



Scottish Information
Commissioner
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Decision Notice 303/2025

Sport and leisure review – contract documents

Authority: Moray Council

Case Ref: 202500509

Summary

The Applicant asked the Authority for the consultant's scope of services and contract documents regarding the Authority's Sports and Leisure Review October 2024. The Authority notified the Applicant that some information was not held, some of the information was published on its website and other information was being withheld as it was commercially sensitive.

The Commissioner did not accept that the Authority was entitled to withhold the information it had identified, and he required it to be disclosed to the Applicant. The Commissioner also required the Authority to carry out further searches and provide the Applicant with a revised review outcome in relation to the information it had previously claimed was either not held or already in the public domain.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 7 February 2025, the Applicant made a request for information to the Authority. He asked for information regarding the Authority's Sports and Leisure Review October 2024, and specifically asked for:

- (i) The consultant's scope of services and contract documents. No commercially sensitive information is requested in respect of the consultant's business.
- (ii) Any amendments or clarifications to the above prior to contract award.
- (iii) Any further instructions, variations or similar to the contract post-award.
- (iv) Copies of the minutes or notes of all meetings, telephone conversations and written communication including electronic communications relating to the services.

2. The Authority responded on 4 March 2025. It provided the Applicant with a copy of the consultant's scope of services for part (i) of the request and it withheld information falling within the scope of part (iv) of the request under section 33(1)(b) of FOISA, on the grounds that it was commercially sensitive. The Authority also commented that requests (ii) and (iii) were not applicable.

3. On 4 March 2025, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the response to be inadequate. Specifically, the Applicant stated that the Authority had not provided him with the contract documents he had asked for, and he did not accept that the Authority had not had any communication with the consultant that varied the scope of services. The Applicant commented that the Authority should be able to disclose notes of meetings and communications, with commercially sensitive information and the names of individuals redacted.

4. The Authority notified the Applicant of the outcome of its review on 1 April 2025. It gave him notice, under section 17(1) of FOISA, that it did not hold any information falling within the scope of requests (ii) and (iii). The Authority also stated that it was withholding information falling within the scope of request (i) under section 33(1)(b) of FOISA, and that information falling within the scope of request (iv) was either not held (and was therefore subject to section 17(1) of FOISA) or it was published on its website and was therefore exempt under section 25(1) of FOISA.

5. On 4 April 2025, 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 the Authority's review because in request (i) he had not sought commercial information, and he believed the contract documents could be provided. The Applicant was also dissatisfied that the information he had asked for in request (iv) was not provided and it was not available via the Authority's website.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 25 April 2025, the Authority was notified in writing that the Applicant had made a valid application. The Authority provided the information, and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to parts (i) and (iv) of the request.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Scope of the investigation

10. The Applicant did not challenge the Authority's responses to requests (ii) and (iii) in his application to the Commissioner. However, the Commissioner notes that this appears to have been based on an assumption that the Authority had conducted thorough searches. As the Commissioner is not persuaded by the searches carried out by the Authority in this case (this decision will go on to explain why) he will consider the Authority's handling of requests (i), (ii), (iii) and (iv).

Request (i)

11. In request (i) the Applicant asked the Authority for the consultant's scope of services and contract documents. The Applicant specified that he was not seeking any commercially sensitive information in respect of the consultant's business.
12. In its review outcome, the Authority notified the Applicant that it was withholding information falling within the scope of request (i) under section 33(1)(b) of FOISA.

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

13. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure 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 subject to the public interest test in section 2(1)(b) of FOISA
14. There are several elements a Scottish public authority needs to demonstrate are present when relying on this exemption. 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.
15. 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
16. As noted above, the Authority applied this exemption to withhold the information requested in part (i) of the Applicant's request.

The Authority's comments on section 33(1)(b)

17. The Authority explained that the contract came through a Framework call-off and was not therefore its blank document (i.e. template) that it could release.

