

# Decision Notice



Decision 090/2011 Mr Kiran Oza and Dundee City Council

West End Schools Project

Reference No: 201100144  
Decision Date: 16 May 2011

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Oza requested from Dundee City Council (the Council) information pertaining to the West End Schools Project. The Council responded, indicating that the information was commercial information, exempt and withheld in terms of section 33(1)(b) of FOISA. Following a review, Mr Oza remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had been entitled to withhold the information under the exemption in section 33(1)(b) of FOISA (accepting that the commercial interests of the Council would, or would be likely to be, substantially prejudiced by disclosure, and that the public interest in withholding the information outweighed that in disclosure). He did not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 7 July 2010, Mr Oza wrote to a Dundee City Councillor, requesting the following information:

*I write to you in your capacity as leader of the administration to ask about the West End Schools Project. Please can you ask the relevant council officers to advise me:*

1. *What is the current market value of the St Joseph's RC Primary School building and grounds, including "land at Bellfield" as identified in report 69-2009?*
2. *What is the current market value of the Logie site of the former Harris Academy Annexe on Blackness Road?*
3. *Will there be any funds transfer if the above lands are exchanged by way of excambion, as agreed at City Development Committee meeting of 22 February 2010?*



*4. Alternatively, would any funds transfer only happen when the existing St Joseph's RC Primary School is sold to the Al-Maktoum Foundation?*

*5. Will St Joseph's RC Primary School continue to have unrestricted access to the playing field (car park), football pitch and surrounding green space until such time as the new school is built and the children and teachers have transferred to the new facility?*

*6. Does the city council have any evidence that, after nearly 10 years of promised investment by the Al-Maktoum Foundation, that a cultural centre or other development will actually be built on the St Joseph's land, if this is exchanged for the Logie site as planned in the West End schools proposal?*

*As the formal planning application is currently underway, I would appreciate your early response so that parents and residents can be assured regarding these plans.*

2. On 2 September 2010, Mr Oza wrote to the Council providing a copy of the request for information as outlined above and requesting a review in that he had not received a response from the Councillor.
3. The Chief Executive of the Council responded on 9 September 2010, indicating that the Councillor had forwarded his request of 7 July 2010 to the Council and apologising that a response had not been provided. The Council informed Mr Oza that it had carried out a review and informed him it did not hold any information relating to his requests numbered 5 and 6. It further stated that information relating to his requests numbered 1 to 4 was being withheld as it was considered to be commercially confidential and exempt under section 33(1)(b) of FOISA.
4. On 10 September 2010, Mr Oza wrote to the Commissioner, stating he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. On 13 September 2010, Mr Oza was informed that his application to the Commissioner was not valid, on the basis that his initial request of 7 July 2010 had been made to an individual Councillor (who is not a Scottish public authority for the purposes of FOISA). He was further advised that his email to the Council of 2 September 2010, in which he forwarded his request to the Council, was considered to be his initial request to the Council. Consequently, for the purpose of FOISA, the Council's response of 9 September 2010 was considered to be a response to that request and not a response to a request for review.
6. On 13 September 2010, Mr Oza wrote to the Council requesting a review of its decision as advised by the Commissioner's office.
7. On 27 October 2010 Mr Oza wrote to the Commissioner, stating that he was dissatisfied with the Council's failure to respond to his request for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.



8. As a result of this application, the Commissioner issued *Decision 201/2010 Mr Kiran Oza and Dundee City Council* requiring the Council to respond to Mr Oza's request for review by 18 January 2011.
9. On 18 January 2011, the Council responded to Mr Oza's request for review, upholding the decision that the information in relation to requests 1 to 4 above was commercially confidential and confirming that this information was withheld under section 33(1)(b) of FOISA. It also confirmed that it held no information in relation to requests 5 and 6.
10. On 21 January 2011, Mr Oza wrote to the Commissioner, stating he was dissatisfied with the outcome of the Council's review in relation to requests 1 to 4 inclusive, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
11. The application was validated by establishing that Mr Oza had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.

## Investigation

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12. On 26 January 2011, the Council was notified in writing that an application had been received from Mr Oza and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested (with particular reference to the requirements of section 33(1)(b)) and to clarify certain points relating to the information.
14. In response, the Council provided its reasons for withholding the information under section 33(1)(b) of FOISA. Further clarification was sought and obtained from the Council in the course of the investigation.
15. The relevant submissions obtained from Mr Oza and the Council will be considered fully in the Commissioner's analysis and findings below.



## 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 submissions made to him by both Mr Oza and the Council and is satisfied that no matter of relevance has been overlooked.

### Section 33(1)(b) – commercial interests and the economy

17. The Council submitted that any information held in relation to requests 1 to 4 inclusive was exempt in terms of section 33(1)(b) of FOISA, which 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.
18. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. 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.
19. In this case, the Council submitted that the release of the information would, or would be likely to, prejudice substantially the commercial interests of the Council and the Al-Maktoum Foundation and provided detailed explanation, emphasising that negotiations between the relevant parties remained ongoing.
20. The Council submitted that the release of information regarding property transactions which were still in progress was likely to weaken its position, both as a purchaser and a seller, in the market place by revealing market-sensitive information or information of potential usefulness to competitors (for example, by enabling a third party to "gazump" the Council where, as here, it sought to acquire property, or offer an alternative property to a potential purchaser from the Council with the result that the sale by the Council did not proceed).
21. The Council continued that it believed third parties would only do business with it on less favourable terms, or be less likely to do business with it at all (and instead choose to do business elsewhere) because of the possibility of disclosure of negotiation information under FOISA.



