

# Decision Notice

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**Decision 184/2017: Jordanhill Community Council and Culture and Sport Glasgow**

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**Contractual and operational information: Scotstoun Stadium**

Reference No: 201700947

Decision Date: 8 November 2017



Scottish Information  
Commissioner

## Summary

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CSG was asked for contractual and operational information concerning Scotstoun Stadium.

CSG provided some information, considering the remainder exempt from disclosure under exemptions in FOISA.

During the investigation, CSG changed its position and disclosed some further information. The Commissioner found that CSG was entitled to withhold the remaining information.

## 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); 33(1)(b) (Commercial interests and the economy)

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 February 2017, Jordanhill Community Council (JCC) made a request for information to Culture and Sport Glasgow (CSG). The information requested was:
  - a. *Tenancy agreement contract terms agreed between Parties: Glasgow Life acting as Landlords and Glasgow Warriors as Tenants. There is now public interest in this particular matter. Scotstoun Community Council supports this request that was considered exempt from disclosure under FOI GL033/16.*
  - b. *Sports Event Risk Management Plan in an easy-to-read diagram(s) associated with planning each PRO12 Rugby and Champions League Rugby matches hosted at Scotstoun Stadium for Season 2016/17. We wish access to reliable, up-to-date information about risks involving spectator numbers significantly above the statutory approved capacity, how the decision-making process is being supported by a framework of risk analysis and evaluation across organisational boundaries along with action processes to monitor risks with control measures implemented to deal with those risks within the site, protected parking zone, and proximity environs specific to:*
    - (i) *List of all statutory partners involved that determine shared risk ownership across organisational boundaries, whether they be related to event planning or other processes;*
    - (ii) *Scope identifying health and safety risks related to the implementation of all relevant statutory standards by virtue of their regulations;*
    - (iii) *Partner and/or Statutory Agency identified for ownership of each risk;*
    - (iv) *Risk Management with clear evidence of structure and process to satisfy that each element or level of risk identification/probability, contingency planning, modification producing risk responses, updating of risk log and reporting;*
    - (v) *Implementation of the actual measures taken in response to the risks;*

- (vi) *Budgeting for risk management for Seasons 2013/14, 2014/15, 2015/16, and 2016/17, and*
- (vii) *Financial contribution by Tenants, Scottish Rugby Union (Glasgow Warriors) for the periods identified in previous item.*

2. CSG responded on 28 March 2017:

- (i) It withheld the information sought in part a. of the request under section 33(1)(b) (Commercial interests and the economy) of FOISA. CSG took the view that disclosure of this information would, or would be likely to, substantially prejudice the commercial interests of Glasgow Life and the Scottish Rugby Union (the SRU), as it contained some sensitive pricing information, disclosure of which would allow the SRU's commercial rivals or other commercial users of Glasgow Life facilities to be aware of their commercial terms. CSG considered the significant public interest in protecting the legitimate commercial interests of Glasgow Life and the SRU should outweigh the public interest in transparency.
- (ii) For part b. of the request, CSG referred to documentation it had previously disclosed to JCC on 14 March 2017 as part of ongoing community consultation, which contained some relevant information (i.e. Transport Assessment, Travel Plan, Design and Planning Statement, and Noise Assessment).
- (iii) CSG provided information in response to part b. (i), and informed JCC it did not hold the information requested in parts b. (vi) and b. (vii).
- (iv) For parts b. (ii) to b. (v), CSG withheld the information requested under section 39(1) (Health, safety and the environment) of FOISA, considering disclosure would be likely to endanger the physical or mental health and safety of spectators within the Stadium. In CSG's view, there was no public interest in disclosure of information which could be used in planning malicious acts, and that the public interest in protecting the public against such acts outweighed such public interest as there was in disclosure.

3. On 28 March 2017, JCC wrote to CSG, requesting a review of its decision. It disagreed that the withheld information was exempt from disclosure. JCC argued that disclosure of this information was very much in the public interest, given the continuing impact on residential amenity.

