

# Decision Notice 065/2020

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## Scotstoun Sport Stadium

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**Applicant: The Applicant**

**Public authority: Culture and Sport Glasgow**

**Case Ref: 201901760**



Scottish Information  
Commissioner

## Summary

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Glasgow Life was asked for information concerning Scotstoun Sports Stadium.

Glasgow Life withheld some of the information requested, disclosure of which, it believed, would prejudice the effective conduct of public affairs. It stated it held no information for other parts of the request.

During the investigation, Glasgow Life changed its position and disclosed the majority of the information identified, including some further information it had identified during the investigation. It withheld the remainder for reasons of confidentiality and prejudice to commercial interests.

The Commissioner found that Glasgow Life had partially breached FOISA in responding to the request. While he was satisfied that Glasgow Life had correctly withheld some legal advice, he found it had failed to fully identify all relevant information until during his investigation, and had wrongly withheld some other information under certain exemptions.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 30(b)(ii) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 28 June 2019, the Applicant made a request for information to Culture and Sport Glasgow (which trades as, and is referred to in this decision as, "Glasgow Life"). The information requested was:

*Disclosure is sought on how the principles of regularity and probity are being upheld at a public services amenity by the ALEO Glasgow Life and the asset owner Glasgow City Council. There is a public interest in accountability related to the growing influence of Scottish Rugby Union (SRU) that conflicts with sport, physical recreation and open space to prejudice the community and the long standing shared primary stadium user - Victoria Park City of Glasgow Athletics Club.*

*Disclose in a Portable Document Format (PDF) from a base date of 21 September 2017:*

- (a) *Reports, minutes of meetings or correspondence between Glasgow Life, SRU and any other relevant party confirming discussions and supposed agreement for SRU to fund, and/or part fund, a development plan for the expansion of spectator capacity at Scotstoun Sports Stadium. To include identification of funding sources and preliminary costs for compensatory work elements that include a new international standard all-weather athletics track, stadia with appropriate capacity, floodlights, and supporting facilities within the land-locked site.*

- (b) *Committee Reports to Glasgow City Council, Executive Report(s), Minutes of Meetings or internal/external correspondence seeking a legal opinion, development policy compliance, Audit Scotland on any proposed revision to the SRU Tenancy Agreement OR replacement by a Lease Agreement to provide 'term' security for alleged SRU capital investment.*
  - (c) *Related correspondence with stakeholders, partnership funding organisations (Sportscotland etc.), match sponsors, shared stadium users – e.g. Victoria Park City of Glasgow Athletics Club and other users of the athletics facilities, other voluntary organisations, sports groups, allotment group and community councils.*
  - (d) *Correspondence with Land and Environmental Services with regard procurement of Work Plan Ranking 2: Scotstoun - protected parking extension into Jordanhill and Whiteinch.*
2. Having received no response within 20 working days, the Applicant wrote to Glasgow Life on 2 August 2019, requesting a review based on its failure to respond.
  3. On 4 September 2019, having received no response to his requirement for review within 20 working days, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA based on Glasgow Life's failure to respond.
  4. Glasgow Life notified the Applicant of the outcome of its review on 9 September 2019. It recognised its earlier failure to respond. For parts (b), (c) and (d) of the request, it informed the Applicant that it held no information and applied section 17(1) (Notice that Information is not held) of FOISA to those parts.
  5. For part (a), Glasgow Life withheld notes of meetings and correspondence under section 30(b)(ii) (Prejudice to effective conduct of public affairs) of FOISA. This information, Glasgow Life explained, related to the potential development of the stadium and reflected early dialogue between stakeholders. As no decision on the proposal had been made, Glasgow Life believed premature disclosure of this information would substantially inhibit the free and frank exchange of views. In Glasgow Life's view, the public interest in openness and transparency was outweighed by that in protecting the quality and effectiveness of the decision-making process.
  6. On 20 September 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Glasgow Life's review because he disagreed with the exemption applied to the information identified for part (a) of the request, arguing that the public interest lay in its disclosure. He also doubted that Glasgow Life did not hold any information for parts (b), (c) and (d).
  7. On 26 September 2019, the Commissioner issued *Decision 139/2019 The Applicant and Culture and Sport Glasgow*<sup>1</sup>, finding that Glasgow Life failed to comply with section 10(1) (Time for compliance) and section 21(1) (Review by Scottish public authority) of FOISA. However, given that by that time Glasgow Life had issued its substantive review outcome, he did not require it to take any further action.

