

# Decision Notice



Decision 105/2012 Mr Martin Dunn and Clackmannanshire Council

Internal audit report

Reference No: 201200502  
Decision Date: 29 June 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Martin Dunn asked Clackmannanshire Council (the Council) for an internal audit report regarding the award of a contract. The Council responded by disclosing the report, but withholding a single line of text, which it considered to be exempt from disclosure under section 30(c) of FOISA. Following a review, Mr Dunn remained dissatisfied with the Council's decision to withhold that information and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information under the exemption in section 30(c) of FOISA, which applies where the disclosure of information would, or would be likely to, prejudice substantially the effective conduct of public affairs.

## Relevant statutory provisions

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

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

## Background

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1. On 4 January 2012, Mr Dunn wrote to the Council requesting (amongst other things) a report on the investigation of a particular contract award.
2. The Council responded on 1 February 2012, disclosing a copy of the report, subject to the redaction of a single sentence which it considered to be exempt from disclosure under section 30(c) of FOISA.
3. On 6 February 2012, Mr Dunn emailed the Council requesting a review of its decision to withhold the redacted sentence. Mr Dunn commented that public authorities are subject to FOISA because they are publicly funded and should be open and accountable. He added that public authorities are judged by different standards than private companies and should not be able to hide any of their actions, even ones that make them look bad.



4. The Council notified Mr Dunn of the outcome of its review on 24 February 2012. The Council upheld its decision without amendment.
5. On 13 March 2012, Mr Dunn emailed the Commissioner, 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.
6. The application was validated by establishing that Mr Dunn 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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7. On 19 April 2012, the investigating officer notified the Council in writing that an application had been received from Mr Dunn. The information under consideration in this case was already held by the Commissioner as a result of it being considered in a previous investigation (which led to *Decision 056/2012 Mr John Waites and Clackmannanshire Council* (Mr Waites' decision)).
8. Before commencing an investigation, the investigating officer alerted Mr Dunn to the content of Mr Waites' decision, and indicated that the circumstances in relation to his request appeared to be substantially similar to those considered in that decision. Since the Commissioner had concluded in Mr Waites' decision that the Council had complied with Part 1 of FOISA when withholding the same information, Mr Dunn was asked whether he still required a decision from the Commissioner in relation to his own request.
9. Mr Dunn responded that he considered the circumstances of his own case were different, because any court action to which the information related had passed. He confirmed that he considered that the exemption in section 30(c) of FOISA did not apply to the withheld information and that he still required a decision to be issued by the Commissioner.
10. The investigating officer then contacted the Council and provided it with the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. In providing the Commissioner with comments, the Council referred to the submissions it had made in relation to Mr Waites' decision. The Council also provided an explanation as to why the events that had taken place since Mr Waites' decision did not affect its view that the information withheld from Mr Dunn was exempt from disclosure under section 30(c) of FOISA at the time of its handling of his request and subsequent request for review.



12. The investigating officer also contacted Mr Dunn during the investigation, seeking his submissions on the matters to be considered in the case. Mr Dunn's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Dunn and the Council (including those not summarised in this decision), and is satisfied that no matter of relevance has been overlooked.

### The time relevant for the Commissioner's decision

14. Before considering the substance of this case, the Commissioner would note that, as in any case, she has considered the circumstances that held at the time when the Council notified Mr Dunn of the outcome of its review of its handling of his request. That was 24 February 2012.
15. She recognises that, in this case, timing may be of some significance to the consideration of the exemption in section 30(c) and the associated public interest test. Mr Dunn has made submissions relating to differences in circumstances that held at the time when the Council responded to his initial request, and when it responded to his request for review. These circumstances are discussed in more detail below.
16. Mr Dunn has expressed the view that the Commissioner should be able to consider the Council's handling of his request in the first instance, and not just his request for review, and he has requested that the Commissioner address this point in her decision.
17. The Commissioner has considered all of Mr Dunn's comments, but must nonetheless focus on the time when the Council notified him of its review outcome for the purposes of her decision. The process of request making set out in FOISA requires that an applicant first makes their request, and if they are dissatisfied with the response received, they should submit a request for an internal review by the public authority. An applicant can only make an application for decision by the Commissioner once that internal review has been completed, and the application must set out the reasons why they are dissatisfied with the outcome of the review, as well as the reasons why they had been dissatisfied with the initial response.
18. The review process therefore allows a public authority the opportunity to reconsider its initial response, correct errors, and take into consideration any changes in circumstances since the initial request. It is that decision on review that is then the subject of the application to the Commissioner.



