

# Decision Notice

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**Decision 080/2017: Mr Stephen Temlett and Dumfries and Galloway Council**

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**Cost of Repairs to DG One Leisure Centre**

Reference No: 201601960

Decision Date: 19 May 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked about the cost of repairs to the DG One Leisure Centre in Dumfries, which was closed in October 2014 for remedial works to be carried out, and for how much it had received in settlement from the contractor, Kier Construction.

During the investigation, the Council disclosed some of the information it had previously withheld. It continued to withhold the information about the settlement reached with the contractor. It considered disclosure of the settlement figure would prejudice the effective conduct of public affairs.

The Commissioner investigated and found that the Council was not entitled to withhold the settlement figure on this basis. She required the Council to disclose this 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); 30(c) (Prejudice to effective conduct of public affairs)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 30 August 2016, Mr Temlett made a request for information to Dumfries and Galloway Council (the Council). The information requested was:  
  
"A full list of the repairs to be carried out on the DG One leisure centre by contractors McLaughlin & Harvey Construction Limited;  
  
How much money the Council is going to pay towards the repairs, where the money is coming from and how much they received in settlement from Kier Construction."
2. The Council responded on 27 September 2016. It provided a list of repairs, but informed Mr Temlett that it considered the financial information to be exempt from disclosure in terms of section 36(2) (Confidentiality) of FOISA. The Council explained that it was prohibited from disclosing this information as it was bound by the terms of a settlement agreement, the terms of which were confidential.
3. On 27 September 2016, Mr Temlett wrote to the Council requesting a review of its decision. He commented that the issues surrounding DG One had been well documented in the past. He noted that the original cost of the building had risen to £17m during construction and the building was closed, two years before his request, for repairs due to cost £10m. In view of this, Mr Temlett argued it was only fair that the public, as taxpayers funding the project, knew how much money was being put towards the repairs.

4. The Council notified Mr Temlett of the outcome of its review on 19 October 2016. It upheld its original decision to withhold the information, but no longer wished to withhold the information on the basis that disclosure would constitute an actionable breach of confidence (section 36(2)). Instead, it chose to apply the exemption in section 30(c) (Prejudice to effective conduct of public affairs) of FOISA. While acknowledging the public interest in disclosure of the information, the Council explained that it was unable to do so because disclosure would lead to a breach of its settlement agreement with Kier Construction.
5. On 28 October 2016, Mr Temlett wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Temlett stated he was dissatisfied with the outcome of the Council's review because he believed there was a strong public interest in disclosure of the information. Given that taxpayers' money was potentially being used to fund repairs on a job which, he argued, was poorly done first time around, Mr Temlett considered members of the public should know how much they were contributing to the repair works (which were due to cost approximately £10m).

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Temlett made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 29 November 2016, the Council was notified in writing that Mr Temlett had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Temlett and was informed that failure to provide this information would result in the Commissioner issuing an information notice in terms of section 50(1)(a) (Information notices) of FOISA. The Council's attention was also drawn to section 50(7) of FOISA, which provides that neither an obligation to maintain secrecy nor any other restriction on disclosure affects the duty to comply with an information notice.
8. The Council wrote to the Commissioner on 12 December 2016, stating that the confidentiality clause in the settlement agreement prohibited it from disclosing the information to the Commissioner. Acknowledging section 50(1)(a) of FOISA, the Council asked the Commissioner to explain why she needed the information in order to be able to make an informed decision, and how not providing the information would prejudice her in reaching a decision.
9. On 16 January 2017, the Commissioner wrote to the Council again, explaining that she routinely required to see information during investigations which a public authority considered confidential, and could not perform her functions effectively if she was unable to do so. The Council was issued with a formal information notice under section 50(1)(a) of FOISA, requiring it to provide the Commissioner with the withheld information by 3 March 2017.
10. The Council provided the Commissioner with the withheld information on 3 March 2017. With the exception of the settlement figure, the Council stated that the remaining withheld information was now publicly available and therefore it was happy to disclose it to Mr Temlett. The Council confirmed it wished to continue to withhold the settlement figure, stating this had been provided to the Commissioner only to enable her to fulfil her duties under FOISA.
11. The case was allocated to an investigating officer. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an

application. The Council was invited to comment on this application and answer specific questions, focusing on the application of section 30(c) of FOISA to the withheld information.