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<sup>1</sup> <http://itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201901660.aspx>

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
9. On 8 October 2019, Glasgow Life was notified in writing that the Applicant had made a valid application and was asked to send the Commissioner the information withheld from the Applicant. Glasgow Life provided the information and the case was allocated to an investigating officer.
10. In providing the withheld information to the Commissioner, Glasgow Life stated that it wished to change its position. It now identified that it held information for parts (b) and (c), but still maintained that no information was held for part (d). Glasgow Life stated it no longer wished to withhold the majority of the information under section 30(b)(ii), but considered the remainder to be exempt under section 30(b)(ii) and section 36(1) (Confidentiality), with some personal data being withheld under section 38(1)(b) (Personal information).
11. On examination of the withheld information provided to the Commissioner, the investigating officer noted that it covered only part of the period stipulated in the request. This was raised with Glasgow Life. Following further searches, Glasgow Life informed the investigating officer that additional information had been identified, copies of which were provided to the Commissioner.
12. On 26 and 29 November 2019, Glasgow Life disclosed to the Applicant the majority of the information identified (contained in Documents 1-71). It informed him it was now withholding the remainder (variously) under the exemptions in section 30(b)(ii), section 33(1)(b) (Commercial interests and the economy), section 36(1) (Confidentiality) and section 39(1) (Health, safety and the environment) of FOISA, with some personal data withheld under section 38(1)(b).
13. Following this further disclosure by Glasgow Life, the Applicant confirmed he was raising no dissatisfaction with the following:
  - the personal data withheld under section 38(1)(b).
  - any financial information in Document 52, withheld under section 33(1)(b).
  - the information in Documents 50 and 51 (earlier drafts of Document 52) withheld under section 30(b)(ii), given all the information therein (with the exception of some financial information) was also present in Document 52 (which had been disclosed, minus the financial information).
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Glasgow Life was invited to comment on this application and to answer specific questions. These focused on the searches carried out by Glasgow Life to identify the information falling within scope, and whether it held any further information. Glasgow Life was also asked to comment on its justification for withholding information under the exemptions claimed.
15. As Glasgow Life was withholding some information under exemptions which are subject to the public interest test, the Applicant was also invited to comment on the public interest in disclosure of the information.

16. Glasgow Life provided its submissions to the Commissioner, together with additional information it had identified as falling within the scope of the request (Documents 72-80). Glasgow Life confirmed that some of this additional information fell within the scope of part (d) of the request. It disclosed this further information to the Applicant on 10 and 17 January 2020, with the exception of some personal data which it withheld under section 38(1)(b). Glasgow Life also withdrew its earlier reliance on section 39(1)(b) to withhold any information.
17. The Applicant also provided his comments on the public interest in disclosure of the remaining withheld information.

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

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18. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and Glasgow Life. He is satisfied that no matter of relevance has been overlooked.

### **Glasgow Life's change of position during the investigation**

19. As explained above, during the investigation, Glasgow Life provided submissions to the effect that some information, originally withheld, could now be disclosed. This information had been withheld at review stage under the exemption in section 30(b)(ii) of FOISA. Glasgow Life disclosed this information to the Applicant on 26 November 2019 (with some personal data redacted under section 38(1)(b)).
20. Glasgow Life submitted that it had reconsidered its position and had elected to disclose the majority of the information initially withheld at review stage under section 30(b)(ii), and wished to withhold the remainder under the exemption in section 36(1) of FOISA.
21. Glasgow Life provided no submissions explaining why this information, now disclosed, was correctly withheld at the time it dealt with the requirement for review, so the Commissioner can only conclude that Glasgow Life was not entitled to withhold that information at that time, and therefore breached section 1(1) of FOISA in doing so.
22. The Commissioner will go on to consider whether or not Glasgow Life was entitled to rely on the exemptions claimed for the remaining withheld information. Given that the Applicant confirmed he was raising no dissatisfaction with any personal data withheld under section 38(1)(b), this matter does not fall within the scope of the Commissioner's investigation.