4. CSG notified JCC of the outcome of its review on 26 April 2017, modifying its original decision. As it deemed some of the information to be environmental information, CSG considered the request under both FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

- (i) For part a. of the request, CSG disclosed a redacted copy of the Agreement between CSG and SRU for the hire and use of facilities at Scotstoun Stadium. CSG withheld some of the redacted information under both section 33(1)(b) of FOISA and regulation 10(5)(e) of the EIRs (which relates to commercially confidential information), largely in keeping with the reasons outlined in its original response.
- (ii) For part b. of the request, CSG disclosed redacted copies of the following documents:
  - Scotstoun Stadium Infrastructure Support – Health and Safety Risk Assessment
  - Scotstoun Stadium Operation Plan

- Scotstoun Stadium Multi Agency Response Guide

CSG withheld some of the redacted information under section 39(1) of FOISA, and regulation 10(5)(a) of the EIRs (which also relates to public safety), again mainly in line with the reasons outlined in its original response.

- (iii) CSG explained that some other information, contained in all four documents now disclosed, had been redacted under section 38(1)(b) (Personal information) of FOISA and regulation 11(2) and (3) (Personal data) of the EIRs. This was because it comprised personal data of third party individuals, disclosure of which would breach the data protection principles in Schedule 1 to the Data Protection Act 1998.
- (iv) Referring to the information contained in documentation previously disclosed to JCC on 14 March 2017 as part of ongoing community consultation (i.e. Transport Assessment, Travel Plan, Design and Planning Statement, and Noise Assessment), CSG applied the exemption in section 25(1) (Information otherwise available) of FOISA and the provision in regulation 6(1)(b) (Form and format of information) of the EIRs.

5. On 24 May 2017, JCC wrote to the Commissioner, applying 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. JCC stated it was dissatisfied with the outcome of CSG's review because it disagreed with its refusal to disclose information for reasons of prejudice to commercial interests or public safety. JCC argued that safeguarding such contractual and operational information no longer outweighed the general public interest in openness, transparency and accountability. JCC confirmed it was raising no dissatisfaction with CSG's decision to withhold the information considered to be personal data, or that which it deemed to be otherwise available (having been disclosed to JCC as part of ongoing community consultation).

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that JCC 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.
7. On 10 July 2017, CSG was notified in writing that JCC had made a valid application. The case was subsequently allocated to an investigating officer, and CSG was asked to send the Commissioner the information withheld from JCC. CSG provided the information.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CSG was invited to comment on this application and answer specific questions, with particular reference to the exemptions/exceptions it had applied earlier and the matters raised by JCC in its application.
9. As CSG was withholding some of the information requested under exemptions in FOISA and exceptions in the EIRs which were subject to the public interest test, JCC was also invited to comment on why it believed it was in the public interest for the information to be disclosed.
10. Both parties provided submissions to the Commissioner.

11. During the investigation, CSG informed the Commissioner that it was willing to disclose further information to JCC, which it identified. Following full consideration of all of the withheld information by the Commissioner's office, CSG was asked to consider disclosing some additional information.
12. On 27 September 2017, CSG disclosed to JCC all of the further information referred to in the preceding paragraph. It confirmed it no longer wished to rely on the exemptions in FOISA and exceptions in the EIRs previously applied to that information.
13. CSG informed the Commissioner it wished to continue to withhold some financial information relating to lease and insurance figures, contained in the Agreement document, under section 33(1)(b) of FOISA. It also confirmed it wished to maintain reliance on regulation 10(5)(a) of the EIRs to continue to withhold some operational information, contained in the Risk Assessment, the Operation Plan and the Multi-Agency Response Guide.
14. Following receipt of the further information now disclosed by CSG, JCC informed the Commissioner that it was happy to withdraw its application in respect of the information disclosed, and also in respect of the information which continued to be withheld under regulation 10(5)(a) of the EIRs. JCC confirmed that it wished the Commissioner to issue a decision on CSG's refusal to disclose the financial information in the Agreement document, withheld under section 33(1)(b) of FOISA.
15. Both parties were informed that the investigation would continue, focusing solely on CSG's decision to withhold the financial information in the Agreement document under section 33(1)(b) of FOISA. Both parties provided further submissions to the Commissioner.

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

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16. 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 JCC and CSG. He is satisfied that no matter of relevance has been overlooked.

