

# Decision Notice 156/2020

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## Kings College Tennis Club, Aberdeen

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**The Applicant**

**Public authority: University of Aberdeen**

**Case Ref: 202000119**



Scottish Information  
Commissioner

## Summary

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The University was asked for information relating to Kings College Tennis Club in Aberdeen.

The University withheld some information under the EIRs, as it considered it to be legally privileged. It also withheld some information under FOISA, as it considered disclosure would be prejudicial to conducting public affairs.

Following an investigation, the Commissioner accepted that the information had been correctly withheld.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 39(2) (Health, safety and the environment)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) (Duty to make available environmental information on request); 10(1), (2) and 5(d) (Exceptions from duty to make environmental information available)

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 7 August 2019, the Applicant made a request for information to the University of Aberdeen (the University). It requested all information held by the University relating to the single tennis court on University Road, the adjacent club hut, or to the Kings College Tennis Club (the Club) itself, for the period between 1 January 2004 and 8 August 2019.
2. By way of background, there is local concern with the University's plans to change the use of the grounds containing the tennis court to a multi-use games area for basketball and five a side football.
3. The University responded on 5 September 2019, providing some information while also withholding other information under several FOISA exemptions or EIRs exceptions.
4. On 30 October 2019 and 6 November 2019, the Applicant wrote to the University requesting a review of its decision. It believed that parts of the information being withheld should be disclosed and that further information should be held.
5. The University notified the Applicant of the outcome of its review on 27 November 2019. The University disclosed some further information to the Applicant. Part of one email chain was withheld under regulation 10(5)(d) of the EIRs and another email was withheld under section 30(b)(ii) of FOISA. The University advised the Applicant that it held no further information falling within the scope of the request.
6. On 22 January 2020, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the

enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated it was dissatisfied with the outcome of the University's review. It believed it was in the public interest for the information being withheld to be disclosed.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 24 January 2020, the University was notified in writing that the Applicant had made a valid application. The University was asked to send the Commissioner the information withheld from the Applicant. The University provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The University was invited to comment on this application and to answer specific questions. These related to the University's reasons for applying the exemption and exception referred to in paragraph 5 to the withheld information and to its views on the public interest in disclosure.
10. The Applicant was also asked why it believed it was in the public interest for the information to be disclosed.
11. Submissions were received from both the University and the Applicant.

## Commissioner's analysis and findings

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

### FOISA or EIRs?

13. "Environmental information" is defined in regulation 2(1) of the EIRs (parts (a) and (c) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
14. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup> and need not be repeated here. However, he will reiterate some of the key points which are relevant in this case:
  - (i) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.aspx>

- (ii) Any request for environmental information, therefore, must be dealt with under the EIRs.
  - (iii) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
15. The University considered that the information in the partially withheld email was environmental given that it concerns the use of an area of ground as a tennis court and the obligations on the University under an agreement with the Club to continue to use the land for that purpose. The University considered this to be information on a measure and activity that affects the state of the elements of the environment and that it is therefore covered by definitions (a) and (c) of environmental information in regulation 2(1) of the EIRs. The University confirmed that it wished to rely on section 39(2) of FOISA for responding to that part of the request.
  16. Having considered the nature and content of the withheld information, the Commissioner is satisfied that the information in the partially withheld email comprises environmental information as defined within regulation 2(1) of the EIRs. It concerns the use of a specified piece of land and a potential change of use of that land, and so concerns the state of the elements of the environment, such as air and atmosphere referred to in part (a) of the definition of environmental information, and concerns administrative factors likely to affect these elements of the environment as referred to in part (c) of the definition of environmental information.
  17. In the circumstances, the Commissioner also concludes that the exemption in section 39(2) of FOISA was correctly applied by the University to this information.
  18. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
  19. The Commissioner therefore concludes that the University was correct to apply section 39(2) of FOISA, and consider this information under the EIRs.
  20. He will now go on to consider the University's application of regulation 10(5)(d) to this information.