18. The Authority submitted that releasing the template into the public domain could potentially introduce the possibility of the template being doctored and, as a result, being used criminally. The Authority acknowledged that the likelihood of criminal use was low but it was still a risk, and it could breach the agreements it had in place with the procurement Framework provider.
19. The Authority submitted that if it were to jeopardise its working relationship with the Framework provider, it could negatively impact on its ability to utilise such Frameworks in the future, and if this occurred it would negatively impact the public purse. The Authority provided the Commissioner with a copy of the agreement it had with the Framework provider.
20. The Authority submitted that it had not sought the views of any third parties as the exemption it was relying on (section 33(1)(b) of FOISA) did not focus on the need to release any details regarding the consultation providers.

The Applicant's comments on section 33(1)(b)

21. In his application to the Commissioner, the Applicant expressed dissatisfaction with the Authority's reliance on section 33(1)(b) of FOISA. He explained that he had not requested any commercial information. He commented that the Authority's claim that disclosure of a blank document (with no personal information, rates or prices) could impact on the value of quotes, negatively impacting the public purse, was facile and either showed a lack of understanding of how the market works or was simply spurious.

The Commissioner's view on section 33(1)(b)

22. "Commercial interests" are not defined in FOISA, but the [Commissioner's guidance on the exemption in section 33\(1\)\(b\)](#)¹ states that commercial interests are not the same as financial interests. It goes on to explain that an organisation's commercial interests will usually relate to the commercial trading activity they undertake, and that such activity will normally take place within a competitive environment. The guidance acknowledges that there may be cases where prejudice to a person's financial interests may affect their commercial interests, but this will not always be the case, and it gives the example of Council Tax, which can relate to a Council's financial interests but does not relate to any commercial activity.
23. The Authority was referred to the Commissioner's guidance and it was asked to identify the commercial interests of the party (or parties) who had commercial interests, and it was also asked to explain why these interests were commercial. It was advised that if it was the Authority's own commercial interests that were of concern, it should provide a detailed explanation of those interests and how they related to the withheld information. The Authority was asked to describe, in detail, the substantial prejudice that would be likely to follow disclosure of the information, and it was asked to identify the specific material that it considered to be particularly sensitive.
24. In response, the Authority did not address any of these specific questions, and its sole reasons for arguing that the exemption applied are outlined above in paragraphs 17 to 20. The Commissioner considers that the reasons given by the Authority for relying on section 33(1)(b) of FOISA are poor. The Authority's comments lack detail and explanation, and do not clearly explain which body has commercial interests, nor does it indicate why these interests are commercial and not financial.

¹ <https://www.foi.scot/sites/default/files/2023-06/BriefingSection33CommercialInterestsandtheEconomy.pdf>

25. The Commissioner is disappointed that the Authority has failed to respond to the questions asked by his investigating officer and, in doing so, it has failed to demonstrate why the exemption applies to the withheld information.
26. Taking into account the submissions received from the Authority in relation to the actual information being withheld in this case, the Commissioner does not believe he has any option but to find that the Authority has not evidenced the required substantial prejudice for section 33(1)(b) of FOISA to be engaged. He cannot see how, based on the submissions provided by the Authority, disclosing the contract documents would, or would be likely to, prejudice substantially the commercial interests of a person or person(s).
27. Having concluded that the exemption is not engaged, the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA.
28. The Commissioner requires the Authority to disclose the identified contract documents to the Applicant.

Request (iv)

29. In request (iv) the Applicant asked for copies of the minutes or notes of all meetings, telephone conversations and written communication including electronic communications relating to the services.
30. In its review outcome, the Authority gave the Applicant notice, under section 17(1) of FOISA, that it did not hold some of the information he had asked for in request (iv) and it advised him that the information that was held, was included in the final report which was published on its website, and it provided him the link to the report. The Authority applied section 25(1) to the information that was included in the published report.