### **Whether Glasgow Life held any further information**

23. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
24. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what

relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

25. Glasgow Life explained the searches and enquiries it had undertaken to identify what information it held, and whether it held any further information.
26. In respect of the searches initially carried out, Glasgow Life submitted the following:
  - The request was initially passed to the Sports Operations Manager with oversight of the Stadium. Not having had direct involvement in the subject matter of the request, and having assessed that Glasgow Life's Head of Sport and its Director of Sport and Events were most likely to have knowledge of the matter, the Sports Operations Manager forwarded the request to their respective Personal Assistants to facilitate searches of their emails and files.
  - The request was also forwarded to the General Manager at Scotstoun Sports Campus to carry out searches of emails and files. Due to only being in post for part of the time covered by the request, he forwarded the request to his predecessor for the same purpose.
  - No specific folder or file was dedicated to the information relevant to the request. However, appropriate searches of emails and files were carried out using the request itself to apply search terms, and relevant information was identified and retrieved.
  - Glasgow Life recognised the delays in pulling the information together and responding to the Applicant.
27. As referred to previously, at the start of the investigation, the investigating officer queried why the withheld information provided to the Commissioner only appeared to cover part of the time period set out in the request. In response, Glasgow Life explained that there appeared to have been an error with the searches initially carried out, which had resulted in only part of the information being identified (i.e. up to a year prior to the request date). Whilst Glasgow Life was unable to conclusively state why some documentation had been initially missed, it appeared likely that this was due to an administrative error. Glasgow Life believed the date on the search instructions had been erroneously changed from 28 June 2019 to 28 June 2018.
28. In respect of the searches carried out at the start of the investigation (i.e. using the correct search dates), Glasgow Life submitted the following:
  - The Sports Operations Manager forwarded the request to the Head of Sports' Personal Assistant, who carried out searches of emails and files. Further information was identified and retrieved.
  - Further searches of the Director of Sports and Events' emails and files were carried out, and further information was identified and retrieved.
  - Due to the limited Glasgow Life staff involved in the subject matter, it did not consider the searches needed to be widened from those listed above.
29. Glasgow Life submitted that, during the investigation, it had conducted a further review of documentation to ensure all information strands had been exhausted. During this process, it identified two individuals who had not been involved with the earlier searches, as it was believed they would hold no additional information, given their roles in the project. These

individuals were duly asked to carry out searches of their emails, which resulted in further information being identified.

*The Commissioner's conclusions on the information held*

30. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, Glasgow Life had taken adequate, proportionate steps in the circumstances to establish the extent of information held that was relevant to the request.
31. He has considered the reasons provided by Glasgow Life which explain why it did not identify all of the information captured by the request until during the investigation, relating to incorrect search dates being used and relevant individuals who held information not being consulted.
32. In the Commissioner's view, had these deficiencies not been present, the searches described by Glasgow Life would have been capable of identifying all of the information held and relevant to the request. However, the Commissioner is satisfied, on the balance of probabilities, that – by the conclusion of the investigation – Glasgow Life was entitled to conclude that it did not hold any further information falling within scope, and that all relevant information had been identified.
33. The Commissioner is concerned that it took a number of attempts during the investigation for Glasgow Life to fully identify all of the information falling within the scope of the request. This was something it should have addressed when responding to the requirement for review, at the latest. Given that it was not resolved definitively until during the investigation, it is clear that Glasgow Life failed to take adequate steps to identify and locate all the relevant information when responding to the Applicant. In this respect, the Commissioner finds that Glasgow Life failed to comply with section 1(1) of FOISA.
34. Not only was this a breach of FOISA, it resulted in avoidable delay for the Applicant and avoidable expense to the public purse. The Commissioner would strongly urge Glasgow Life to reflect on its FOI practice with a view to avoiding similar situations in the future so that applicants receive the information they request, or an explanation as to why it is being withheld, at the earliest opportunity.