### **Regulation 10(5)(d) of the EIRs**

21. The University withheld legal advice it had obtained from its legal adviser relating to the University's rights and obligations under an agreement with the Club under regulation 10(5)(d).
22. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulations 10(4) and (5) applies to that information and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception or exceptions. It should be noted that, under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure.

23. The exception in regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the authority's proceedings where such confidentiality is provided for by law.
24. In its publication, *The Aarhus Convention: an implementation guide*, the Economic Commission for Europe (the United Nations agency responsible for the Convention the EIRs are designed to implement) notes, at page 87<sup>2</sup>, that the Convention does not comprehensively define "proceedings of public authorities". It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence.
25. The University submitted that the common law of Scotland provides protection for communications between a legal adviser and client for the purpose of seeking and providing legal advice. It cited, by way of example, a statement of that principle in *Narden Services Ltd v Inverness Retail & Business Park Ltd & Ors* [2008] CSIH 14 at paragraph 11.<sup>3</sup>
26. The Commissioner accepts that the "confidentiality" in regulation 10(5)(d) may either arise from a specific statutory provision or, as the University has argued here, from the common law of confidence.
27. For information to be confidential under the common law, two main requirements must be met. These are:
  - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already; and
  - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.
28. The confidentiality of communications, which embraces the rules and principles applying to legal professional privilege, is recognised in common law.
29. As noted in paragraph 27, to have the necessary quality of confidence, the information must not be generally accessible. There is nothing, either in the withheld information or elsewhere, to suggest that this particular correspondence has been made public or disclosed to any sector of the public.
30. The information must also have been communicated in circumstances importing an obligation of confidentiality. Given that the communication in question is a communication from a legal adviser acting in a professional capacity, which occurred in the context of the legal adviser's professional relationship with their client, the Commissioner is also satisfied that the exchange was communicated in circumstances importing an obligation of confidentiality.
31. It is not sufficient, of course, for the information to be confidential for the exception in regulation 10(5)(d) to apply. The Commissioner must also consider whether disclosing the

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<sup>2</sup>[https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

<sup>3</sup> [https://www.bailii.org/scot/cases/ScotCS/2008/CSIH\\_14.html](https://www.bailii.org/scot/cases/ScotCS/2008/CSIH_14.html)

legal advice would, or would be likely to, prejudice substantially the confidentiality of the proceedings.

32. The University noted that that the legal advice received by it outlined both the strengths and weaknesses of the positions adopted by the parties in a dispute. It considered that disclosing the advice would prejudice substantially its ability to receive full and frank advice to inform its stance on the management of its estate.
33. The test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. Given the content of the information and its inherently confidential nature, and having taken full account of the University's arguments, the Commissioner accepts that making this information available would, or would be likely to, prejudice substantially the confidentiality of the University's proceedings. Therefore, the Commissioner is satisfied that the exception in regulation 10(5)(d) was correctly applied.

#### *The public interest*

34. The Commissioner must now consider whether the public interest in making the information available was outweighed by the public interest in maintaining that exception.

#### Submissions from the Applicant

35. The Applicant submitted that it is a matter of strong public interest that the University should not dismiss the Club's claims to rights over the courts.
36. The Applicant believes it is possible that the release of the information might throw some light on the attitudes or views of University staff towards the Club or any of its members or supporters, or might serve to explain some of the underlying purposes behind the University's actions regarding the tennis court in recent years. In its view, this would serve the public interest.
37. It was the view of the Applicant that the release of an email containing advice from a University legal adviser concerning a written agreement between the University and the Club would give the necessary clarification of the whole situation to all those who are anxious about it. It is necessary, in the Applicant's view, for the public to come to an understanding of the basis of the University's current position vis-d-vis the Club's claims, which up until now, the Applicant believed, had not been forthcoming.
38. The Applicant referred to the University's claim that there is a strong inherent public interest in the ability of the University to protect legal advice on a disputed issue in order to defend the interests of the University community. The Applicant argued that this interpretation of the definition of the term "the University" was unacceptably narrow
39. The Applicant submitted that, as a publicly funded body of a particular character with a far-reaching and diverse membership and community, the University had to represent the interests not only of employees, and trustees and administrators of the University, but also of the wider congregation of Members of the University, including staff, former staff, and all Alumni, who are de facto Members of the General Council of the University, one of its Governing Bodies. Any legal advice the University received from its in-house legal adviser relating to their interests in the matter of the tennis court also relates to the interests of all Members of the University. The Applicant emphasised that these members have a clear interest which must be taken into account.