12. On 21 March 2017, the Council wrote to Mr Temlett providing him with some of the information he requested, namely the Council's contribution to the cost of repairs to the DG One leisure centre and where, within the Council, the money was coming from. The Council informed the Commissioner that it no longer wished to rely on section 30(c) in relation to this information.
13. On 23 March 2017, Mr Temlett confirmed to the Commissioner that, as the Council had now disclosed some of the information, he no longer required a decision in respect of those parts of his request. The investigating officer subsequently informed the Council that submissions were required only in respect of the remaining withheld information (i.e. the settlement figure).
14. The Council provided submissions to the investigation officer. Mr Temlett also provided submissions on why he believed it was in the public interest for the information to be disclosed. He referred the Commissioner to a published report (considered in more detail below), which he understood to contain the settlement figure.

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

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15. 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 her by both Mr Temlett and the Council. She is satisfied that no matter of relevance has been overlooked.

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

16. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from such disclosure.
17. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
18. It is important for public authorities to treat each request for information on a case-by-case basis. Disclosure of information in one case should not be taken to imply that information of a particular type will routinely be disclosed in future. The circumstances of each case, including the content of the information under consideration and the timing of the request, must be taken into consideration.

### *The Council's submissions*

19. In its submissions to the Commissioner, the Council confirmed that, despite the fact that it was no longer relying on the confidentiality exemption in section 36(2) of FOISA, it was unable to disclose the settlement figure due to being bound by the confidentiality clause in the settlement agreement. The Council explained it had taken further legal advice on this matter, which confirmed that the confidentiality clause must be adhered to.
20. In the case of DG One, the Council submitted, reaching a settlement with the contractor, as opposed to proceeding with a court case where the outcome was not guaranteed, enabled remedial works to begin at the end of summer 2016. The Council considered this was very much to the public benefit. Had the settlement not been reached, the Council submitted, this would have absolutely impacted its activities, costing more money and delaying the commencement of the remedial works.
21. The Council explained that the confidentiality clause was part of the settlement agreement. Disclosure of the information requested would not only breach the agreement, but would prejudice the Council's ability to negotiate similarly in future.
22. The Council submitted that confidentiality clauses in legal settlements were quite usual. In the Council's view, to limit or withdraw a public authority's ability to enter into such settlement agreements with the private sector would substantially limit its options to act in the public interest.
23. In conclusion, the Council submitted that confidence in settlement agreements must be maintained, and to be forced to breach such an agreement would severely damage confidence in extra-judicial settlements, mediations and arbitrations.

### *Information in public domain*

24. The investigating officer drew the Council's attention to an audit report by PriceWaterhouseCoopers LLP (PWC) dated 22 September 2016. (This is the report referred to in paragraph 14.) The report, "Dumfries and Galloway Council – Annual Report to those charged with Governance and the Controller of Audit – Year ended 31 March 2016", is PWC's report to the Council's Audit and Risk Committee on its annual audit of the Council's accounts.
25. Page 10 of the report states that a settlement agreement was reached between the Council and "another party in respect of a dispute regarding Council property". It also includes the actual settlement figure.
26. This report explains that, following consideration of relevant legislation (section 12 of the Local Government in Scotland Act 2003) and the CIPFA / LASAAC Code of Practice on Local Authority Accounting in the UK 2015/16, the Council was required to disclose the nature and value of the settlement separately within its financial statements.
27. The PWC audit report is publicly available on the Council's website.
28. The investigating officer noted that this settlement figure was also published as a separate item on page 60 of the Council's 2015/16 annual accounts, also dated 22 September 2016 and publicly available on the Council's website.
29. It was put to the Council that, when taken together with other information publicly available at the time of Mr Temlett's request and requirement for review (i.e. confirming that a settlement had been reached between the Council and Kier Construction), it would appear reasonable

to conclude that the settlement figure relating to DG One was now publicly available, and was so when the Council responded to Mr Temlett's requirement for review.

30. The Council was also asked to provide details of any other projects of a similar scale that it would be reasonable to attribute this payment to.
31. In response, the Council submitted that, in relation to the published settlement figure, detailed lengthy discussions took place with PWC concerning the publication of the Council's accounts, with both parties obtaining legal advice. The third party's solicitors were also consulted. The Council explained that the confidentiality agreement pertaining to this figure specifically provided for this information to be disclosed to its auditors. Being a public authority, the Council anticipated that any substantial receipt would need to be explained, if not publicly then at least to its auditors.
32. The Council submitted that it took the decision, following legal advice, not to publicly disclose the source of the receipt in question. It did not comment on whether it would be reasonable to attribute the receipt to any other settlement.