**Section 17(1) – Notice that information is not held**

35. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
36. As explained above, the information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
37. In this case, Glasgow Life informed the Applicant, at review stage, that it did not hold any information for parts (b), (c) and (d) of his request, and applied section 17(1) of FOISA to those parts.
38. During the investigation, and as explained above, Glasgow Life identified some further information which, variously, fell within the scope of all parts of the request.

39. As set out above, having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, Glasgow Life had taken adequate, proportionate steps to identify and locate any information it held and which fell within the scope of the request.
40. However, given its change of position in identifying, during the investigation, information that fell within the scope of parts (b), (c) and (d), the Commissioner concludes that Glasgow Life was not entitled to rely on section 17(1) of FOISA in relation to these parts of the request. He has found that in failing to provide this information earlier, Glasgow Life breached section 1(1) of FOISA.
41. As Glasgow Life has disclosed the majority of this information to the Applicant during the investigation, with some personal data redacted under section 38(1)(b) of FOISA, he does not require Glasgow Life to take any further action in respect of this failure.
42. He will now go on to consider whether Glasgow Life was entitled to withhold the remaining information under the exemptions claimed. As stated above, given the Applicant confirmed that he was raising no dissatisfaction with any personal data withheld under section 38(1)(b), this matter is not considered to fall within the scope of the Commissioner's investigation.

### **Section 36(1) – Confidentiality**

43. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege – which, Glasgow Life argued, applied in this case.
44. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
  - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
  - (ii) The legal adviser must be acting in his/her professional capacity, and
  - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
45. Glasgow Life submitted that section 36(1) of FOISA applied to some information withheld in Document 1, the content of which related to, or referenced, communications with a legal adviser acting in their professional capacity, where Glasgow Life was the client and where legal advice was being provided.
46. In its submissions to the Commissioner, Glasgow Life explained that it was an Arm's Length External Organisation (ALEO) wholly-owned by Glasgow City Council (the Council), and had a "Transitional Services Agreement" with the Council, under which the Council provided legal advice to Glasgow Life. This was delivered by a team of dedicated solicitors within the Council, of which the individual providing the legal advice under consideration here was, at the relevant time, the manager (and also a qualified solicitor employed by the Council).
47. Glasgow Life submitted that the information was subject to legal advice privilege, being contained in an email to certain Glasgow Life/Council staff from the legal adviser.



48. Glasgow Life confirmed that the information had the necessary quality of confidence. It was the opinion of the legal adviser on the current/potential future situation, and her view of potential relevant issues, endorsed with a statement that the email was “strictly privileged and confidential”. Glasgow Life stated that the information was not in the public domain, and legal professional privilege had not been waived.
49. Having considered Glasgow Life’s submissions, together with content of the information and the circumstances under which it was obtained by Glasgow Life, the Commissioner is satisfied that the information in question meets the conditions set out in paragraph 44 above and, therefore, is subject to legal advice privilege.
50. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that the information in question remained confidential at the time Glasgow Life dealt with the Applicant’s requirement for review (and that it remains so now).
51. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged for this information.

*Public interest test – section 36(1)*

52. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA. This states that a Scottish public authority may only withhold information under certain exemptions (including section 36(1)) where, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

The Applicant’s comments

53. In his submissions to the Commissioner, the Applicant believed that disclosure of the information would contribute to a debate on a significant matter of public interest. He argued that disclosure would:
  - provide policy compliance with Glasgow Community Plan and Community Action Plan 2018-20
  - enhance transparency and scrutiny of decision-making processes to improve accountability and participation between Glasgow Life and the community
  - obtain clarity in any proposed risk assessment highlighting deviation from the primary tenancy agreement between the SRU and Glasgow Life, including SRU acquisition to support a business case to obtain capital investment for a major development to further increase spectator capacity and hospitality at the site
  - achieve transparency in communications with Scottish Water with regard to potential acquisition of land known as the Victoria Park Allotments for the purposes of development
  - reveal malpractice or enable the correction of misleading claims specifically made in information previously disclosed, and

- keep the public adequately informed of any pending development threat to public health or safety, or to the environment.