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

17. In its submissions to the Commissioner, CSG confirmed it was maintaining reliance on section 33(1)(b) of FOISA to withhold the remaining information in the Agreement document, namely the annual lease fee due by the SRU to CSG, and the level of insurance cover that the SRU must have in place for both employers' and public liability insurance.
18. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
19. 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.

20. 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.

#### *Commercial interests*

21. CSG submitted that disclosure of the annual lease fee would damage not only its own commercial interests, but also those of the SRU. In this instance, "commercial interests" referred to the following:
- (i) Annual lease fee: This detailed the annual fee being paid to CSG by the SRU in exchange for the use of facilities at Scotstoun Stadium. While the Agreement was signed in 2010, it remained in force and was still being paid. The information was not in the public domain.
  - (ii) Insurance figures: These detailed the insurance figures the SRU must have in place throughout the term of the Agreement, in the event of a claim being made against it. The information was not in the public domain.
22. Having considered CSG'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. He recognises that both CSG and the SRU must be able to freely enter into lease agreements with third parties, which stipulate terms and conditions of hire.
23. The Commissioner accepts that CSG has identified commercial interests relating to CSG, which might be adversely impacted should disclosure of the information jeopardise the lease Agreement and consequentially lead to a reduction in income.
24. The Commissioner also accepts that CSG has identified commercial interests relating to the SRU, which might be adversely impacted should disclosure of the information prejudice (i) its ability to compete fairly when securing the hire of training facilities or (ii) its insurance arrangements.
25. The Commissioner must now go on to consider whether the commercial interests identified by CSG would, or would be likely to, be prejudiced substantially by disclosure of the information.

#### *How would disclosure prejudice these commercial interests?*

26. CSG submitted that, as the withheld information related to a live agreement, disclosure of the annual lease fee could lead to a breakdown in its relationship with the SRU, resulting in termination of the Agreement and consequentially a loss of income for CSG.
27. CSG explained it had numerous other agreements in place with a variety of commercial users, as well as governing bodies of sports, sports clubs and sports events, for the hire of its other facilities. While annual fees charged were decided on a case-by-case basis, CSG argued that disclosure of the SRU's annual lease fee into the public domain might lead to it having to renegotiate all such other agreements, as other commercial users might take the view that their annual fee was not consistent with the fee charged for the Stadium.
28. CSG explained it did not have standard terms and conditions for the lease of its facilities. All terms and conditions, it submitted, were decided on a case-by-case basis between CSG and the commercial user.

29. CSG further believed that disclosure of the annual lease fee could lead to a reduction in the number of commercial users willing to work with it, due to their concerns about future disclosure of their commercial information. This, CSG submitted, would be likely to substantially impact its ability to secure future income.
30. CSG also considered disclosure of the withheld information would place the SRU at a commercial disadvantage. CSG submitted that the information, if publicly disclosed, could be used by the SRU's other landlords to attempt to secure a higher fee from the SRU for the hire of training grounds, or by other sporting companies or clubs to undercut the SRU's fees in the future, significantly harming the SRU's commercial interests.
31. In relation to the insurance figures, CSG argued that disclosure of the information into the public domain could lead to a breakdown in the SRU's relationship with its insurance company, which could prejudice SRU in the event an insurance claim was made against it.

#### *SRU comments*

32. CSG explained it had obtained comments from the SRU, which confirmed it concurred with CSG's decision to withhold the financial information under section 33(1)(b) of FOISA. In the SRU's view, disclosure would substantially affect its commercial interests without serving the public interest.
33. The SRU provided the following comments to support its position:
  - The redacted information had not previously been disclosed and was not in the public domain.
  - The financial and insurance terms in the Agreement were confidential and commercially sensitive information between the SRU and CSG.
  - The redacted information contained the financial terms for the SRU's use of Scotstoun Stadium and related facilities, and so had demonstrable economic value to the SRU.
  - The SRU is a major hirer of sports, training, education and operational facilities in Scotland, including both publicly and privately owned facilities, used for the benefit and development of the sport at all levels, for operational, training and educational purposes, and for match venues. Against this background, disclosure of the financial terms for the SRU's use of Scotstoun Stadium and related facilities would expose the SRU to financial harm to its economic position when competing with other parties for the use of similar facilities.
  - Any economic harm caused to the SRU would have a direct impact on its ability to fund, support and grow the sport at all levels. As such, disclosure was not in the public interest.

