

# Decision Notice



Decision 059/2012 Mr John McKnight and Glasgow City Council

Burial information

Reference No: 201100718  
Decision Date: 30 March 2012

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## Summary

Mr McKnight requested from Glasgow City Council (the Council) information about the burials in two specific lairs in the Eastern Necropolis, Glasgow. The Council responded by issuing a notice charging a fee for providing the information to Mr McKnight, while also alerting him to alternative sources for the information. Following a review, the outcome of which was that the Council maintained the information was otherwise accessible to him, Mr McKnight remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which the Council provided further arguments as to why the information should be withheld under FOISA, the Commissioner found that Council had failed to deal with Mr McKnight's request for information in accordance with Part 1 (and in particular section 1(1)) of FOISA. The Commissioner concluded that the Council had incorrectly applied the exemptions in section 25(1) (which relates to information otherwise accessible) and section 33(1)(b) (which relates to commercial interests) to the information requested by Mr McKnight. She required the Council to provide Mr McKnight with the information.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 21(1) Review by Scottish public authority; 25 (Information otherwise accessible); 33(1)(b) (Commercial interests and the economy)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation – definition of "environmental information")

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 14 September 2010, Mr McKnight wrote to the Council asking to be informed who was buried in two specified lairs in the Eastern Necropolis, Glasgow.
2. The Council responded on 17 September 2010, and explained that, given the high volume of genealogical searches being applied for outwith the requirement to effect a funeral, it had become necessary to institute a standard administration charge of £62 for information of the kind he had requested. The Council alerted Mr McKnight to alternative search facilities at the Mitchell Library, Glasgow or New Register House, Edinburgh.
3. Mr McKnight wrote to the Council on 18 September 2010. He stated that his original correspondence had not been under the terms of FOISA, but he was now requesting the information under FOISA. Mr McKnight also stated that he had supplied exact details so the information could be easily accessed: he was not asking for a full search of the records.
4. The Council responded on 28 September 2010 and confirmed that it held the information requested, but that the information was exempt in terms of section 25(1) of FOISA, i.e. it was information reasonably accessible without having to make a request under section 1(1) of FOISA. The Council explained that the information could be obtained from it at no charge on production of the title deeds for the lairs in question, or, if no title deeds were available, the information could be purchased from the Council.
5. On 15 October 2010, Mr McKnight wrote to the Council requesting a review of its decision. Given the age of the lairs in question, he did not consider it reasonable to expect him to have the title deeds. He also considered the fee set by the Council to be excessive. In the circumstances, he did not believe the information to be reasonably accessible to him.
6. The Council notified Mr McKnight of the outcome of its review on 15 November 2010, upholding its original decision (with reasons).
7. On 14 April 2011, Mr McKnight wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr McKnight 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. The case was then allocated to an investigating officer.



## Investigation

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9. 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 asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with specific reference to its arguments that the information was reasonably accessible to Mr McKnight.
10. In response, the Council intimated that it was relying on sections 25(1) and 33(1)(b) of FOISA, and provided its reasons. Further comments were obtained from the Council and Mr McKnight in the course of the investigation. As part of the investigation, the investigating officer also approached the National Records of Scotland (NRS) and the Mitchell Library with questions about whether they held the information in question and, if so, in what format.
11. Towards the end of the Commissioner's investigation, the Council explained that certain Glasgow burial information was to be provided to the Mitchell Library by NRS following digitisation, including information in respect of the Eastern Necropolis. Once the digitised images had been checked, work could be done to facilitate Mr McKnight's access to the information in the Mitchell Library.
12. Mr McKnight was contacted by the Commissioner and asked if he wished to take up the Council's offer to make the digitised images available at the Mitchell Library.
13. Mr McKnight declined this offer. He believed he had established that the Council held the information and should make it available. He had concluded that the Council's Bereavement Services Section alone held comprehensive records of burials in Glasgow: the Council's claim that the same records, in accessible format, were held at the Mitchell Library, and at New Register House, was incorrect.
14. Finally, on 22 February 2012, the Council indicated that it was now of the opinion that the information sought by the applicant might, perhaps, more properly be treated environmental information in terms of the EIRs. The Council proposed that the information requested should be made available to the applicant upon payment of an appropriate fee.
15. The relevant submissions provided by both Mr McKnight and the Council will be considered further in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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16. In coming to a decision on this matter, the Commissioner has considered all the submissions made to her by both Mr McKnight and the Council and is satisfied that no matter of relevance has been overlooked.



