



Scottish Information  
Commissioner

**Decision 025/2005 – Mr Kelly and South Ayrshire Council**

*Refusal to provide information about the Gaiety Theatre, Ayr*

**Applicant: Mr R. C. Kelly of Robert C Kelly Ltd**

**Authority: South Ayrshire Council**

**Case No: 200501553**

**Decision Date: 26 August 2005**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Information about seats sold and value of sales for shows at the Gaiety Theatre, Ayr – whether release would be likely to prejudice substantially the commercial interests of the Council – section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 – application upheld by the Commissioner**

### **Facts**

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Mr Kelly, of Robert C Kelly Ltd, an independent theatrical production house, requested information about the total seats sold and the value of these sales for specified productions at the Gaiety Theatre between 1998 and 2005. South Ayrshire Council (the Council), the owner of the theatre, provided information for the years 1998 – 2001, but withheld the more recent figures. Its refusal cited the exemption in section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) and claimed that release would prejudice substantially the commercial interests of the Gaiety Theatre and the Council. This decision was upheld when Mr Kelly sought a review by the Council. Following this review, Mr Kelly asked the Commissioner to investigate his case.

### **Outcome**

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The Commissioner found that the Council had not demonstrated that release of the information under consideration would be likely to prejudice substantially the commercial interests of the theatre or the Council, and that therefore the information was not exempt under section 33(1)(b). He found that the Council had breached section 1(1) of FOISA by failing to provide this information to Mr Kelly. The Council is now required to provide this information.

### **Appeal**

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Should either the Council or Mr Kelly wish to appeal against the Commissioner's decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.



## Background

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1. Mr Kelly emailed the Council on 9 February 2005 to request details of the total number of seats sold, and the value of these sales, in relation to the Gaiety Theatre's annual winter pantomime and summer Gaiety Whirls productions over the period 1998 - 2005. A subsequent email clarified the request, stating that the request included information about summer season shows in 2003 and 2004 that were not referred to as "Whirls".
2. The Council responded to this request on 8 March 2005. Figures were provided detailing the information requested for the years 1998 – 2001. A refusal notice was issued in relation to information from the years 2002-2005. This stated that the more recent information was considered exempt under the terms of section 33(1)(b) of FOISA because release would prejudice substantially the commercial interests of the Gaiety Theatre and the Council.
3. The Council's notice stated that release of figures for 2002-2005 would provide competitors with an unfair commercial advantage in terms of costing rates, pricing information and marketing strategies, and therefore could affect the quality and standard of the service that the theatre provides to the public. The Council concluded that the public interest in maintaining the exemption outweighed that in release.
4. Mr Kelly emailed the Council again on 9 March, seeking a review of the decision to withhold the information for the years 2002 - 2005. The Council conducted a review and issued its response on 31 March 2005. This stated that the appeal had been unsuccessful for the reasons set out in the original decision notice.
5. Mr Kelly emailed my Office on 21 April 2005, applying for a decision in relation to his request. He expressed dissatisfaction with the Council's decision for a number of reasons. He stated that he did not believe that the information was commercially sensitive. He also noted that such information would be available to companies tendering to produce shows, and indicated that this was the practice of neighbouring Councils.
6. An Investigating Officer was assigned to this case.



## Investigation

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7. Mr Kelly's appeal was validated by establishing that he had made a valid information request to a Scottish public authority, and had appealed to me only after requesting that the authority review its response to his request.
8. A letter was sent to the Council on 3 May 2005, informing it that an appeal had been received and that an investigation into the matter had begun. The Council was invited to comment on the case under the terms of section 49(3) of FOISA.
9. The Council was also asked to provide me with a range of information in relation to this case. This included a detailed explanation of the reasons for the judgement that the information withheld falls under section 33(1)(b) of FOISA and the consideration of the public interest test. In particular, the Council was asked to explain why the exemption was judged to apply to information from 2002 – 2005, but not to the earlier information. Background information was also sought on the relationship between the Council and the Gaiety Theatre and the tendering processes followed in relation to the productions in question.
10. The Council's response was received on 2 June 2005. This confirmed that the Gaiety Theatre is directly owned and managed by the Council.

### **The Council's reasons for withholding information for period 2002-2005**

11. The Council rejected Mr Kelly's argument that the information would be available to parties tendering to produce shows and so should be available under FOISA now. It stated that the information requested has not been provided to any tendering organisation in the recent past (2003 onwards), and that it would not be provided to those tendering (including the incumbents) for upcoming shows.
12. The Council's explanation for the application of the exemption in section 33(1)(b) is that information about ticket sales and income can be used to judge the success and failure and commercial worth of investment, quality, casting, marketing strategies and pricing strategies. As a result, competitors could use the information to tailor their own strategies and tactics to compete more effectively with the Gaiety Theatre. A consequent reduction in the attendance and income for the Gaiety Theatre would lead to reduced financial performance. Furthermore, the information could be used to either copy successful strategies or avoid unsuccessful strategies without the risk taken by the Gaiety Theatre.



13. The Council added that it considered it appropriate to withhold information that is less than 36 months old for these reasons. It noted that the strategic value of older data had both decreased and been superseded such that the risk of substantial prejudice is no longer present.
14. The Council did not provide any details of its consideration of the public interest in relation to this information in its submissions to me. Copies of internal documents relating to the Council's consideration of the case did refer to the application of the public interest test and the Council's decision that the public interest favoured the withholding of the information. However, these documents did not refer to the arguments on either side. The factors I would have expected the Council to have considered in such a case include:
  - i. the general public interest in openness by public authorities
  - ii. the public interest in demonstrating that public funds are being used effectively
  - iii. the competing public interest in the continuation of the theatre's existence and ability to maintain the quality of its output.

