

# Decision Notice



Decision 056/2012 Mr John Waites and Clackmannanshire Council

Internal audit report

Reference No: 201102175  
Decision Date: 30 March 2012

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**Margaret Keyse**

Acting Scottish Information Commissioner

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## Summary

Mr John Waites asked Clackmannanshire Council (the Council) for an internal audit report regarding the award of a contract. The Council responded by withholding the report. Following a review, Mr Waites remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council disclosed the audit report, apart from one single line of text; this decision considers only this line of text.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information under the exemption in section 30(c) of FOISA, which applies where the disclosure of information would, or would be likely to, prejudice substantially the effective conduct of public affairs. However, she also found that the Council failed to provide a refusal notice to Mr Waites in accordance with sections 16(1) and (2) of FOISA. As the Council had rectified this error in its internal review, she did not require the Council to take any action in relation to this breach.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 16(1)(c) and (d) and (2) (Refusal of request); 30(c) (Prejudice to the effective conduct of public affairs).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

All references in this decision to “the Commissioner” are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 27 September 2011, Mr Waites emailed the Council requesting (amongst other things) a report on the investigation of a particular contract award.



2. The Council responded on 25 October 2011. It confirmed that an internal audit had been undertaken in relation to the contract award after errors regarding the scoring of the tenders had been discovered. However, it indicated that the audit report could not be distributed as the Council considered it would prejudice its position with regard to ongoing legal proceedings.
3. On 26 October 2011, Mr Waites emailed the Council, requesting a review of its decision to withhold the audit report. Mr Waites argued that the report did not fall within any of the exemptions in FOISA. He also argued that the public interest favoured disclosure of the report, because it described the failures and mistakes made by the Council which led to it awarding a substantial contract to the wrong contractor. He maintained that he was entitled to know why money was spent on the basis of errors within the procurement process.
4. The Council notified Mr Waites of the outcome of its review on 21 November 2011. It recognised that its previous response was incomplete, because it had not specified the grounds upon which the audit report was withheld. It upheld its decision to withhold the audit report, at this stage confirming that it considered it to be exempt from disclosure under section 30(c) of FOISA.
5. On 22 November 2011, Mr Waites emailed the Commissioner, stating that he was dissatisfied with the Council's response to his initial request and the outcome of the Council's review, and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Waites had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 13 December 2011, the Council was notified in writing that an application had been received from Mr Waites, and was asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested. It also indicated that it was withholding only a single line in the report, as, although it had not directly disclosed the remaining parts to Mr Waites, it considered that the remainder of the information had been made public in a recent court case. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was also asked whether it would disclose a redacted version of the report to Mr Waites.
9. On 19 January 2012, the Council disclosed the audit report to Mr Waites, subject to the redaction of the line considered to be exempt from disclosure. Following receipt of the redacted report, Mr Waites confirmed that he still required the Commissioner to issue a decision, though this should consider only the information still being withheld.



10. The Council provided its submissions on 3 February 2012, giving background information on the events surrounding the procurement exercise to which the audit report relates, and explaining why the Council considered the remaining withheld information to be exempt from disclosure under section 30(c). It also provided details of its reasoning when applying the associated public interest test.
11. Mr Waites' submissions were sought on the matters to be considered in the case including why he considered that the public interest test associated with section 30(c) of FOISA favoured disclosure.
12. The relevant submissions received from both the Council and Mr Waites will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Waites and the Council (including those not summarised in this decision), and is satisfied that no matter of relevance has been overlooked.
14. In every case she considers, the Commissioner's decision must be based on the circumstances that existed when the authority responded to the requester's requirement for review. In this case, therefore, the Commissioner must consider whether section 30(c) applied to the withheld information on 21 November 2011.

### Section 30(c) – Prejudice to effective conduct of public affairs

15. The Council applied the exemption in section 30(c) of FOISA to one sentence in the audit report. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". (The word "otherwise" is used here to differentiate this particular exemption from the other exemptions in section 30.) This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
16. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The Commissioner's guidance<sup>1</sup> on this exemption makes it clear that the damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal. Authorities should therefore consider disclosing the information asked for unless disclosure would (or would be likely to) cause real, actual and significant harm.