## Environmental information

17. As indicated above, the Council has suggested that the information requested by Mr McKnight might properly be considered to be environmental information.
18. The Council has not, however, explained why it considers the information to be environmental, either in general terms or by reference to the provisions of regulation 2(1) of the EIRs. Without such explanation, it is not apparent to the Commissioner why information of the kind requested should be considered environmental. She is satisfied that the Council is aware of the need to provide such explanation, and that it has had adequate opportunity to do so in the course of the investigation.
19. The Commissioner has, however, considered whether the requested information might reasonably be considered to fall within the definition of environmental information in regulation 2(1) of the EIRs, notwithstanding the absence of relevant submissions from the Council.
20. Basically, Mr McKnight is seeking the identities of the persons buried in the lairs specified in his request. Paragraph (a) of the definition of environmental information covers information on the state of the various elements of the environment and their interaction, while paragraph (b) covers factors affecting, or likely to affect, those elements. While elements of the environment are undoubtedly involved in burial, the Commissioner believes it would be stretching the relevant parts of the definition too far to infer a connection with either those elements, or factors affecting or likely to affect them, from the fact of burial in a particular place or the identity of a person who has been buried there.
21. Paragraph (c) covers measures and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition, as well as measures or activities designed to protect those elements. The information does not, on any reasonable interpretation, relate to measures or activities.
22. The information is obviously not a report on the implementation of environmental legislation, or a costs benefit or other economic analysis or assumptions used within the framework of the measures and activities referred to in paragraph (c) of the definition. Consequently, paragraph (d) or (e) of the definition cannot apply.
23. The final part of the definition is in paragraph (f). This covers information on the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c). There would appear to be no conceivable connection between the information requested and any of these matters.



24. While the Commissioner accepts that certain information in respect of burial matters held by a Scottish public authority might fall within the definition of environmental information in regulation 2(1) of the EIRs, the Commissioner can find no reasonable basis for finding that to be the case in relation to the particular information requested by Mr McKnight in this case. In what follows, therefore, she has considered the withholding of the information solely in terms of FOISA.

### Section 25 – information otherwise accessible

25. In terms of section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute: it is not subject to the public interest test in section 2(1)(b) of FOISA. Accordingly, where information is otherwise available to the applicant, there is no need for a public authority to provide an alternative right of access to it through FOISA.

*Is the information made available under the Council's publication scheme?*

26. Section 23 of FOISA requires a Scottish public authority to adopt and maintain a publication scheme approved by the Scottish Information Commissioner, and to publish information in accordance with that scheme. The scheme must specify the classes of information which a public authority publishes, the manner in which information in each class is published, and whether the information is available free or on payment. Section 25(3) of FOISA provides that any information made available under a publication scheme which has been approved by the Commissioner is presumed to be reasonably obtainable and therefore exempt from disclosure under section 25(1) of FOISA.
27. The position in respect of section 25 was summarised by the Court of Session in the case of *Glasgow City Council and Dundee City Council v. The Scottish Information Commissioner*<sup>1</sup> (at paragraph 59):

'The condition is that the information "is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme." If the condition is fulfilled, the Commissioner has no discretion to hold that, nevertheless, the information is not reasonably obtainable: the legislation proceeds on the basis that the role of the Commissioner in approving publication schemes (under section 23(1)(a)) is a sufficient guarantee that the information will be reasonably obtainable. Where a publication scheme operates in accordance with [FOISA], no further evaluation of whether the information is reasonably obtainable is necessary or appropriate. The cost of obtaining the information under the scheme, in particular, is of no relevance to exemption by virtue of section 25(3).'

28. "Publication scheme" is defined by section 73 (Interpretation) of FOISA as having the meaning given by section 23(1)(a), which clearly states that a Scottish public authority must:  
'adopt and maintain a scheme (in [FOISA] referred to as a "publication scheme") which relates to the publication of information by the authority and is approved by the Commissioner.'