19. This conclusion was made clear by the Court of Session in *Scottish Ministers v Scottish Information Commissioner* [2007] CSIH 8<sup>1</sup>, in which the Lord President stated “It is correct that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of the Act” [i.e. the notice confirming the outcome of the public authority's review].
20. Given this clear conclusion from the Court of Session, the Commissioner considers that she would err in law if she were to consider whether the Council complied with Part 1 of FOISA when it first responded to Mr Dunn's request within this decision. She has therefore focused on the Council's decision and the circumstances that held at the point where it notified Mr Dunn of the outcome of its review, on 24 February 2012.

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

21. The Council applied the exemption in section 30(c) of FOISA to one sentence in the audit report. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". (The word "otherwise" is used here to differentiate this particular exemption from the other exemptions in section 30.) This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
22. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The Commissioner's guidance<sup>2</sup> on this exemption makes it clear that the damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal. Authorities should therefore consider disclosing the information asked for unless disclosure would (or would be likely to) cause real, actual and significant harm.
23. In its submissions, the Council explained that the audit report had been created following errors which occurred during a tendering exercise and which had been subject to multiple litigation processes. The outcome of some of the litigation prompted by the procurement was in the public domain by the date of the Council's review response.
24. The Council provided submissions which explained the nature and context of the withheld information, and why it believed disclosure would be likely to prejudice substantially the effective conduct of public affairs. Given that these submissions focussed on the actual content of the withheld information, the Commissioner cannot refer to them in detail in this decision. In essence, however, the Council explained that the information related to an ongoing court matter; although the matter had been heard in court, the sheriff had not issued his decision by the date of the Council's review response and consequently the circumstances that applied in Mr Waites' decision were still applicable to Mr Dunn's application.

<sup>1</sup> <http://www.scotcourts.gov.uk/opinions/2007CSIH08.html>

<sup>2</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&sID=117>



25. The Council submitted that disclosure would have a significant impact on financial and staff resources that could affect particular services or the provision of services in the future. As a minimum, it submitted that it could take one solicitor away from dealing with other matters surrounding essential service provision by the Council.
26. In his submissions, Mr Dunn made reference to the submissions in Mr Waites' decision, in particular that the exemption did not apply as the Council was relying on a series of hypothetical events that may possibly occur in the future and the application of section 30(c) states that there must at least be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied. The only harm envisaged would be from the possibility of the Council being sued, which is not certain, as it is not possible to confirm that in the first instance that the other party would sue or confirm with any certainty the outcome of a legal process.
27. In addition, Mr Dunn commented that, by the point when the Council notified him of the outcome of its review, the relevant court case had been heard. He considered that the exemption was therefore no longer applicable,

*Commissioner's conclusion*

28. The Council has provided detailed submissions to support its case that disclosure of the information would be likely to have the effect of undermining its position in a court action that had been heard by the point when it notified Mr Dunn of the outcome of its review. It also highlighted that the Court's judgement on that case was not issued until some time later, in March 2012.
29. The Commissioner recognises also that the possibility of an appeal being raised in relation to the Court's judgement therefore remained.
30. The Commissioner notes that Mr Dunn has referred to Mr Waites' submissions that the possibility of the Council being sued as a result of its disclosure was merely hypothetical. This is true, but the key question raised by the Council's submissions in this case is not whether the disclosure would prompt further additional court action, but whether disclosure at the time when the Council responded to Mr Dunn's request and request for review would have had the effect of undermining the Council's position in an ongoing court action.
31. Having considered all the points made by the Council and by Mr Dunn, the Commissioner accepts that disclosure of the withheld information at the relevant time would have been likely to have a detrimental effect on the Council's position in the ongoing court case, delaying the resolution of the matters before the court, and requiring additional costs (in both staff and financial resources) to be borne by the Council.



