exemptions on receipt of the initial request for information.
50. The key difficulty with this present investigation has been the Council's failure to provide a detailed analysis of how each exemption cited applies to each document withheld until the final stages of my investigation. This was compounded by the apparent contradictions in the Council's responses to Mr Jarvis and in its correspondence with my Office as to which subsection or subsection of the cited exemptions was being relied on.
51. For example, in its letter of review the Council indicated that disclosure would "inhibit substantially the free and frank exchange of views for the purpose of deliberation." This wording corresponds to section 30(b)(ii) of FOISA, but the Council cited only section 30(c) in its letter to my Office. In its letter of review the Council also indicated that documents 8-11 are exempt under the belief that a claim to confidentiality of communications could be maintained in legal proceedings. This corresponds to section 36(1) of FOISA, but the Council cited only section 36(2) in its letter to my Office.
52. After receiving our initial assessment the Council accepted that it had misunderstood the role of the Commissioner, believing that the Commissioner would consider not only the practice of the authority, but also the overall validity of the decision regardless of how well the authority had justified it. The Council then set out its arguments in relation to the remaining information withheld. I have focussed entirely on these arguments in deciding whether the information should be released rather than on any earlier statements made by the Council in this case, judging that this must be the Council's final submission regarding the information withheld.



53. Where the Council has cited a particular exemption it has used the same arguments in relation to each item of information withheld. This is acceptable where the information is of a similar nature. As a result, rather than considering each document in turn, I will consider the information by exemption.

Application of section 33(1) (b)

54. Section 33(1)(b) states that information is exempt if its disclosure would or would be likely to prejudice substantially the commercial interests of any person (including a Scottish public authority).
55. The Council has cited section 33(1)(b) in relation to the following information:
- Document 1 – paragraphs 4 and 5
 - Document 2 – paragraphs 5 - 8; paragraph 9, single word
 - Document 4 – paragraphs 2 – 3; paragraph 4, one sentence; paragraph 5, one sentence and phrase
 - Document 5 – paragraph 2, last sentence;
 - Document 6 – paragraph 3, second part; paragraphs 4 and 5; paragraph 6, majority
 - Document 7- nearly all of document
56. There are certain elements to section 33(1)(b) which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, the nature of those commercial interests and how these interests will be substantially prejudiced. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests will be substantially prejudiced.
57. Even where an authority considers that section 33(1)(b) applies to information which is the subject of the request, it must still go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding the information.
58. The Council has stated that the information withheld affects its commercial interests as well as those of the developer. It considers, however, that only the Council's interests would be substantially prejudiced by disclosure of this information. As a result, it is applying section 33(1)(b) only in relation to its own interests. I am not obliged therefore to consider the impact that disclosure might have on the developer's commercial interests.



Does the Council have “commercial interests”?

59. The first issue to consider is whether the Council is an entity capable of having “commercial interests”. Commercial interests are different from financial interests and relate to the ability to participate successfully in a commercial activity, such as the sale and purchase of goods and services. In order to be “commercial” activities will normally be undertaken for the purpose of making a profit.
60. This case involves discussion of property in which it is a publicly acknowledged that the Council has an interest. Should it be minded to accept any proposal concerning those property interests it will seek to secure an outcome which is to the advantage of the Council. The Council has indicated that in this instance it is operating within the terms of the commercial property market. It points to the role for example of its Property Management Division which has to negotiate the sale, purchase, lease etc of properties to further the policies and requirements of the Council. Its aims are the effective management of the Council's property assets to further the Council's objectives and support the local economy by the direct provision of property through a commercial investment programme.
61. Within this division it employs staff such as surveyors who operate under a professional Code of Conduct expected of counterparts in the commercial sector.
62. The Council has a responsibility to obtain best value when carrying out such transactions and I am prepared to accept that the Council is capable of having “commercial interests” to allow consideration of section 33 (1) (b).

Would the Council’s commercial interests be substantially prejudiced by disclosure?