Interpretation of request (iv)

31. In its submissions, the Authority referred to the wording in part (iv) of the Applicant's information request, and it noted that he had asked for:

"Copies of the minutes or notes of all meetings, telephone conversations and written communication"
32. The Authority explained that it had interpreted this request to mean:
 - (a) "all minutes and notes of all meetings between the Council and the Consultants",
 - (b) "all telephone conversations between the Council and the Consultants", and
 - (c) "all written communications between the Council and the Consultants".
33. In relation to interpretation (a), the Authority submitted that all meetings between the Council and the Consultants were held via MS Teams meetings, and they were not recorded or transcribed. The Authority explained that the Consultants were based hundreds of miles away and this was why all of the meetings took place via MS Teams. It submitted that section 17(1) applied to this information.
34. In relation to interpretation (b), the Authority stated that it does not record telephone conversations that connect to any telephone number, outwith its Customer Services department. It acknowledged that there may have been a couple of brief telephone conversations, but no information was now held and therefore section 17(1) applied.

35. In relation to interpretation (c), the Authority submitted that the substance of any communications between the Authority and the Consultants would have been included within the published report. It suggested that even if it no longer held a record of the original communications, the pertinent information (from those communications) would have been reflected within the published report.

Commissioner's view on the Authority's interpretation of request (iv)

36. The Commissioner has considered the wording of request (iv) together with the Authority's interpretation (set out in paragraph 32). The full wording of request (iv) was:

"Copies of the minutes or notes of all meetings, telephone conversations and written communication including electronic communications relating to the services."

37. He notes that request (iv) does not specify that it is limited to minutes, notes of meetings, telephone conversations and written communications between the Authority and the Consultants. He considers that the wording of request (iv) would also capture any minutes/notes of meetings between Authority officials, along with notes of telephone or written communications between Authority officials.
38. The Commissioner finds that the Authority has erred in its interpretation of the request by limiting the scope of request (iv) to meetings/calls between the Authority and the Consultants, and excluding information generated as a result of internal meetings or communications.
39. The Commissioner requires the Authority to carry out new searches for information captured by request (iv), ensuring that these searches capture any internal communications or notes/minutes made during meetings by Authority staff. He requires the Authority to provide the Applicant with a revised review outcome that either discloses any additional information that is located as a result of these new searches, or notifies the Applicant why any such information is being withheld.

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

40. 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, 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. The qualifications contained in section 1(6) are not applicable in this case.
41. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect. As outlined above, in its review outcome the Authority notified the Applicant that it did not hold some of the information captured by request (iv).

The Applicant's comments on section 17(1)

42. The Applicant argued that if the information he had requested did not exist, then there were serious questions regarding the management of the contract. The Applicant acknowledged that such concerns would not fall within the remit of the Commissioner.

The Authority's comments on section 17(1)

43. As noted above, in paragraphs 32 to 35, the Authority interpreted request (iv) as seeking information that was generated during conversations/meetings between itself and the Consultants. It did not consider that request (iv) was also seeking internally generated information from internal telephone calls or meetings between Authority staff.
44. The Authority explained that all of the meetings held with the Consultants were MS Teams meetings and that these meetings were not recorded or transcribed. The Authority also noted that it does not record telephone calls outwith its Customer Services department.
45. The Authority stated that the nature and purpose of its meetings with the Consultants was to discuss the consultation and share statistical information, which was then physically written down by the Consultants ahead of those statistics being placed within the final written, publicly available report. The Authority confirmed that it did not have notes of these meetings in its possession.
46. The Authority explained that the Head of Service was already aware of the scope of service and the contract, therefore it considered that no open-ended searches were needed due to prior staff awareness and knowledge. The Authority confirmed that the Head of Service did search their own emails and other platforms and that no relevant information was found.
47. The Authority submitted that all resources were networked and there was only a single Microsoft tenancy. It explained that there was an online document sharing platform, but this was no longer in operation as the consultation was concluded and, as such, it could not be searched.