32. The Commissioner recognises that the test to be considered in relation to section 30(c) of FOISA is high, but she accepts in this instance that these effects would prejudice substantially the effective conduct of public affairs by the Council in relation to the Council's ability to defend itself robustly before the court in the matter under consideration, and to manage its staff and financial resources. In the circumstances, the Commissioner accepts that the exemption in section 30(c) applied at the relevant time to the information withheld.
33. However, as noted above, the exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.

### Consideration of the public interest test

34. With regard to the public interest in favour of disclosure, the Council acknowledged that there is a need for its decisions to be open and transparent and for it to provide assurances to the public that it is spending the public pound appropriately. However, in support of maintaining the exemption, the Council considered that there is a need not to waste public finances by putting the Council at risk of unnecessary litigation. It noted that the impact of the disputed contract does not significantly affect the wider public beyond those individuals concerned with litigation, although the public may have "an interest" in what has happened.
35. On balance, the Council explained that it had concluded that the public interest was better served by maintaining the exemption, because the benefits of not releasing outweighed those in favour of release. It submitted that this was particularly relevant in relation to the scrutiny of decisions that used public funds because such issues that could be explored using other avenues (such as court cases and news reporting).
36. In his submissions, Mr Dunn disagreed with the Council's submissions that the public interest is not served by release, since the decision only affects one party. Mr Dunn argued that this was flawed logic, commenting that where a local authority jeopardises public money by "mis-stating the truth in court proceedings or lying to third parties", it will only ever be one party which can benefit from disclosure. He maintained that, to promote openness and accountability, the information under consideration should be disclosed.
37. The Commissioner's guidance on the public interest test<sup>3</sup> states:

"The term [public interest] is not defined within [FOISA] but it has been variously described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that public interest does not mean "of interest to the public" but "in the interest of the public", i.e. it serves the interests of the public."
38. It is clear that disclosure of the information withheld in this case would be of interest to a party in a dispute with the Council about the relevant procurement. This is not necessarily a matter that is more generally of benefit to the public.

<sup>3</sup> <http://www.itspublicknowledge.info/legislation/briefings/publicinterest.htm>,



39. However, the Commissioner does recognise that there is a general public interest in the transparency and openness of public authorities, particularly in identifying improvements to be made in the tender process, and in ensuring that there is accountability in the expenditure of public funds. These are important considerations in the current case, since the report requested by Mr Dunn was produced in order that the Council could understand and learn from mistakes that were made in a tendering process. The Commissioner recognises that disclosure of the report in full would give a fuller understanding of the conclusions of that audit.
40. However, that public interest has been met to a significant extent by the disclosure of the remaining content of the report. The Commissioner's decision is considering only a single line of text. Having regard to the nature and content of that text, the Commissioner does not consider that its disclosure would contribute significantly to the public interest in ensuring transparency and accountability, or public understanding in relation to the particular tendering process concerned, or the Council's processes more generally.
41. While the Commissioner has given some weight to the public interest favouring disclosure in this case, she does not consider it to be sufficiently heavy to outweigh the considerable public interest in ensuring that the Council is not put at a disadvantage and can protect its interests in a matter which, at the time when the Council notified Mr Dunn had yet to be decided. The Commissioner considers there to be a substantial public interest in allowing public authorities, like any other person, to robustly defend their actions, without having to disclose information that may undermine its position either in current or future court cases (outwith the formal court disclosure processes).
42. On balance, having considered the particular information under consideration, and the submissions from both Mr Dunn and the Council, the Commissioner has concluded that, in this instance, and at the relevant time, the public interest in maintaining the exemption in section 30(c) outweighed that in the disclosure of the information withheld. She therefore concludes that the Council was entitled to withhold this information and that it complied with Part 1 of FOISA by doing so.

## DECISION

The Commissioner finds that Clackmannanshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Martin Dunn.



Decision 105/2012  
Mr Martin Dunn  
and Clackmannanshire Council



## **Appeal**

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

**Margaret Keyse**  
**Head of Enforcement**  
**29 June 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.

...

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

...

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