63. An authority relying on section 33(1)(b) needs to identify the “commercial interests” that would be harmed. In its submissions, the Council has indicated the information in each document that would affect its commercial interests. However, it has not argued that disclosure of the specific information would substantially prejudice its commercial interests in this particular transaction.
64. Rather, the Council has argued that its general commercial interests would be harmed because if details of ongoing negotiations were seen to be disclosed, the Council could no longer operate in the commercial property market.
65. An authority cannot rely on section 33(1) (b) to protect a category of information. Therefore, an authority could not use section 33(1) (b) to protect all information connected with ongoing negotiations as a matter of course. Assurances of confidentiality during negotiation processes ended with the introduction of the freedom of information regime.



66. I accept that the commercial interests of an authority (or a third party) could be harmed once negotiations are ongoing if information about a party's negotiating position and/or proposal were released into the public domain. In my view, disclosure of a third party's proposal and/or bargaining position during ongoing negotiations could substantially prejudice its commercial interests. Likewise, the authority's own bargaining position could be weakened by disclosure of this information and result in it being unable to obtain the best commercial value.
67. Last year, in case no: A.6/04 **The Coal Authority** the Parliamentary Ombudsman considered the application of Exemption 13 of the *Government Code on Access to Official Information* which concerns the need to protect from disclosure sensitive commercial information which would adversely affect those to whom the information relates. The Ombudsman stated:
- “There is nothing in the Code that requires [Government] departments to prejudice the legitimate commercial confidences of companies with whom they do business: companies will need to be confident that the Government will apply its general commitment to openness in a way which does not damage their legitimate interests or undermine the trust they have placed in Government. Moreover, care must be taken by departments not to disclose commercially sensitive information in case it might harm the Government's reputation as a client and, ultimately, the taxpayer's interests.”
68. I agree that the public sector should be able to continue to protect sensitive commercial information supplied by or concerning third party entities where the release of the information would substantially prejudice the third parties. Likewise, commercially sensitive information supplied by or concerning an authority will also warrant protection where disclosure would substantially prejudice the authority's commercial interests.
69. However, authorities will have to argue any exemption in relation to the specific information. Therefore, an authority wishing to rely on section 33(1)(b) would need to demonstrate that disclosure would:
- 1) reveal specific information relating to the authority's commercial interests; for example, the authority's bargaining position, the value of a commercial interest etc and that disclosure of this information would substantially prejudice its commercial interests and/or
 - 2) reveal specific information relating to the third party's commercial interests; for example, the third party's pricing system, bargaining position etc and that disclosure of this information would substantially prejudice its commercial interests.



70. As previously indicated the Council has stated that although the information withheld affects its commercial interests as well as those of the developer, it considers that only the Council's interests would be substantially prejudiced by disclosure of this information.
71. It has not been able to demonstrate what substantial prejudice would occur to its commercial interests in this instance if information supplied by the third parties was released, except that its general commercial interests would be harmed, arguing that if details of ongoing negotiations were seen to be disclosed the Council could no longer operate in the commercial property market.
72. The basis for this argument is similar to that which it argues under section 30 which I will go on to consider next.
73. But so far as section 33 (1) (b) is concerned I do not accept that the Council has justified its use of the exemption.

Application of section 30(c)

74. The Council has argued that disclosure of the information withheld would also substantially prejudice the conduct of public affairs under section 30(c) of FOISA.
75. Section 30(c) provides that information is exempt information if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
76. The Council has submitted that it is required to operate in the commercial property market and a key feature of this market is the requirement to maintain the confidentiality of negotiations prior to their conclusion. The information is, therefore, relevant to the conduct of the general business of the Council.
77. The Council has indicated that a local authority, by its nature, is responsible for, or has interests in, a wide variety of non-domestic properties and land. These range from office accommodation, residential homes and industrial developments, to public spaces and miscellaneous tracts of land. Many properties are owned outright and others are leased. In turn, the Council leases or rents properties to others. It currently has a portfolio of over 1000 properties of diverse nature. It is consequently necessary that the Council manage its various property assets in a suitable manner.