#### *The Commissioner's views*

34. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
35. In this case, the Commissioner accepts that disclosure of the withheld information would allow further insight into the Agreement between CSG and the SRU. In particular, it would also allow scrutiny of the financial arrangements in place for the SRU's hire of the facilities at Scotstoun Stadium.

36. The Commissioner also recognises that disclosure of the annual lease fee would give an opening to other commercial users of the Stadium and other CSG facilities to attempt to renegotiate their own hire costs, reducing CSG's income. He also accepts that disclosure of this information could lead to other commercial users losing confidence in CSG's ability to keep their commercial information confidential, leading to a reduction in interest in its facilities. In the Commissioner's view, both factors would, or would be likely to, prejudice CSG's commercial interests substantially.
37. The Commissioner recognises that the SRU hires various other facilities across the country for the development of the sport at various levels. With this in mind, the Commissioner accepts that disclosure of the annual lease fee paid to CSG would place the SRU at a disadvantage in negotiating such arrangements in future, and could open the way to existing providers of such facilities seeking to renegotiate their terms. Conversely, other sporting bodies could be placed at a competitive advantage in negotiating for these facilities. The Commissioner accepts that these factors would, or would be likely to, prejudice the SRU's commercial interests, to a significant extent.
38. In relation to the insurance figures, the Commissioner accepts that public disclosure of this information would be likely to impact on the SRU's relationship with its insurance company, which in turn would be likely to prejudice the SRU's commercial interests substantially.
39. In conclusion, the Commissioner is satisfied that the information relating to the annual lease fee and insurance figures was of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was correctly applied on that basis.

#### *The public interest test*

40. As the Commissioner has found that the exemption in section 33(1)(b) of FOISA was correctly applied to the remaining withheld information, he is now required to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

#### CSG's submissions

41. CSG acknowledged there was a significant public interest in disclosure of the information, to promote openness and transparency. It had recognised this in the disclosures made to JCC. In CSG's view, however, this was outweighed by the substantial public interest in avoiding the commercial harm discussed above.
42. CSG submitted that there was no public interest in disclosing financial information that could lead to a breakdown in its relationships with the SRU and other commercial users, and consequently a loss of income. Nor did CSG consider there was any public interest in disclosing information that would lead to other commercial users becoming less willing to work with it, in the fear that their financial information might be disclosed into the public domain (again leading to a reduction in its income).
43. CSG believed there was a substantial public interest in protecting the SRU's commercial interests. It argued there was no public interest in disclosing information that would be used by other parties to their advantage, thus jeopardising the SRU's use of other training facilities.
44. In relation to disclosure of the insurance figures, CSG argued that there was no public interest in disclosing information that would prejudice the SRU's insurance arrangements.



45. On balance, CSG took the view that the public interest in openness and transparency was outweighed by the arguments for withholding the information.

#### JCC's submissions

46. JCC submitted there was a clear public interest in accountability for the use of public monies relating to a public services amenity provided under an agreement with the SRU. It argued that transparency of facts and analysis were required to understand how a major policy decision to bring professional rugby to Scotstoun Stadium was taken without public consultation. This, JCC continued, was in the knowledge that the Stadium did not have the statutory capacity or infrastructure, or an effective travel plan management regime to support such provision.
47. In JCC's view, CSG was prioritising the commercial goals of the SRU above the needs, safety and wellbeing of local residents. It considered there were sufficient grounds for intervention, relating to high levels of public expenditure which potentially benefitted private enterprise.
48. JCC considered the general public interest in openness, transparency and accountability outweighed the safeguarding of contractual and operational information. In JCC's view, disclosure of the information could mitigate the increasing perception within the community that Scotstoun Stadium existed primarily to serve the SRU, to the detriment of athletics facilities.
49. Referring to an increase in council tax to protect public facilities and services, JCC believed this emphasised the need for proactive transparency of legal associations at Scotstoun Stadium.
50. In its submissions, JCC recognised that the continued use of a facility was a factor in making it a long-term success. However, it questioned who the financial benefactors were from the Agreement, whether CSG was obtaining value for money from the SRU, whether favourable terms and conditions existed, whether such terms were to the detriment of the public amenity or other users, and how the Agreement interfaced with (or whether it was responsible for) "unauthorised development creep".
51. JCC submitted that there was a growing public interest in proactive transparency, to determine why the SRU's situation was perceived to be so commercially comfortable, with apparent risks being absorbed by the public purse, at the expense of the residential amenity. In the interests of public safety, JCC believed the public interest was strong enough to override the competitive interest of any party.
52. In conclusion, JCC believed disclosure was in the public interest, as it would assist the community in more effective community planning and decision making and would allow evaluation by the community councils.
53. To support its position, JCC submitted there was considerable public interest amongst the neighbouring Community Councils of Scotstoun and Whiteinch in favour of disclosing the information. JCC provided the Commissioner with statements of support from each of these community councils in this connection.