### Glasgow Life's submissions

54. In its submissions, Glasgow Life acknowledged the general public interest in openness and transparency and in the running of public facilities.
55. However, Glasgow Life believed this was outweighed by the strong and well-established public interest in maintaining confidentiality of communications in legal proceedings, and in being able to obtain legal advice without fear of such communications or advice being made public. In Glasgow Life's view, this could only be overturned where there were particular circumstances which provided a real and significant public interest in disclosure. Glasgow Life submitted there was no such public interest here as the information was very general, referencing potential future development.

### The Commissioner's views on the public interest – section 36(1)

56. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)<sup>2</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
57. The Commissioner accepts that there is a considerable public interest in disclosure of legal advice, in terms of accountability and transparency, particularly surrounding matters concerning potential future developments and their resulting impact on the public in general.
58. The Commissioner recognises that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. In this particular case, he has given weight to the Applicant's views regarding the public interest in disclosure of information that would provide transparency and scrutiny of the decision-making process, given that any future development would undoubtedly affect those members of the public who were either resident in the area or users of the Stadium.
59. Having considered the public interest arguments on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information was sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
60. In conclusion, after careful consideration, the Commissioner is satisfied that Glasgow Life correctly withheld the information under consideration here in terms of section 36(1) of FOISA.

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<sup>2</sup> [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

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

61. Section 33(1)(b) of FOISA provides that information is exempt information if 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). This exemption is also subject to the public interest test in section 2(1)(b) of FOISA.
62. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
- (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
  - (ii) the nature of those commercial interests, and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
63. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

### *The Applicant's submissions*

64. The Applicant's submissions for section 33(1)(b) largely reflect those set out above under section 36(1) and need not be replicated here. In addition to these, the Applicant also believed disclosure would provide an understanding of the proposed scale and impact of the development, by publishing the architectural visualisations withheld in Document 61.

### *Glasgow Life's submissions*

65. In its submissions to the Commissioner, Glasgow Life confirmed it wished to maintain reliance on section 33(1)(b) to withhold certain information in pages 6-9 of Document 61 which comprised artists' impressions and plans for a potential redevelopment of the venue.

### Commercial interests

66. Glasgow Life submitted that the commercial interests of Glasgow Warriors – an SRU professional rugby team who train and play at Scotstoun (and who commissioned the relevant drawings) – would be prejudiced substantially by disclosure of the withheld information.
67. Glasgow Life stated that the commercial interests in question were income from ticket/hospitality sales and sponsorship, and Glasgow Warriors' ability to obtain best value from future tendering and contractual processes.
68. Having considered Glasgow Life's submissions on this point, the Commissioner is satisfied that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. These concern the generation of income by a professional body, and its need to ensure that it obtains best value when tendering for and negotiating contracts.
69. The Commissioner accepts that Glasgow Life has identified commercial interests relating to Glasgow Warriors, which might be adversely impacted should disclosure of the information prejudice those commercial interests.

70. The Commissioner must now go on to consider whether the commercial interests identified by Glasgow Life would, or would be likely to, be prejudiced substantially by disclosure of the information.

How would disclosure prejudice these commercial interests?

71. Glasgow Life submitted that the withheld images and drawings marked the start of a process of potential redevelopment, but were not the final design: indeed, subsequent discussions had indicated that any proposal was likely to be markedly different. In Glasgow Life's view, disclosure would attract significant media speculation and scrutiny, despite the information no longer being accurate. Were the drawings to be disclosed and not implemented as shown (or even at all), Glasgow Life believed this would cause significant reputational damage to Glasgow Warriors which, in turn, would adversely impact ticket/hospitality sales and sponsorship, thereby substantially prejudicing Glasgow Warriors' commercial interests.
72. Glasgow Life argued that if and when development proposals were finalised, it would be Glasgow Warriors' intention to undertake a targeted launch, along with supplementary sales and package information to generate pre-sales interest. In Glasgow Life's view, early disclosure of likely inaccurate images would significantly impact such a launch, and cause significant detrimental impact to ticket, hospitality and sponsorship sales that would otherwise be generated.
73. Further, Glasgow Life submitted, if and when the development were to proceed, disclosure of the information would likely harm future tendering exercises or contract negotiations undertaken by Glasgow Warriors in relation to the development. It believed perceived knowledge of these likely inaccurate plans would influence any proposals (including prices) made by potential suppliers in response to tenders, thus preventing Glasgow Warriors from obtaining best value solutions, and substantially prejudicing its commercial interests in this regard.