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<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&sID=117>



17. In its submissions, the Council explained that the audit report had been created following errors which occurred during a tendering exercise and which had been subject to multiple litigation processes. The outcome of some of the litigation prompted by the procurement was in the public domain by the time of the Commissioner's investigation.
18. The Council provided submissions which explained the nature and context of the withheld information, and why it believed disclosure would be likely to prejudice substantially the effective conduct of public affairs. Given that these submissions focussed on the actual content of the withheld information, the Commissioner cannot refer to them in detail in this decision. In essence, however, the Council maintained that the information related to a live court matter, and disclosure of the information would be likely to cause delay and additional expense for the Council in the course of that action.
19. The Council submitted that disclosure would have a significant impact on financial and staff resources that could affect particular services or the provision of services in the future. As a minimum, it submitted that it could take one solicitor away from dealing with other matters surrounding essential service provision by the Council.
20. Having been provided with a summary of the Council's submissions, Mr Waites considered that the exemption did not apply as the Council was relying on a series of hypothetical events that may possibly occur in the future. Mr Waites referred to the Commissioner's briefing on the exemption, which states that there must at least be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied.
21. Mr Waites considered that the only harm envisaged would be from the possibility of the Council being sued, which is not certain as it is not possible to confirm that in the first instance that the other party would sue or confirm with any certainty the outcome of a legal process. In addition, Mr Waites commented that the Council regularly uses an internal solicitor so the Council would not be directly affected.

*Commissioner's conclusion*

22. The Council has provided detailed submissions to support its case that disclosure of the information would be likely to have the effect of undermining its position in a court action that was pending at the time when the Council notified Mr Waites of the outcome of its review.
23. The Commissioner notes that Mr Waites has commented that the possibility of the Council being sued as a result of its disclosure was merely hypothetical. This is true, but the key question raised by the Council's submissions in this case is not whether the disclosure would prompt further additional court actions, but whether disclosure at the time when the Council responded to Mr Waites' request and request for review would have had the effect of undermining the Council's position in an ongoing court action.



24. Having considered all the points made by the Council and Mr Waites, the Commissioner accepts that disclosure of the withheld information at the relevant time would have been likely to have a detrimental effect on the Council's position in the pending court case, delaying the resolution of the matters before the court, and requiring additional costs (in both staff and financial resources) to be borne by the Council.
25. The Commissioner recognises (as highlighted by Mr Waites) that the test to be considered in relation to section 30(c) of FOISA is high, but she accepts in this instance that these effects would prejudice substantially the effective conduct of public affairs by the Council in relation to the Council's ability to defend itself robustly before the court, and to manage its staff and financial resources. In the circumstances, the Commissioner accepts that the exemption in section 30(c) applied at the relevant time to the information withheld.
26. However, as noted above, the exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### **Consideration of the public interest test**

27. With regard to the public interest in favour of disclosure, the Council acknowledged that there is a need for its decisions to be open and transparent and for it to provide assurances to the public that it is spending the public pound appropriately. However, in support of maintaining the exemption, the Council considered that there is a need not to waste public finances by putting the Council at risk of unnecessary litigation. It noted that the impact of the disputed contract does not significantly affect the wider public beyond those individuals concerned with litigation, although the public may have "an interest" in what has happened.
28. On balance, the Council explained that it had concluded that the public interest was better served by maintaining the exemption, because the benefits of not releasing outweighed those in favour of release. It submitted that this was particularly relevant in relation to the scrutiny of decisions that used public funds because such issues could be explored using other avenues, (such as court cases and news reporting).
29. In his submissions, Mr Waites disagreed with the Council's claim that the only parties to benefit from disclosure would be those involved with litigation. He argued that disclosure of the withheld information would enhance scrutiny of decision making and thereby improve accountability and participation in future. He also suggested that disclosure would contribute to the administration of justice, and maintained that, without disclosure, the Council (and other public authorities) would be able to harm third parties in the knowledge that they need not disclose their actions. Mr Waites also commented that disclosure would make the Council less likely to "endanger" public funds in the future, as they would be less inclined to carry out acts harming third parties which may result in costly litigation.