The Commissioner's view on section 17(1)

48. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances. He will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.
49. Although the Authority has confirmed that the Head of Service, who was the main contact for the consultation, did search their own emails and other digital platforms and had not located any relevant information, the Commissioner is not persuaded by these arguments. The Authority did not provide the Commissioner with any screenshots or detailed evidence (such as lists of the search terms used, date parameters, digital sources accessed, etc.) that would demonstrate that thorough and proportionate searches were carried out.
50. As stated previously, the Commissioner is concerned that the Authority has excluded internal communications from the scope of this request. As he has already found that the Authority interpreted request (iv) too narrowly and that it deliberately excluded communications/meetings between Authority staff, he finds that the Authority has not provided sufficient evidence to justify its position that the information is not held.
51. As set out in paragraph 39, he requires the Authority to carry out further searches for information falling within the scope of part (iv) of the request (and to ensure that these searches capture any communications/meetings/notes between or by Authority staff) and to provide the Applicant with a revised review outcome.

If any new information is identified as falling within the scope of request (iv) it should either be disclosed, or the Applicant should be notified of any exemptions that are being relied on to withhold it.

Section 25(1) – Information otherwise accessible

52. Information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt from disclosure. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA. Section 25(1) is not intended to prevent or inhibit access to information, but to relieve public authorities of the burden of providing information that an applicant can access readily without asking for it.
53. As noted above, in this case the Authority explained how it had interpreted request (iv). It provided three interpretations of request (iv), which the Commissioner has outlined above in paragraph 32, and which he has described as interpretations (a), (b) and (c). The Authority argued that information falling within the scope of interpretations (a) and (b) was not held (and so section 17(1) of FOISA applied) and information falling within the scope of interpretation (c) was included in the published report² and was therefore exempt from disclosure under section 25(1) of FOISA.

The Authority's comments on section 25(1)

54. In its review outcome, the Authority applied section 25(1) to all written communications between the Authority and the Consultants. It confirmed that all pertinent information was included in the final report which was in the public domain. It explained that the report was published on its website and was therefore exempt under section 25(1) of FOISA.
55. The Authority explained that the names and contact details of stakeholders, and other statistical information (including demographic information already in the public domain) would have been sought by the Consultants, to assist with the final report. It commented that the published consultation report would contain this information.
56. The Authority noted that the Consultants had restricted access to the Gladstone Leisure Management System (Gladstone). It explained that Gladstone was a database used by both the Authority and Moray Leisure Centre (an external organisation), and that it houses details of all members, such as Fitlife members and Pay-as-you-go members. The Authority stated that the Consultants were given restricted access to the database, so that they could interrogate it to provide statistics. The Authority noted that because the Consultants had direct access to Gladstone, they did not need further communications with the Authority.

The Applicant's comments on section 25(1)

57. The Applicant was not satisfied with the Authority's response. He explained that the published report was the document that prompted his request for the information in the first place. He commented that normally, pertinent communications relating to such services would be stored and easily accessible as part of the audit trail.

²

<https://moray.cmis.uk.com/moray/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=u2%2bKxcVuliJMJ4Yziclt1GIL%2bDU8YOyEo2vx49ZbMKXce6adjy3S1A%3d%3d&rUzwRPf%2bZ3zd4E7lkn8Lyw%3d%3d=pwRE6AGJFLDNlh225F5QMaQWCtPHwdhUfCZ%2fLUQzgA2uL5jNRG4jdQ%3d%3d&mCTIbCubSFfXsDGW9IXnlg%3d%3d=hFflUdN3100%3d&kCx1AnS9%2fpWZQ40DXFvdEw%3d%3d=hFflUdN3100%3d&uJovDxwdjMPoYv%2bAJvYtyA%3d%3d=ctNjf55vVA%3d&FgPIIEJYlotS%2bYGoBi5oIA%3d%3d=NHdURQbu>