#### *The Commissioner's view*

33. The Commissioner has considered these submissions carefully. She notes that the Council's arguments for relying on section 30(c) of FOISA focus on its belief that disclosure would not only breach the settlement agreement, but would also lead to reputational damage, thereby prejudicing its ability to negotiate successfully in similar future situations.
34. While the Council has explained the benefits of entering into a settlement agreement, the Commissioner is not satisfied that it has explained what actual harm would, or would be likely to, result in this case from disclosure of the information under consideration, and what the likelihood of that harm would be. More particularly, she is not satisfied that the Council has explained adequately how disclosure of the information would breach the confidentiality clause in the settlement agreement. (Again, the Commissioner would note that the Council is no longer applying on the confidentiality exemption in section 36(2) of FOISA to withhold the figure.)
35. The Commissioner considers it likely, in situations such as that concerning DG One, that most commercial organisations would be inclined to pursue settlement through negotiation, as this is a less costly and time-consuming alternative to litigation, which is clearly of public benefit. In the absence of any evidence, she is not persuaded by the Council's argument that disclosure of the information under consideration here would have the inhibiting effect claimed in relation to future settlement negotiations, particularly given the Council's success in these particular negotiations.
36. The Commissioner must also consider the circumstances present at the time the Council considered Mr Temlett's request for review. By that time, the Council had publicly stated that it had reached a settlement agreement with the contractor allowing remedial works to commence, and a settlement figure (although not identified as relating to DG One) had been published in the PWC audit report and the Council's annual accounts.
37. The Commissioner notes that, despite being asked to do so, the Council failed to provide submissions on what other project this published figure could possibly relate to, and failed to address the likelihood that it related to DG One. Acknowledging that the source of the receipt has not been publicly identified, the Commissioner considers it unlikely that, in an area which is largely rural, there could be a number of capital projects of similar size to which this settlement could relate. While the Council has confirmed publicly that it reached a

settlement agreement in relation to DG One, it does not appear to have done so in relation to any other project of a similar scale within a similar timeframe.

38. In the absence of any arguments persuading her otherwise, the Commissioner considers it would be reasonable for any informed bystander to infer that the published settlement figure related to DG One, particularly taking into account the timing of this figure's publication (September 2016) and the commencement of the remedial works to DG One at the end of summer 2016.
39. The Commissioner acknowledges that, in relation to the published figure, the confidentiality agreement allowed for disclosure of the information to the Council's auditors, as a receipt of this size would clearly need to be explained. She also notes that the decision not to publicly link this with the corresponding project was an intentional one, taken following legal advice. However, it is clear that when considering this receipt, the auditors did not perceive any harm in itemising it separately within a publicly available document. In the Commissioner's view, the Council's submissions failed to address the obvious implications of publication.
40. In the circumstances, the Commissioner considers the information is already in the public domain, at least by necessary implication. That being the case, she is not satisfied, on the basis of the submissions she has received, that the information could be said to retain the quality of confidence necessary for disclosure to amount to a breach of the settlement agreement.
41. On the arguments advanced by the Council, therefore, the Commissioner is not satisfied, in all the circumstances of this case, that the Council has demonstrated the substantial prejudice it has claimed.

#### *The Commissioner's conclusions*

42. In conclusion, the Commissioner is not satisfied, on the basis of the submissions put forward by the Council, that disclosure of the withheld information would, or would be likely to, prejudice substantially the effective conduct of its affairs, as required for the purposes of section 30(c) of FOISA. She does not, therefore, uphold the Council's reliance upon this exemption.
43. Having reached this conclusion, the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA.
44. The Commissioner requires the Council to disclose the withheld information to Mr Temlett.

## **Decision**

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The Commissioner finds that Dumfries and Galloway Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Temlett.

She finds that the Council was not entitled to withhold the information requested under section 30(c) of FOISA.

The Commissioner therefore requires the Council to disclose the information requested (the settlement figure) by **3 July 2017**.

## **Appeal**

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Should either Mr Temlett or Dumfries and Galloway Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

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

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**19 May 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.

...

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

Information is exempt information if its disclosure under this Act-

...

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

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