Third party comments

74. In its submissions to the Commissioner, Glasgow Life stated it had previously held informal discussions with Glasgow Warriors concerning the relevant information, confirming it had obtained their formal views during the investigation.
75. Glasgow Warriors' views, in the main, reflected Glasgow Life's submissions on commercial interests as set out above. In summary, Glasgow Warriors submitted that:
- the drawings were conceptual and represented the start of a process
  - significant work was ongoing to clarify what was required in terms of stadium size, capacity and seating quality
  - recent discussions demonstrated that the proposal was already significantly different from these drawings (which were by no means the finalised design), and
  - no decision had been made on the project (including final design/capacity).
76. Glasgow Warriors contended that disclosure would:
- impair its ability to maximise publicity when launching the project (once agreed), alongside supplementary sales/package information to generate pre-sales interest. This would materially reduce and prejudice the impact of any commercial launch.

- cause significant reputational damage, should the plans change significantly (having already changed) or not go ahead, and impair its ability to consult with stakeholders including the general public, local stakeholders and its fan base.
- impair its ability to negotiate with prospective suppliers/contractors, and adversely impact any necessary tendering processes.

*The Commissioner's views – section 33(1)(b)*

77. The Commissioner has carefully considered all the arguments put forward by both parties, the third party views and the withheld information itself.
78. Having done so, he is not convinced that disclosure of the information would lead to the harm envisaged by Glasgow Life. Glasgow Life has explained that the drawings are, through the passage of time, now likely inaccurate, a point which Glasgow Warriors confirmed in providing third party views.
79. Turning to the withheld information itself, the Commissioner does not consider the images and drawings provide sufficient detail to be able to determine capacity or seat design. Without being able to do so, he finds it difficult to agree that disclosure would prejudice ticket, hospitality and sponsorship sales.
80. Acknowledging Glasgow Life's claims that disclosure might attract media attention and soften the impact of any future commercial launch, the Commissioner considers that this is unlikely to impact, to any great extent, future sales, as claimed by Glasgow Life (and endorsed by Glasgow Warriors), particularly given Glasgow Warriors' high profile and ticket sell-outs (as referenced in the information on page 3 of Document 61, already disclosed to the Applicant).
81. The Commissioner notes that Glasgow Life has argued that disclosure of likely inaccurate plans would cause reputational damage to Glasgow Warriors were the project to proceed with different plans, or not at all (a view also taken by Glasgow Warriors). However, it is already in the public domain that future stadium development at Scotstoun is being discussed, and so the Commissioner fails to see how disclosure of this information, in particular, would cause any more reputational damage (were plans to change or fall through), in addition to any which might result regardless of disclosure. It is certainly not apparent how acknowledged inaccuracies, for perfectly intelligible reasons, should impact in any way on Glasgow Warriors' reputation or ability to consult on the development.
82. Similarly, the Commissioner is not satisfied that Glasgow Life has fully demonstrated how disclosure of this particular information, now deemed likely to be inaccurate, would impair any future tendering exercise concerning the development. In his view, any future tenders would require to be based on an up-to-date specification, in line with planning permissions. It seems extremely unlikely that competent contractors would base their proposals on anything else. As such, the Commissioner fails to see how disclosure would lead to Glasgow Warriors being impaired from obtaining best value, due to bids being influenced by the disclosure of information now deemed likely to be inaccurate.
83. In conclusion, the Commissioner is not satisfied that disclosure of the remaining information in Document 61 would, or would be likely to, prejudice substantially the commercial interests of Glasgow Warriors, in the manner claimed by Glasgow Life. In any case, if the question of inaccuracy remains of any concern, it can quite readily be explained when the information is disclosed.