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

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15. The main questions that I am required to address in this case are, firstly, to what extent would the release of this information be likely to affect the commercial interests of South Ayrshire Council as owners of the Gaiety Theatre and, secondly, does this amount to substantial prejudice and so make the information exempt from release under FOISA?
16. Mr Kelly asked for details of the total number of seats sold, and the value of these sales, in relation to the Gaiety Theatre's annual winter pantomime and summer productions over the period 1998 - 2005. The outstanding information under consideration here is that relating to the years 2002-2005.
17. Even though this information, if released, would simply provide aggregate totals, the Council argues that a chain of events would be likely to follow from release. First of all, a competitor theatre would analyse the information for each year to establish which shows, cast members, marketing strategies etc proved effective and which ones did not. It would then use this analysis in building its own strategies for developing and marketing future shows. As a result, the competitor(s) would gain customers at the expense of the Gaiety Theatre, thereby reducing its income and ability to offer high quality shows in future.



18. Although the Council suggests a possible chain of events, it provides no evidence of its likelihood, or to suggest why, when and how it would happen. No evidence was provided to show how many customers might be lost as a result of any advantage gained, or to demonstrate the financial or other effects such a loss would have on the theatre. The Council has provided me with some details of the levels of patronage from outside of the Ayr area and the value of such patronage but has not provided evidence as to why such patrons would all or in substantial numbers discontinue coming to the Gaiety if the information requested was released.
19. Furthermore, it seems to me unlikely that the potential chain of events described by the Council would be possible on the basis of information about tickets sold and the income from these. With this information, it is feasible that a competitor could establish an understanding of the relative success of shows over the years. However from such aggregate figures, it would be difficult to conclude whether a show's success was as a result of casting, production, its marketing or any other factor that distinguishes it from previous productions. Indeed, without further information about the cost of a particular show, this data alone cannot even be interpreted to establish its profitability. It therefore seems unlikely to me that a competitor, with access to all relevant information to analyse the factors favouring success or failure within its own productions, would choose to base its own strategy on the limited analysis of the kind of aggregate data requested by Mr Kelly.
20. I have also noted in the course of this investigation that a considerable amount of information is already in the public domain about the Gaiety Theatre's work in recent years. In January 2004, the Economic and Tourism Development Committee of the Council considered a report that sought its approval for a series of actions in response to a consultant's report on the Gaiety Theatre. This report is available online: [http://www.south-ayrshire.gov.uk/committees/publications/2004/etcadd2701/counciltheatres\(2\).pdf](http://www.south-ayrshire.gov.uk/committees/publications/2004/etcadd2701/counciltheatres(2).pdf).
21. The consultant's report was completed in May 2003 and commented, for example, on the quality of recent shows, the number of tickets sold over the course of a year, and the funding from the Council, expressed as the subsidy per ticket sold. This report also notes losses made on the Gaiety Whirls productions in the previous two years, presumably 2001 and 2002. The second of these years is one for which the Council has refused to provide information to Mr Kelly because doing so would allow a competitor to establish the success or otherwise of this production. It is difficult to see why the information requested by Mr Kelly would be likely to lead to substantial prejudice when the Council is comfortable making this report freely available.



22. Finally, I want to comment on the Council's response to Mr Kelly in this case. Mr Kelly is the managing director of a company that has produced shows for the Gaiety Theatre in the past. His request for review noted that the information he requested would be available to those tendering for future shows, and this type of information is made available by neighbouring local authorities. He therefore asked that the information be made available under FOISA now.
23. In its submission to me, the Council confirmed that this information was neither provided to tendering parties, nor required in order to submit a bid to produce shows at the theatre in recent years. It went on to state that this highlighted the "lack of relevance" of the information sought by Mr Kelly. This shows that there was an assumption of the reasons (which he had never explicitly stated) for Mr Kelly's request, and therefore that he did not actually need the information he has requested.
24. When considering requests for information, public authorities should remember that applicants do not have to justify their reasons for making requests and it is not for the authority to determine whether applicants need the information or not in respect of any supposed reason for making the request.

## Conclusion

25. The Council has suggested a chain of events that could ultimately have an impact on the commercial interests of Gaiety Theatre, and the Council.
26. In coming to my decision, I note the guidance of the Scottish Ministers within section 72 of the *Code of practice on the discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002* (the 'Section 60 Code'). This states that when determining whether disclosure would result in substantial prejudice, authorities should consider releasing information unless the prejudice caused would be of "real, actual and of significant substance". In my own guidance on the application of the exemption in section 33(1)(b) of FOISA, I have indicated that in order to claim these exemptions, the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future, not in some distant time.
27. I am of the view that the Council has not demonstrated that real harm could occur as a result of the release of the information sought by Mr Kelly and, even if it did follow, the Council has not demonstrated that the harm would be substantial. Therefore, I do not find that release of this information would be likely to prejudice substantially the commercial interests of the Gaiety Theatre and the Council.



28. Having found that the exemption in section 33(1)(b) does not apply, it has not been necessary for me to consider the public interest in relation to this case.

## **Decision**

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I find that the Council has not dealt with Mr Kelly's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In failing to release information to Mr Kelly, the Council has breached section 1(1) of FOISA. The reasons for this are detailed above.

I require the Council to release the information sought by Mr Kelly for the years 2002-2005.

I am obliged to give the Council at least 42 days in which to supply Mr Kelly with the information as set out above. In this case, I require the Council to take these steps within two months of the date of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**26 August 2005**