30. The Commissioner recognises that there is a general public interest in the transparency and openness of public authorities, particularly in identifying improvements to be made in the tender process, and in ensuring that there is accountability in the expenditure of public funds. These are important considerations in the current case, since the report requested by Mr Waites was produced in order that the Council could understand and learn from mistakes that were made in a tendering process. The Commissioner recognises that disclosure of the report in full would give a fuller understanding of the conclusions of that audit.
31. However, that public interest has been met to a significant extent by the disclosure of the remaining content of the report. The Commissioner's decision is considering only a single line of text. Having regard to the nature and content of that text, the Commissioner does not consider that its disclosure would contribute significantly to the public interest in ensuring transparency and accountability, or public understanding in relation to the particular tendering process concerned, or the Council's processes more generally.
32. Regarding Mr Waites' comments about the administration of justice, with access to the information under consideration, the Commissioner does not consider that disclosure would contribute significantly to the public interest in this respect. She notes that there are processes in place which allow parties to a court action to recover documents relevant to their case; while the Commissioner is aware that parties to an action may use FOISA to access information which they considers may be useful in court actions, FOISA is not intended to replace such processes.
33. While the Commissioner has given some weight to the public interest favouring disclosure in this case, she does not consider it to be sufficiently heavy to outweigh the considerable public interest in ensuring that the Council is not put at a disadvantage and can protect its interests in a matter which, at the time when the Council notified Mr Waites of the outcome of its review, had yet to be considered in court. The Commissioner considers there to be a substantial public interest in allowing public authorities, like any other person, to robustly defend their actions, without having to disclose information that may undermine its position (outwith the formal court disclosure processes).
34. On balance, having considered the particular information under consideration, and the submissions from both Mr Waites and the Council, the Commissioner has concluded that, in this instance, and at the relevant time, the public interest in maintaining the exemption in section 30(c) outweighed that in the disclosure of the information withheld. She therefore concludes that the Council was entitled to withhold this information and that it acted in line with Part 1 of FOISA by doing so.

#### **Other matters to consider**

35. In his application to the Commissioner, Mr Waites highlighted his concern that in its initial response the Council did not advise him which exemption in FOISA applied to the audit report and the associated public interest was not considered.



36. These points were raised with the Council, which acknowledged and confirmed that its initial response was not compliant with sections 16(1)(c), (1)(d) and (2) of FOISA, in that it had not specified the relevant exemption, stated why that exemption applied or stated the reasons why the Council had concluded that the public interest in maintaining that exemption outweighed that in disclosure. The Council noted that it had recognised that it had provided an incomplete response when notifying Mr Waites of the outcome of its review.
37. The Commissioner acknowledges that the Council recognised and rectified these failures in its review response to Mr Waites, but finds that the Council failed to comply with sections 16(1)(c), (1)(d) and (2) in responding to Mr Waites' initial request. As the Council recognised and rectified this failure in its review, the Commissioner does not require the Council to take any action in relation to these failures in this case.

## DECISION

The Commissioner finds that Clackmannanshire Council (the Council) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to disclose the information that is considered in this decision to Mr Waites. In particular, the Council correctly applied the exemption in section 30(c) of FOISA to the line of text that was redacted within the audit report.

However, in failing to provide a compliant refusal notice to Mr Waites, the Council failed to comply with Part 1, and, in particular, with sections 16(1)(c), (1)(d) and (2) of FOISA.

For the reasons set out above, the Commissioner does not require the Council to take any action in response to these failures in this case.

## Appeal

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Should either Mr Waites or Clackmannanshire Council wish to appeal against this 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 after the date of intimation of this decision notice.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**  
**30 March 2012**





## Appendix

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### 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.

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- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (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.

...

##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

...

- (c) specifies the exemption in question; and
  - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.



...

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

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.