84. The Commissioner therefore finds that Glasgow Life wrongly withheld this information under section 33(1)(b) of FOISA and requires it to be disclosed to the Applicant. Given that he has found this information to have been wrongly withheld under the exemption, he is not required to go on to consider the public interest for this particular information.

## Handling issues

85. As noted above, the Commissioner is concerned that it took a number of attempts during the investigation for Glasgow Life to fully identify all the information held falling within the scope of the request.

86. Section 6 of Part 2 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004<sup>3</sup> (the Section 60 Code) provides good practice advice on searching for information, advising on factors to be considered in relation to the scope and focus of searches, and on maintaining records of searches carried out.

87. Conducting thorough and focused searches, identifying and retrieving all relevant information at an early stage, and retaining records of searches carried out, can save a lot of time and work in the longer run. An unnecessary application to the Commissioner may be avoided in this way. If there is an application, adequate records of earlier searches will provide evidence and reduce the amount of work required during the Commissioner's investigation.

88. The Commissioner would draw Glasgow Life's attention (and that of all Scottish public authorities) to Module 2 of the Self-Assessment Toolkit "Searching for, Locating and Retrieving Information"<sup>4</sup>. This resource is intended to assist authorities by giving them a tool which they can use to evaluate and, where necessary, improve practice in searching for, locating, identifying and retrieving information.

89. In its submissions to the Commissioner, Glasgow Life recognised, and apologised for, the deficiencies in its handling of this request. It explained it had recently significantly altered its processes and procedures for handling information requests, reviews and appeals to the Commissioner. As an ALEO of the Council, Glasgow Life had moved its FOI processing to the Council's FOI team. In addition, a number of training workshops had been delivered to allow officers within Glasgow Life departments, with FOI responsibility, to work collaboratively and fully understand Glasgow Life's FOI obligations. In addition, a variety of FOI resource materials were now available to all staff on Glasgow Life's Intranet pages.

90. While the Commissioner welcomes the changes in practice recently adopted by Glasgow Life for handling information requests, he would ask it to reflect on the points above.

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<sup>3</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

<sup>4</sup> <http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkitIntroduction.aspx>

## Decision

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

The Commissioner finds that Glasgow Life correctly withheld some information under section 36(1) (Confidentiality) of FOISA, and so complied with Part 1 in that respect.

However, the Commissioner also finds that Glasgow Life failed to comply with section 1(1) of FOISA by:

- (i) failing to fully identify all information falling within the scope of the request until during his investigation;
- (ii) wrongly applying section 17(1) (Notice that information is not held) in its review outcome to parts (b), (c) and (d) of the request;
- (iii) wrongly withholding some information, at review stage, under section 30(b)(ii) (Prejudice to effective conduct of public affairs), and
- (iv) wrongly withholding some information under section 33(1)(b) (Commercial interests and the economy).

The Commissioner therefore requires Glasgow Life to disclose to the Applicant the information he has found to have been wrongly withheld under section 33(1)(b) of FOISA, by 24 July 2020.

Given that, by the end of the investigation, the Commissioner is satisfied that, on the balance of probabilities, all relevant information held by Glasgow Life had been identified (and the majority disclosed), he does not require Glasgow Life to take any action in respect of the failures identified at points (i), (ii) and (iii) above, in response to the Applicant's application.

## Appeal

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Should either the Applicant or Glasgow Life wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## Enforcement

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If Glasgow Life fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Glasgow Life has failed to comply. The Court has the right to inquire into the matter and may deal with Glasgow Life as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**8 June 2020**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

#### 17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but
- (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- ...



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

Information is exempt information if its disclosure under this Act-

...

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

...

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

...

### **33 Commercial interests and the economy**

(1) Information is exempt information if-

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

### **36 Confidentiality**

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

**Scottish Information Commissioner**

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