<sup>1</sup> <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



29. Section 23(5) of FOISA permits the Commissioner, when approving a publication scheme, to provide that approval expires at the end of a specified period. The Council's publication scheme was approved by the Commissioner for a four year period in 2004, and while that scheme's approval was extended, it expired in December 2009.
30. The Council's submission to the Commissioner confirmed that it was seeking to rely on the publication scheme approved by the Commissioner in 2004 and revised in 2005. Approval for this scheme has expired, but, according to the Council, it continues to rely on its existing publication scheme and the scheme appears on the Council's website<sup>2</sup>.
31. The Council, therefore, had no approved publication scheme in place at the time it dealt with Mr McKnight's initial information request or his requirement for review, or for that matter during the Commissioner's investigation. As at the date of this decision, the Council still does not have a publication scheme approved in terms of section 23 of FOISA. While noting that the Council's position is that it continued to make information available in accordance with the publication scheme approved in 2004, the Commissioner cannot accept that it followed that it could continue to rely upon the provisions of section 25(3) in the absence of an approved publication scheme. Consequently, information could not, in the circumstances, be considered reasonably obtainable from the Council simply because it was made available in accordance with the publication scheme approved in 2004, as if that scheme remained in force. In any event, the scheme does not contain a reference to the type of information requested by Mr McKnight.

*Can Mr McKnight reasonably obtain the information nonetheless?*

32. Information does not have to be made available solely under a public authority's publication scheme to be exempt in terms of section 25(1) of FOISA. Information will still be exempt under section 25(1) in circumstances where information can reasonably be obtained by the applicant by other means. Where information is not made available in line with an approved publication scheme, the onus is on the authority to demonstrate that the information is reasonably obtainable by the applicant otherwise than by making a request under FOISA.
33. The Council informed Mr McKnight that the information could be obtained from the Council:
- at no charge on production of the title deeds for the lair in question; or
  - if no title deeds were available, at a charge of £62 the information could be purchased from the Council; or
  - it could be obtained from other sources (the Mitchell Library and New Register House).
34. Mr McKnight submitted that each of these options were unreasonable in terms of section 25(1) of FOISA. Clearly, he does not (and did not) possess the title deeds and, therefore, as a matter of fact, the information was not reasonably obtainable to him by that route. In this case, therefore, the Commissioner is required to determine whether, through either of the other means referred to in the preceding paragraph, the information Mr McKnight requested could be said to be reasonably obtainable by him.

<sup>2</sup> <http://www.glasgow.gov.uk/en/YourCouncil/FreedomofInformation/PublicationScheme/index.htm>



35. In the *Glasgow City Council* Court of Session case, the Court acknowledged that certain practical difficulties in obtaining information, such as those of cost or isolating and collating specific information requested from a larger mass of information, might well be relevant when considering the application of section 25(1) in the absence of section 25(3), since they could (in such circumstances) have a bearing on the question whether the information requested was "reasonably obtainable".
36. The Commissioner does not, however, find it necessary in this case to consider the nature and characteristics of this particular applicant in determining whether the information was reasonably obtainable to him. In the *Glasgow City Council* decision, the Court of Session found that there had been information before the Commissioner which should have alerted him to the fact that the applicant was in a materially different position from the general public. It went on to acknowledge, however, that the Commissioner was not under a general duty to make enquiries about applicants.
37. In this particular case, the Commissioner is aware of no information which suggests that the applicant should be considered to be in a different position (with regard to access to the requested information) from any other member of the public. Indeed, Mr McKnight himself does not believe himself to be in such a position. Consequently, the Commissioner has proceeded on the basis that Mr McKnight is a member of the general public, with no special circumstances affecting his ability to access the information.

#### *Purchasing the information at a charge*

38. As section 25(2)(a) of FOISA makes clear, information may be "reasonably obtainable" for the purposes section 25(1) even if payment is required for access to it. In this case, there is a charge of £62, described in the current list of charges set by the Council's Land and Environmental Services Department as being for a "search of records".
39. The Council's submissions in relation to this charge were focused largely on its inclusion in the 2004 publication scheme. However, these included arguments as to why the charge was considered reasonable in the circumstances. Bearing in mind the comments of the Court of Session referred to in paragraph 35 above, the Commissioner believes it appropriate to consider these latter arguments at this stage, in determining whether section 25(1) of FOISA could be found to apply in the absence of an approved publication scheme.