#### The Commissioner's conclusions

54. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the scrutiny of public finances.

55. He has considered the public interest arguments put forward by JCC in favour of disclosing the annual lease fee. The Commissioner accepts that there is a public interest in transparency and accountability, to allow effective scrutiny of whether the public authority is obtaining value for money.
56. The Commissioner notes that JCC believes there is a public interest in knowing whether or not the SRU were benefitting from favourable terms and conditions. He notes CSG's explanation that no standard terms and conditions exist for lease agreements of this kind, with each being considered on a case-by-case basis. In the Commissioner's view, disclosure of the financial information would only confirm the amounts of the lease fee and insurance levels in this particular instance, not whether the SRU was benefitting from favourable terms and conditions. In the Commissioner's view, it is certainly not self-evident that the financial terms are "favourable", if indeed that is capable of objective assessment.
57. The Commissioner notes that the remainder of the Agreement document, already disclosed to JCC during the investigation, details the terms and conditions pertaining to the lease. Other information relating to the SRU's use of the stadium has also been disclosed, in the Risk Assessment, the Operation Plan and the Multi-Agency Response Guide. To an extent, these disclosures have addressed the public interest arguments under consideration here. The Commissioner is not satisfied that disclosure of the financial information still withheld would add significantly to understanding of the issues underpinning the concerns JCC clearly has regarding the SRU's association with Scotstoun Stadium, as rehearsed above.
58. On the other hand, the Commissioner accepts (in this case) that there is a public interest in ensuring that there is fair competition in the commercial environment in which both CSG and the SRU operate. He has already acknowledged the submissions made by CSG in support of maintaining the exemption, and has already concluded that disclosure of the withheld information in this case would, or would be likely to, cause substantial prejudice to both CSG's and the SRU's commercial interests. He recognises that such harm would be contrary to the public interest.
59. In the Commissioner's view, it is in the public interest for an organisation such as the SRU to be able to operate on fair terms, when securing the hire of playing, training and supporting facilities. The Commissioner considers it is in the public interest that the SRU is not treated unfairly, simply as a result of having entered into a commercial agreement with a public body, where disclosure of its financial information has a consequential impact on its ability to continue to participate fairly in a competitive market. He notes JCC's concerns about the use of the stadium by other sports, but it does not follow that there is a public interest in placing this particular sport at a disadvantage of potentially wider impact (particularly where no clear benefit to the other sports would be conferred by disclosure).
60. With regard to the insurance figures, the Commissioner has already acknowledged the submissions made by CSG in support of maintaining the exemption, and has already concluded that disclosure of the withheld information in this case would, or would be likely to, prejudice the SRU's commercial interests. That would not be in the public interest. On the other hand, having considered the relevant submissions, the Commissioner can identify no public interest which would be served by disclosing this information.
61. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the financial information under consideration here. The Commissioner therefore finds that CSG was entitled to withhold the

financial information relating to the annual lease fee and insurance, under section 33(1)(b) of FOISA.

## **Decision**

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The Commissioner finds that Culture and Sport Glasgow complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Jordanhill Community Council, in respect of the financial information remaining withheld in the Agreement document.

## **Appeal**

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Should either Jordanhill Community Council or Culture and Sport Glasgow 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**

**8 November 2017**

### 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.

...

#### 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).

...

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