78. The Council has argued that the disclosure of this information prior to the conclusion of the negotiations would be considered a breach of confidence (in its common usage) by both the developer and by the Council's Property Management Division. The anticipated outcome of this would be an unwillingness of other developers and agents in the commercial property market to deal with the Council, fearing premature disclosure of negotiations. The staff in the Property Management Division would be in an untenable position in terms of future negotiations since they would be unable to commit to the confidentiality of negotiations as expected by their peers.
79. I take this to mean that private organisations would be unwilling to do business with the Council. I have difficulty in accepting that parties would be unwilling to enter into negotiations or contractual arrangements with the Council if some information in such cases was released. There has been much speculation about the potential reluctance of private sector bodies to do business with the public sector because of freedom of information. I do not accept the argument that a requirement for attracting commercial buyers and contractors is to put such exchanges outside the scope of freedom of information laws so far as is possible. Instead the companies must be made aware that if they expect to do business with Scottish public authorities, then they will operate under reasonable terms of scrutiny and openness as provided for by the freedom of information legislation. Processes that were previously undertaken in private may now be subject to public scrutiny. I do not accept that information should be withheld simply because certain kinds of transactions have traditionally been carried out on a confidential basis.
80. To my mind, the effective conduct of public affairs which the Council is seeking to achieve is the conduct of negotiations with third parties regarding its property interest with a view to obtaining best value from any outcome. Simply because such negotiations are underway does not mean that any information, however innocuous, should not be released, but instead that the Council should consider whether release would substantially prejudice the outcome.
81. In fact in this particular case information is already in the public domain, and the Council has contributed to this by releasing certain information in response to Mr Jarvis's original request, after review and then in the course of this investigation.



82. As a consequence, certain information about this matter is already public knowledge:
- i. That two parties are competing for the development of a supermarket in Crieff
 - ii. The identity of those parties
 - iii. Details about the two proposals (to the extent that this has appeared in newspapers and other documents in the public domain)
 - iv. That each development would affect the Council's interests
 - v. The nature of the Council's interests (i.e. the location of those interests and the Council's interests as owners or as tenants of the subjects)
 - vi. That in the event that one or other of the developments is successful, agreement will need to be reached between the Council and the successful developer about the Council's interests.
83. This does not mean that sensitive information cannot be protected during these processes. Where a third party has provided sensitive information or disclosure would reveal a proposal or negotiating position of the authority or third party then this information can be withheld providing the authority can justify this.
84. The Council does not now seek to withhold all information regarding the exchange with commercial third parties. It has released information which makes it clear which third parties are approaching it, and the property site being discussed.
85. However certain information withheld by the Council provides information about proposals being considered and information from which details could be inferred or provides details of ongoing negotiations and the Council's position regarding the property in question.
86. I accept that release of information detailing the negotiating positions and/or proposals of the parties while the negotiations are still ongoing could substantially prejudice the ability of the Council to obtain best value in this transaction. As a result, I am satisfied that disclosure of information revealing the negotiating positions and/or proposals of the parties to this correspondence would, or would be likely to, substantially prejudice the effective conduct of public affairs.
87. However, not all of the information withheld by the Council reveals information about a negotiating position and/or proposal of a party. Having looked at the information, I consider that section 30(c) applies to the following information:



Document 1 – paragraphs 4

I accept that paragraph 4 provides details of the proposals being considered by the developer and information from which details could be inferred.

Document 2 – paragraphs 5 – 8

I accept that paragraphs 5 – 8 discuss details of the proposals being made to the Council.

Document 4 – paragraphs 2 – 3; paragraph 5, one sentence

I accept that paragraphs 2 – 3 and one sentence in paragraph 5 provides some detail of the developer's proposals and of the negotiating position being taken by the Council.

Document 5 – paragraph 2, last sentence:

I accept that the last sentence in paragraph 2 provides some detail of the Council's position regarding the property.

Document 6 – paragraph 3, second part; paragraphs 4 and 5; paragraph 6, majority

I accept that information contained in the above paragraphs provide some detail of the developer's proposals and of the negotiating position being taken by the Council.

Document 7- paragraphs 2 - 6

I accept that the information provides some detail of the developer's proposals and of the negotiating position being taken by the Council.

88. I do not accept that section 30 (c) applies to the following information:

Document 1 - paragraph 5

Document 2 – paragraph 9, single word

Document 4 – paragraph 4, one sentence ;paragraph 5, a phrase

In my view, the information in these documents does not reveal information about the negotiating position of the Council or proposal of the developer. I am not satisfied that disclosure of this information would substantially prejudice the effective conduct of public affairs.