40. As noted above, the 2004 publication scheme did not contain any references to the type of information requested by Mr McKnight. However, the Council advised the Commissioner that the information was described as “value added” in its publication scheme, a fee being required as its collation and provision required a significant amount of staff time and resources. It referred to the explanation of “value added” in its 2004 publication scheme as generally denoting that the Council had to “devote professional time and effort in assembling, creating and/or analysing the data involved such that it has a specific commercial value”, while its new (unapproved) scheme defined “value added” information as “information which is held by the Council but has to be analysed or packaged in some way in response to a specific enquiry for it”. Both definitions acknowledge that the information is not “published” (and therefore is not available under the publication scheme) but is made available to anyone who pays the applicable fees.
41. The Council’s position was that the charge levied was reasonable given the staff time and effort required to source the information. It explained that the charge was in line with those applied by neighbouring local authorities for similar searches of annual records, identifying charges of £50 levied by East Renfrewshire Council (unless an exact date of death was provided) and £46 by West Dunbartonshire Council. The Council advised that its slightly higher charge reflected the larger number of records held and the greater number of books and documents which might need to be searched to locate the relevant information.
42. The Council explained that the information to be supplied as a result of such a search would be as follows:
- confirmation of the Lair Number and Cemetery Section
  - the name and address of the Lair Owner (according to the Council’s records)
  - the name(s), date(s) of death and age(s) of the individuals(s) buried within the lair in question
  - information regarding arrangements for assistance in locating the grave.
- The charge, the Council advised, reflected the amount of work required to locate and compile the information, as opposed to simply the final summary of information provided.
43. The Council explained that its Bereavement Services Section had responsibility for compiling and managing the registers and books required in terms of the of the Burial Grounds (Scotland) Act 1855. These were primarily organised by date of burial and were currently only partially computerised. Generally (and in the case of the Eastern Necropolis) they were held in handwritten bound volumes. It listed the books held in relation to the cemetery in question, noting that they were large, handwritten and not always easy to read. Given their age and method of storage, a number of them were in extremely delicate condition and required careful handling. Each of these factors, the Council submitted, contributed to and increased the amount of time taken to source and collate the requested information. It did not believe the fact that Mr McKnight required only part of the information normally provided in relation to such a search reduced the amount of work required to locate the information he had requested.



44. Further details of the process involved in locating the information were obtained from the Council. The Council explained that this would involve first going to the section book to locate a certificate number, then find a further ledger and locate the names of the people in question. While acknowledging that this would not be the case in all instances, the Council submitted that the work involved could be time-consuming, intricate and specialised. For this reason, a charge was applied.
45. The Council was given a further opportunity to explain why the information Mr McKnight was seeking should be considered “value added”. It submitted that the information, while held by the Council, had to be analysed with reference to other documents in order to provide a response to Mr McKnight’s specific query. It defended its position of charging a fee for what it considered to be a non-statutory service, with a view to recouping a proportion of the costs it incurred in relation to both that service and its statutory functions with regard to burials.
46. Claiming some knowledge of the relevant systems, Mr McKnight did not agree that the provision of the information he required would involve the effort claimed by the Council. He noted that he did not require all of the information covered by the Council’s charge of £62 and suggested that it was inappropriate to apply a standard charge in respect of all requests of this kind. In his view, the Council should deal with each request on its own merits.
47. While the Commissioner has no specific definition of what should constitute a “value added” service, she is of the view that it must have some special characteristics setting it apart from the ordinary investment of time and resources required to deal with a request for information falling within the scope of section 1(1) of FOISA. As the Council appears to recognise in the definitions referred to in paragraph 40 above, relevant factors might include a requirement for particular professional skills or something of specific commercial value in the product of the service.
48. In this case, the Commissioner is not satisfied that the Council was justified in describing the location and provision of the information requested by Mr McKnight as a “value added” service. The process described by the Council appears to require familiarity with the relevant records and a degree of cross-referencing. The task may be rendered a degree more challenging by the nature and condition of the records, but (as the Council itself has pointed out) these are operational records with which the relevant staff must work in any event, as part of their day-to-day duties. Nothing has been identified to the Commissioner which sets the task apart from other work which might reasonably be described as responding to a request for information – and she cannot accept that it should be so set apart simply because the Council has identified a “package” of information for which the relevant charge should be levied.
49. In the particular circumstances of this case, therefore, the Commissioner is unable to accept the Council’s argument that the information was reasonably obtainable from it without making a request under FOISA, by virtue of being available on payment of the specified charge of £62.