22. The Council further submitted that public authorities are required to enter into property transactions for a variety of beneficial purposes, for example to sell property to raise funds in order to provide public services and to purchase property in order to provide buildings and facilities for the public. The Council stated that if it was not able to do these things (or was only able to do so on less favourable terms than might otherwise be available because of the possibility of disclosure) that would, or would be likely to, have a real, significant and immediate detrimental impact on the Council's (and its potential partners') commercial interests.
23. The Council also confirmed that the information withheld was still the subject of ongoing negotiations, with the real possibility that aspects might still be subject to change. The agreement remained to be finalised and it was not possible to estimate when this might happen.
24. The Council concluded that the third party to the negotiations had objected to the release of any information relative to the negotiations, stated that this was a matter of commercial confidentiality.
25. The Commissioner has firstly considered whether the Council has relevant commercial interests. Commercial interests will generally relate to any commercial trading activity an organisation undertakes, such as the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that the activities under consideration here, involving the sale and acquisition of land and property in an environment open to competition, are commercial in nature. In this connection, he would note his conclusion in *Decision 074/2011 Ms Caroline Gerard and City of Edinburgh Council*<sup>1</sup> that:  
“the commercial procurement of resources (including services) required for the purposes of undertaking [the Council's] core (non-commercial) activities can be considered to be a commercial activity, and that [the Council] has commercial interests in this respect.”
26. Having considered the submissions obtained from the Council, therefore, the Commissioner is satisfied that the Council has a commercial interest in the sale and/or acquisition of the land and property in question.
27. Having reached this conclusion, he must now go on to consider whether the commercial interest he has identified would, or would likely to, be prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 18 above: such prejudice must be at least likely before the exemption can apply, and therefore the Commissioner will expect to be satisfied that there is a significant probability of its occurrence.

<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201001883.asp>



28. The Commissioner has considered all of the information withheld, along with the submissions received. In this case, he accepts that negotiations were (and are still) actively being undertaken in respect of the transactions to which Mr Oza's requests relate. He notes the consequent ongoing potential for change in the terms on which these transactions will take effect, should agreement be reached. In the circumstances, while certain of the concerns expressed as to conduct on the part of potential competitors would appear to be overstated, the Commissioner is satisfied that disclosure of the requested information would be (and would have been, at the time the Council dealt with Mr Oza's request) likely to have a substantially prejudicial effect on the Council's ability to obtain the best possible negotiated agreement in terms of value for money.
29. The Commissioner is therefore satisfied that the information requested is exempt under section 33(1)(b) as its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council. He is not, however, satisfied from the submissions received from the Council that the Al-Maktoum Foundation's commercial interests would, or would be likely to, be so prejudiced: this may be the case (and the Council may believe that to be self-evident) but the Commissioner does not consider the Council's submissions to be either adequate or relevant in this respect. Neither is he persuaded that the considerations outlined in paragraph 22 above are of particular relevance in this connection: he can identify no evident connection between the beneficial nature of the purposes of a transaction and either the commercial character of that transaction or any harmful effects which might follow disclosure of information relating to it.
30. In reaching the above conclusion, the Commissioner has noted Mr Oza's comments that he did not believe the information covered by his requests 1 and 2 to be commercially confidential because "current market value" is not the same as "confidential sale price" and should be made available to the public. While this may be true in some cases, the Commissioner cannot accept this position as other than speculative in this particular case, given the ongoing nature of the negotiations.

#### *Public interest test*

31. As mentioned above, the exemption under section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
32. When applying the public interest test, the Council submitted it had considered the following:
- The general public interest that information is accessible, i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation.
  - Whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and the public obtaining value for money.
  - Whether disclosure would contribute to a debate on a matter of public interest.
  - Whether disclosure would prejudice the protection of an individual's right to privacy.



33. The Council concluded that disclosure of the information would not enhance public scrutiny, contribute to the effective oversight of public expenditure or contribute to any public debate on the matter. It also considered that disclosure would be prejudicial to the right to privacy of the third party involved in the negotiations and concluded that maintaining the exemption (with a view to ensuring that value for money was secured in property transactions) outweighed the public interest in disclosure.
34. The Commissioner also notes and has taken into consideration Mr Oza's submission (in relation to requests 3 and 4) that the sums to be transferred at excambion and on the subsequent sale of the land are materially relevant to the Council's finances, at a time when it is seeking to find significant savings, and therefore that this information should be available for public scrutiny.
35. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves spending from the public purse or the acquisition or disposal of public assets. He acknowledges that the withheld information might cast some light on these matters and that those entering into negotiations with Scottish public authorities should be aware that at times information relating to them will be released as a result of a request under FOISA.
36. On the other hand, the Commissioner has taken account of the submissions made by the Council and acknowledges the need for Scottish public authorities to be able to conduct and complete negotiations without the real risk of the kinds of harm he has identified above. The Commissioner considers that there is a strong public interest in Scottish public authorities having the ability to conduct negotiations relative to the acquisition and sale of land and property in conditions which will allow them to secure best value for the public purse.
37. Taking account of these factors, in particular the question of timing, the Commissioner finds that the public interest in disclosing the requested information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA. Once a formal agreement has been concluded with the other party to the transaction, however, the Commissioner may take a different view.

## DECISION

The Commissioner finds that Dundee City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Oza.



Decision 090/2011  
Mr Kiran Oza  
and Dundee City Council



## Appeal

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Should either Mr Oza or Dundee City Council wish to appeal against this 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 after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**16 May 2011**



## Appendix

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### Relevant statutory provisions

#### 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).

...