The Commissioner's view on section 25(1)

58. As noted above in paragraph 38, the Commissioner does not accept the Authority's interpretation of the scope of request (iv) as it excluded internal communications from the scope of the request.
59. Furthermore, the Commissioner notes that in request (iv) the Applicant was seeking written communications, including electronic communications.
60. The Commissioner has reviewed the published report and he notes that it does not contain individual emails or letters from or to the Authority (or between Authority officers). The Commissioner acknowledges that the report may contain some information that was included in written correspondence with the Consultants but, as that information has been incorporated into the report and is not highlighted or separated out, it is impossible to identify what text was originally a written communication. In the circumstances, he does not accept that the published report contains the information requested by the Applicant in request (iv), and he cannot, therefore, uphold the Authority's reliance on section 25(1) of FOISA.
61. The Commissioner requires the Authority to carry out fresh searches for written communications falling within the scope of request (iv), to include internal communications, and to provide the Applicant with a revised review outcome, as specified in paragraphs 39 and 50.
62. If the Authority still considers that the information requested by the Applicant is published on its website (and is exempt under section 25(1) of FOISA) it must direct the Applicant to the specific part, or parts, of any documents that contain the information he has requested. In the circumstances, it may be more helpful to the Applicant if it simply provides him with a copy of this information.
63. If, as a result of its searches, the Authority determines that it does not hold the specific information requested by the Applicant, it must give the Applicant notice, in terms of section 17(1) of FOISA, of this fact.

Request (ii) and (iii)

64. In request (ii) and (iii), the Applicant asked for any amendments or clarifications to the consultant's scope of services and contract documents prior to contract award, and any further instructions, variations or similar to the contract post-award.
65. The Authority withheld the information requested in parts (ii) and (iii) under section 17(1) of FOISA, on the grounds that the information was not held. It explained that there had been no amendments, clarifications, or variations to the consultant's scope of services or contract documents, either before or after the contract was awarded.
66. In his requirement for review, the Applicant commented that the Authority either expected him to believe that there was no communication with the consultant that varied the scope of the contract or that no proper audit trail existed. He argued that the Authority's response to his request was inadequate. In his application to the Commissioner, in relation to requests (ii) and (iii) the Applicant commented that it was extremely unusual for any such contract not to have clarifications or variations, etc.
67. While the Commissioner notes that the Applicant has not specifically challenged the Authority's responses to requests (ii) and (iii) in his application, he does express surprise that no variations or clarifications were made.

The Commissioner has already found that the searches carried out for request (iv) were not thorough or comprehensive and he is not persuaded that the searches carried out for information captured by requests (ii) and (iii) were sufficient.

68. Given this, the Commissioner requires the Authority to carry out new searches for the information captured by requests (ii) and (iii) and to provide the Applicant with a revised review outcome that includes details of the searches that were carried out. If, as a result of these searches, the Authority identifies any information that is captured by requests (ii) and (iii), this should either be disclosed to the Applicant, or he should be notified of any exemption or other provision that is being relied on to withhold it under FOISA.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Specifically, the Authority failed to comply with section 1(1) of FOISA by;

- failing to satisfy the Commissioner that it had identified all relevant information falling within the scope of parts (ii), (iii) and (iv) of the request,
- wrongly withholding information falling within the scope of part (i) of the request under section 33(1)(b) of FOISA, and
- wrongly withholding information falling within the scope of part (iv) of the request under section 25(1) of FOISA.

The Commissioner requires the Authority to disclose the identified contract documents to the Applicant, and to carry out adequate, proportionate searches for all information falling within the scope of parts (ii), (iii) and (iv) of the request (to include any internal communications or notes/minutes of any internal meetings), reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA), by **29 January 2026**.

Appeal

Should either the Applicant or the Authority 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

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

Euan McCulloch
Head of Enforcement

15 December 2025