50. It should be noted that FOISA permits Scottish public authorities to charge for responding to information requests in certain circumstances. There are specific rules on what can and cannot be charged for, how much an authority can charge and an upper limit beyond which a Scottish public authority does not have to comply with a request. These rules are set out in sections 9 and 12 of FOISA and in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations). While these were not the provisions being invoked by the Council in seeking to charge for the requested information, later in this decision the Commissioner will consider their relevance to any steps the Council is required to take to comply with Part 1 of FOISA.

*Access to the information from other sources*

51. Mr McKnight argued that the alternative sources of the information identified by the Council could not provide the information he was seeking. He said that staff at New Register House (General Register Office for Scotland – GROS) had referred him to the Council for the information, stating that they did not hold burial records. He provided copy correspondence to this effect.
52. The Council acknowledged that Mr McKnight had received this correspondence, but still understood New Register House held at least some burial records for Glasgow cemeteries.
53. In the light of these conflicting views, the investigating officer contacted GROS. GROS confirmed that while there was a statutory duty for the Registrar General for Scotland to maintain a register of births, deaths and marriages under the Registration of Births, Deaths and Marriages Act 1965, there was no provision to record burials and cremations. Consequently, they did not keep burial records.
54. GROS explained that they had started creating digital images of the historical cemetery records held by the Council in conjunction with a genealogy organisation, and that work remained ongoing. Images of the records for the Eastern Necropolis had been captured, but no indexing of the entries had been carried out. Therefore, for anyone to check who was buried in a specific lair, they would need to look through the digital images and find the relevant entry. They suggested that the individual should contact another source, such as the Mitchell library in Glasgow, to see if it could assist.
55. Mr McKnight stated that the relevant information held at the Mitchell Library was incomplete. Records for the Eastern Necropolis were held up to 1918 only. It was possible that burials had taken place in the relevant lairs after 1918 and only the Council's Bereavement Services Section held the complete records.



56. Mr McKnight also commented that the Mitchell Library held the burial records chronologically for each cemetery, by date of burial, without indices. As he did not know the identities of the persons buried, he could not determine the date of burial and therefore was unable to obtain the information readily from the library. He would need to scroll through a potentially large number of microfilm copies of the original records, which he submitted were of variable quality and in some cases very difficult to read. He understood the Council to hold records showing who was buried in each lair, by lair number, with the result that the search it would be required to undertake for the information would be considerably more straightforward than the one he would be required to carry out in the Mitchell Library.
57. The Council, on the other hand, considered the information to be accessible to Mr McKnight through the Mitchell Library, as a public library where members of the public could attend and access records. While acknowledging that the information was held on microfilm and not in digital format, it submitted that it consisted of copies of the various books held by the Council. While also acknowledging that Mr McKnight would require to search a number of records to locate the information he required, the Council submitted that these were the same searches it would require to carry out itself in order to locate the information for Mr McKnight. It noted that the original records were also, in places, difficult to read.
58. The Council noted that the Mitchell Library was part of Culture and Sport Glasgow and therefore not directly under the Council's control. It was the Council's understanding, however, that for the period from 1847 to 1918 the Mitchell Library held the same information as the Council's Bereavement Services Section in relation to the Eastern Necropolis (albeit in a different format, i.e. microfilm as opposed to hardcopy books). It believed this timeframe to cover Mr McKnight's requirements. The Council acknowledged that there might be gaps in the information held by Mitchell Library as a result of films being damaged, broken or lost, but advised that this could only be confirmed by the library itself. It believed the library to have specialist resources to assist Mr McKnight in his searching.
59. In the light of these potentially conflicting views, the investigating officer contacted the Mitchell Library with a view to understanding the information it held.
60. The Mitchell Library confirmed that it held information on who was buried in the specified lairs, provided the relevant burials had taken place between 27 August 1847 and 31 December 1918. The information was held on six spools of microfilm, which scanned the original ledger books and were arranged chronologically by date of burial. It acknowledged that the quality of the microfilms was variable and that it was not always clear what each column in the ledger related to.
61. The Mitchell Library also acknowledged that if the enquirer had no date of death or burial, and no name of the deceased, it would take considerable effort and time (which could not fairly be quantified) for them to search through every spool to find information which might relate to a particular section or lair. The library had only limited resources available to assist enquirers with searches and commented that where an enquirer did not have any dates or names, and could not take time to search every spool, or if they estimated that they required information falling outwith the period 1847-1918, they would generally refer the enquirer to the Council's Bereavement Services Section (which they knew had the lair books).