Application of the public interest test

89. Given that I accept that certain information is exempt under section 30(c) (i.e. the information set out in the paragraph above), I have gone on to consider the public interest in relation to this information and whether in all the circumstances of the case the public interest in disclosing the information is outweighed by the public interest in withholding the information.
90. When considering the public interest the authority should identify considerations both in favour of disclosure of the information and those against. In this particular case, I have taken into account the general public interest in information being accessible and, more specifically, have considered:
- whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation and
 - whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money.
91. Given the high profile nature of the related planning applications there may be strong public interest grounds in the public having access to information relating to the applications in order that it can contribute to the debate. I am aware that there is significant public interest in the planning applications for two supermarkets in Crieff. If this information would have an impact on that debate and would be a factor in considering which application should be accepted it seems to me that there would be strong public interest grounds in this information being in the public domain.
92. The Council has submitted that the planning application will be considered on its planning merits, as will the competing application. The Council has indicated that, as a planning authority, it will not, and must not, take into consideration the fact that it owns some of the area affected by the proposals. Any subsequent property transaction will be negotiated by the Council, as a separate process, to achieve the best return for the Council and to best achieve its other objectives such as the provision of its services and facilities.
93. The Council further indicated that there are examples of planning applications being approved, but the subsequent sale of Council property being refused on property management grounds. The reverse also happens, where Council property is sold, but the subsequent planning application is refused.



94. The Council acknowledged that the disclosure of this information could contribute to the current public consultation process regarding the planning applications. However, in practice, it argued this particular information would not inform the debate to any significant degree, since the two processes are separate. Disclosure of the information at this stage is likely to adversely affect the negotiation process. The Council submitted that the public interest is better served by withholding this information while the negotiations continue in the conventional manner.
95. I accept that it is normal practice for planning applications and Council property transactions to be carried out separately. I am not satisfied that disclosure of this information would contribute significantly to the current debate on the planning applications. In particular, I am not satisfied that the contribution this information might make to the planning debate is outweighed by the substantial prejudice to the effective conduct of public affairs by the Council which would result if this information were to be disclosed.
96. I must also consider whether it is in the public interest for members of the public to be aware of the proposals being discussed in relation to the Council's interests.
97. In my view, it is important that members of the public know that these discussions are taking place. I would have concerns if these discussions were taking place without public knowledge. This information is now in the public domain following the release by the Council of certain information in response to the information request made by Mr Jarvis and as a result of our initial assessment. The information released makes it clear that discussions are taking place between the Council and interested parties. The public also now knows the identity of those parties.
98. However, I do not consider that the public interest would be served by the disclosure of the exact proposals under discussion. Given the nature of this information I am satisfied that the harm caused to the effective conduct of public affairs if this information were disclosed is not outweighed by the public interest in disclosing this information.
99. I note, however, that the Council is concerned at the release of the information **at this time** (my emphasis). This information will lose sensitivity once negotiations have concluded and after that point both the withholding of the information under section 30(c) and the public interest in disclosing the information would have to be reconsidered in the light of any new request.



Decision

I find that the Council has not dealt with Mr Jarvis's requests for information fully in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that it has breached section 1(1) of FOISA in withholding certain information from Mr Jarvis.

I find that the Council should release the following information to Mr Jarvis, not later than 45 days after the receipt of this notice:

Document 1 – paragraph 5

Document 2 – paragraph 9, single word

Document 4 – paragraph 4, one sentence ;paragraph 5, a phrase.

I also find that the Council failed to issue a refusal notice in response to Mr Jarvis's request in compliance with sections 16 and 19 of FOISA in that it failed to specify in its refusal notice :

The exemption in question (section 16(1)(c))

Why the exemption applies (section 16(1)(d))

The Council's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure (section 16(2))

The procedure provided by the Council for dealing with complaints about the handling by it of requests for info (section 19(a)) and

The rights of application to the Council and to me (section 19(b)).

However, I do not require the Council to take any remedial steps to comply with the breach of sections 16 and 19 in terms of section 49(6)(b) of FOISA.

Kevin Dunion
Scottish Information Commissioner
18 July 2005