### Submissions from the University

40. The University submitted that it had interpreted the exception restrictively, and with a presumption in favour of disclosure, by withholding only the advice provided by the legal adviser. Other information in the communication was not redacted prior to disclosure in response to the request, including the fact that legal advice was sought, the date of that exchange, the identity of staff members dealing with the issue, the point of concern from the University and the onward transmission of the advice. All other information relating to the dispute (other than third party personal data which did not have a bearing on the environmental issue) had been disclosed.
41. The University had considered the following factors in favour of making the information available:
- (i) the general public interest in transparency: disclosure would enhance understanding of the basis on which the University reached a decision and conducted its affairs
  - (ii) the public interest in transparency on an environmental issue: disclosure would enhance understanding of the University's obligations regarding use of a piece of land that affects members of the public beyond the University community
  - (iii) the public interest in scrutiny to ensure fairness in the dealings between a public authority and another party: disclosure could enhance understanding of the nature of the agreement between the University and the Club.
42. The University had considered the following factors in favour of maintaining the exception:
- (i) the strength of the protection for legal advice: disclosure would undermine this key principle which allows for decisions to be taken by public authorities on a fully informed basis
  - (ii) the lack of connection to participation in environmental decision-making: the information concerns the terms of an agreement between the University and a private party in which the public has no locus to intercede.
43. The University concluded that, on balance, the public interest in maintaining the exception outweighed that in favour of making the information available because of the strength of the in-built weight for legal advice privilege and because the arguments in favour of transparency are off-set to a degree by the disclosure to the Applicant of all other information on the University's management of the area of ground in question.

### The Commissioner's findings on the public interest

44. The Commissioner has previously stated that, while he will consider each case individually, he is likely to order the disclosure of legal advice in highly compelling cases only.
45. He acknowledges that there may be occasions on which the significant public interest in withholding legally privileged communications will be outweighed by a compelling public interest in making the information available. In this particular case, he acknowledges that there is a clear public interest in the community understanding how a potential change of use to local land is being handled by the University.
46. On the other hand, the Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. Any countervailing public interest would need to be compelling.

47. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in making this particular information available outweighs the public interest in maintaining the confidentiality of communications between legal adviser and client. It is in the public interest that reasonable expectations of confidentiality be maintained, and in particular that (where necessary) an authority can communicate with its legal advisers freely and frankly in confidence, with a view to performing its statutory functions effectively.
48. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available. He is, therefore, satisfied that the Council was entitled to withhold the information requested under regulation 10(5)(d) of the EIRs.
49. He will now go on to consider the email being withheld under section 30(b)(ii) of FOISA.

### **Section 30(b)(ii) - Prejudice to effective conduct of public affairs**

50. The University relied on the exemption in section 30(b)(ii) of FOISA to withhold one email. The email contained the view of a member of the University's staff concerning a letter the University had received from the Club.
51. In order for the University to rely on this exemption, it must show that disclosure of the information would (or would be likely to) inhibit substantially the free and frank exchange of views for the purposes of deliberation. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
52. In applying the exemption, the chief consideration is not whether the information constitutes an opinion or view, but whether the disclosure of the information would, or would be likely to, inhibit substantially the exchange of views. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which the exchange of views would, or would be likely to be, inhibited has to be of some real and demonstrable significance.
53. The email in question sets out the initial view of a University staff member, on a letter relating to the dispute involving the Club, for consideration by another member of University staff. The information was part of an exchange of views for the purposes of deliberation on a matter involving the University as a public authority. These members of staff rely on communication systems, such as email, to conduct discussions on University business. Disclosure of the information in this email would inhibit substantially the confidence of staff to exchange full and frank views by this method in future, undermining the ability of the University to conduct its affairs effectively.
54. The Applicant did not believe that the release of this single email could substantially prejudice or inhibit the exchange of all such views in the future.
55. Each request must be considered on a case-by-case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision is still being considered, and



for which further views were still being sought, for example, is likely to be more substantially inhibiting than once advice has been taken.