62. Having considered all of the above, the Commissioner cannot accept in the circumstance that the information sought by Mr McKnight was (at the time the Council dealt with his information request and request for review – or indeed that it is now) reasonably obtainable from the other sources identified by the Council. In the case of New Register House, she is satisfied that the information simply was (and is) not available.
63. In the case of the Mitchell Library, the Commissioner can find no basis in either Mr McKnight's information request or his request for review for concluding (as the Council appears to have done) that the 1847-1918 timeframe was adequate for the purposes of the request. No timeframe is specified in the request and there would appear to be no reason in the circumstances for inferring that the relevant burials must have taken place in 1918 or earlier. Consequently, the Commissioner does not believe that it was reasonable to regard the Mitchell Library's holdings as being capable of addressing the request adequately.
64. Even if the Mitchell Library had held microfilm copies of the relevant ledger books up to the present day, however, the Commissioner would not be satisfied that this would make the information Mr McKnight was seeking reasonably obtainable by him. Having considered all the submissions she has obtained on this point, the Commissioner is not persuaded that it would be reasonable to expect a member of the public in the applicant's position to go to the effort required in carrying out the necessary searches (which, given the records held and the form in which they are held, would appear to go considerably beyond what the Council would be required to do in responding to a request for the same information).
65. The Commissioner has therefore concluded that the information requested by Mr McKnight could not reasonably be obtained by him other than by making a request in terms of FOISA. Consequently she finds that this information could not be withheld under section 25(1) of FOISA.

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

66. Section 33(1)(b) 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). In this case, the Council submitted that its own commercial interests would be prejudiced substantially by disclosure. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
67. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish 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. The prejudice must be substantial, in other words of real and demonstrable significance.
68. The investigating officer, in accordance with section 49(3)(a), invited the Council to comment on Mr McKnight's application. In its comments, the Council stated that it also wished to rely on section 33(1)(b) of FOISA. Subsequently, during the investigation, the investigating officer sought further reasoning from the Council on the applicability of this exemption, and in particular to explain and evidence the relevant harm to the Council.



69. The Council explained that it was required by law to maintain burial records for the purposes of managing burial grounds and providing records to the Court, if required. It commented that it expended significant resources in complying with this statutory requirement. This “value added” service (i.e. making burial information available at a charge, for example for purposes of genealogical research) provided the Council with an opportunity to offset a small proportion of the costs incurred in relation to this function and also in relation to the provision of this information to the public. The Council contended that there was no widespread public interest in this information being provided to individual members of the public without the application of the appropriate charge.
70. It is the Commissioner's view that commercial interests in their clearest sense will relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of revenue generation. Such activity will commonly take place within a competitive environment. There is no requirement that these activities are profit-making before this exemption can be engaged, although it would be normal.
71. Given that section 33(1)(b) clearly acknowledges that public authorities can have commercial interests, the Commissioner accepts that its meaning should not be restricted to commercial activities (in the traditional sense) of a type that most public authorities will not undertake. In the circumstances, the Commissioner accepts the Council's contention that the provision of this service, which extends beyond the Council's statutory obligations in respect of the records in question and appears to be offered primarily for the purposes of revenue generation, can be considered to be a commercial activity. Consequently, she accepts that the Council has commercial interests in this regard.