56. In this instance, the view was expressed by one individual. The Commissioner considers that, in this case, that individual should be allowed a private space to speak freely and openly about the matter to a colleague, without the concern that such comments would be made public.
57. The Commissioner considers that disclosure would be likely to stifle the frankness and candour of comments on similarly sensitive issues in future and would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner is therefore satisfied that this information is exempt from disclosure under section 30(b)(ii) of FOISA.

#### *The public interest*

58. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
59. The "public interest" is not defined in FOISA, but has been 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 the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

#### Submissions from the Applicant

60. The Applicant stated that it is a matter of strong public interest that the University should not dismiss the Club's claims to rights over the court and inferred that disclosure of the email would assist the Club's position.
61. The Applicant also provided the Commissioner with copies of a selection of letters/emails (with the senders' identifying information redacted) which had been sent to the University by objectors to the proposed change of use of the tennis court.

#### Submissions from the University

62. The following factors in favour of disclosure were considered:
  - (i) the general public interest in transparency: disclosure would enhance understanding of the University's conduct of its affairs
  - (ii) the public interest in scrutiny to ensure fairness in the dealings between a public authority and another party: disclosure could enhance understanding of the University's dealings with the Club.
63. The following two factors in favour of maintaining the exemption were considered:
  - (i) the stage of the deliberations: the information indicates the initial view of the staff member which had yet to be the subject of discussion. It is not in the public interest to prejudice the ability of the University to consider and reach a decision privately before articulating or acting on a settled position.
  - (ii) disclosure could impact adversely the relationship between the parties without contributing to the conclusion of the matter. It is not in the public interest to compromise negotiations on a legal issue between the University and the Club in

which the public has no locus to intercede. (Negotiations between the University and the Club had still not been concluded at the time of the request being made.)

64. The University concluded that, on balance, the public interest in maintaining the exemption outweighed that in favour of disclosure because the information related to an internal expression of views at an early stage of discussions on a disputed matter and because the strength of the general argument in favour of transparency was off-set by the adverse effect disclosure would have on the relationship between the University and the Club

#### The Commissioner's findings on the public interest

65. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the information in the email in question. He acknowledges the strong public interest in transparency in relation to any possible change of use of a popular local amenity, and acknowledges that the Applicant feels that disclosure may increase transparency over the plans.
66. The Commissioner acknowledges that there is a public interest in allowing individuals a private space for views to be exchanged and discussed, without the fear that such views would be disclosed. He is persuaded that, in the circumstances, disclosure in this case would limit frankness or willingness to comment in similar circumstances in the future, which would diminish the quality of the views provided for the purposes of deliberation. This would be contrary to the public interest.
67. The Commissioner recognises that the Applicant's arguments on the public interest are partly founded in its notion that disclosure of the email would be to the benefit of the Club, but this is an assumption on the Applicant's part.
68. On balance, the Commissioner has concluded that there is a significant, and greater, public interest in the University being able to obtain such comments in future, and in preventing individuals from being inhibited from exchanging similar views.
69. Therefore, the Commissioner finds that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he is satisfied that the University was correct to withhold the email under that exemption.

## **Decision**

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The Commissioner finds that the University of Aberdeen complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant or the University 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.

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

**4 December 2020**

## Appendix 1: Relevant statutory provisions

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### 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 –

...

- (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

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

...

#### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...

### 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;

...

(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;

...

## **5 Duty to make available environmental information on request**

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

## **10 Exceptions from duty to make environmental information available-**

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

(d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

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