*Would disclosure prejudice the Council's commercial interests substantially?*

72. The Council explained that it sought to provide the service at a charge to offset the costs of searches etc., but provided no reasoning to explain, or evidence to show, why disclosure of the information in question would have the detrimental effect it contended.
73. As the Commissioner has stressed in previous decisions, she will decide each case on an individual basis. In this case, the Commissioner is not persuaded by the submissions she has received from the Council that disclosure of the information requested by Mr McKnight would, or would be likely to, prejudice the Council's commercial interests substantially. While acknowledging that the activity in question might reasonably be characterised as commercial in nature (even if not, in this particular case, “value added” as the Council has also argued – see above), the Commissioner has not been provided with any further argument or evidence as to why any prejudice to the relevant commercial interests resulting from, disclosure should be considered substantial, in the context of the Council's overall commercial activity.



74. In inviting the Council's comments on Mr McKnight's application, as required by section 49(3)(a) of FOISA, the Council was referred on 3 May 2011 to the Commissioner's guide to investigations<sup>3</sup>. This guide makes it clear that it is the responsibility of the public authority to justify the way in which it dealt with the applicant's information request and subsequent request for review. It also makes it clear that if an authority's submissions are inadequate or fail adequately to justify the refusal of a request under Part 1 of FOISA or (as appropriate) under the EIRs, the Commissioner may order the authority to release the information. In this case, the investigating officer contacted the Council subsequent to the initial invitation to comment, in an attempt to seek evidence on the applicability of this exemption.
75. In the absence of persuasive arguments relating to the effects of disclosing this particular information on the Council's commercial interests, the Commissioner unable to accept that disclosure of the withheld information would, or would be likely to, prejudice substantially those commercial interests substantially.
76. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, she is not required to go on to consider the public interest contained in section 2(1)(b) of FOISA in relation to this exemption.

#### *The Fees Regulations*

77. The Commissioner has therefore concluded that the information requested by Mr McKnight is not exempt from disclosure under Part 2 of FOISA. However, as noted above, FOISA permits Scottish public authorities to charge for responding to information requests in certain circumstances and in line with rules set down in the Fees Regulations. From the submissions made by the Council, it is clear that the £62 charge put forward by the Council was not calculated in line with the Fees Regulations. In order to comply with Part 1 of FOISA, the Commissioner requires the Council to disclose the information to Mr McKnight or, if it is entitled to issue a fees notice under the Fees Regulations or to refuse to comply with the request on the basis that it would cost more than £600 to comply, to respond to Mr McKnight in line with sections 9 or 12 of FOISA respectively.

#### **Timescales**

78. Mr McKnight was also dissatisfied with the Council's failure to comply with the relevant statutory timescale in dealing with his requirement for review.
79. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.

<sup>3</sup> <http://www.itspublicknowledge.info/uploadedfiles/InvestigationsGuideJan2011.pdf>



80. As the Council acknowledged in its review response, it did not provide a response to Mr McKnight's requirement for review within the requisite 20 working days. Consequently, the Commissioner finds that the Council failed to comply with section 21(1) of FOISA. Given that it did respond on 15 November 2010, the Commissioner does not (in response to Mr McKnight's application) require the Council to take any action in respect of this failure.

## DECISION

The Commissioner finds that Glasgow City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McKnight. By incorrectly withholding the information in terms of sections 25(1) and 33(1)(b) of FOISA, the Council failed to comply with section 1(1) of FOISA.

In order to comply with Part 1 of FOISA, the Commissioner therefore requires the Council to provide Mr McKnight with the information withheld, or to issue a notice to Mr McKnight in terms of sections 9 or 12 of FOISA by 15 May 2012

The Commissioner also finds that the Council failed to respond to Mr McKnight's requirement for review within the timescale specified in section 21(1) of FOISA. The Commissioner does not require the Council to take any action in respect of this failure, in response to Mr McKnight's application.

## Appeal

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Should either Mr McKnight or Glasgow City 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.

...

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

##### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...



## 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-
  - (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if-
    - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,  
members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

## 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).  
...



## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...