

# Decision Notice



Decision 174/2014 Mr Bob Doris MSP and Glasgow City Council

Correspondence concerning the closure of day centres for adults with learning disabilities

Reference No: 201301277

Decision Date: 08 August 2014

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

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## Summary

On 20 February 2013, Mr Doris asked Glasgow City Council (the Council) for correspondence between Councillors and Council Officers relating to the proposal to close three day centres for adults with learning disabilities. The Council withheld the information on the basis that it was exempt from disclosure in terms of section 30(b)(ii) of FOISA.

During the Commissioner's investigation, the Council disclosed some information to Mr Doris. The Council also told Mr Doris that it held some of the information on behalf of Councillors and this meant that it did not hold the information for the purposes of FOISA and so did not have to disclose it.

Following an investigation, the Commissioner accepted that some of the information was held by the Council on behalf of Councillors, and not for the purposes of FOISA. However, the Commissioner also found that some of the information was held by the Council in its own right, and so the Council did hold this information for the purposes of FOISA. The Commissioner accepted that the Council was entitled to withhold some of this information under the exemption in section 30(b)(ii) of FOISA but did not accept that the remainder was exempt from disclosure. She required the Council to disclose it to Mr Doris.

The Commissioner was satisfied that the Council had identified all of the relevant information that it held which fell within the scope of Mr Doris's request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 3(2)(a)(i) (Scottish public authorities); 17 (Notice that information is not held); 30(b)(ii) (Prejudice to effective conduct of public affairs)

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 20 February 2013, Mr Doris emailed the Council requesting the following information:  
*“...correspondence between councillors/council offices and documentation relating to the decision to close three day centres for adults with learning disabilities. We would like this to include any documentation on the matter dating from May 2011, a year before the elections to the Council in May 2012.”*
2. The Council responded on 20 March 2013. It informed Mr Doris that a proposal paper on the future of day services for adults with learning disabilities had been issued on 12 November 2012, with a subsequent engagement process undertaken from November 2012 to January 2013. The Council provided Mr Doris with a report on the outcome of the engagement process which had been presented to its Health and Social Care Policy Development Committee on 6 March 2013.
3. The Council informed Mr Doris that it was withholding correspondence between Council officers and Councillors. This was on the basis that it considered such correspondence to be exempt from disclosure in terms of section 30(b)(ii) of FOISA. In the Council’s view, disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
4. On 2 April 2013, Mr Doris wrote to the Council requesting a review of its decision. Mr Doris considered the exemption in section 30(b)(ii) had been used by the Council in such a way to deny transparency, rather than to protect the free and frank exchange of views. He disputed the Council’s application of the public interest test. Mr Doris also queried why no information was available from before 12 November 2012 (his request was for information dating from May 2011).
5. The Council notified Mr Doris of the outcome of its review on 2 May 2013. The Council upheld its decision that the information was exempt from disclosure under section 30(b)(ii) of FOISA. The Council stated that it held such communications only from 15 November 2012. The Council also stated that some of the communications contained the personal data of service users and constituents, and that this was exempt from disclosure under section 38(1)(b) of FOISA.
6. On 29 May 2013, Mr Doris wrote to the Commissioner, stating that 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.
7. The application was validated by establishing that Mr Doris made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.



## Investigation

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8. On 4 June 2013, the Council was notified in writing that an application had been received from Mr Doris and was asked to provide the Commissioner with the information withheld from him. The Council provided the information. The case was then allocated to an investigating officer.
9. 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. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The Council was also asked to clarify why no relevant information existed prior to 15 November 2012 (the date of the earliest document supplied to the Commissioner) and to explain the searches it had carried out to locate and retrieve information created before this date.
10. The Council responded on 22 August 2013. It:
  - (i) provided submissions on its application of the exemption in section 38(1)(b) of FOISA;
  - (ii) explained why it did not hold any relevant information from before 15 November 2012;
  - (iii) stated that it no longer wished to rely on the exemption in section 30(b)(ii) of FOISA;
  - (iv) advised the Commissioner it now considered that it did not hold some of the information sought by Mr Doris for the purposes of FOISA, because it was information created by Councillors as part of their duties;
  - (v) indicated that it intended to disclose to Mr Doris the relevant information which it considered it held for the purposes of FOISA (that is, information held otherwise than on behalf of Councillors), subject to the redaction of personal data.
11. On 29 August 2013, the Council disclosed a number of documents to Mr Doris. The Council redacted the names of junior members of staff and individual service users on the basis that the information comprised personal data and was exempt from disclosure in terms of section 38(1)(b) of FOISA. The Council also informed Mr Doris that some documents had been withheld in their entirety as the Council did not consider that it held them for the purposes of FOISA.
12. In subsequent discussions with the investigating officer, Mr Doris confirmed that he had no objection to the Council redacting the personal data of junior members of staff or individual service users. Therefore, this decision will not consider the Council's application of the exemption in section 38(1)(b) of FOISA. However, Mr Doris was dissatisfied with the Council's position that it did not hold some of the information for the purposes of FOISA, and with the Council's statement that it held no relevant information from before 15 November 2012.
13. During the investigation the Council stated that, should the Commissioner disagree with its position that it did not hold some information for the purposes of FOISA, it wished to argue that the information was exempt from disclosure in terms of section 30(b)(ii) of FOISA. The Council provided submissions explaining why it considered the information to be exempt under section 30(b)(ii).



## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Doris and the Council. She is satisfied that no matter of relevance has been overlooked.

### Information falling within the scope of the request

15. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case.
16. In this case, the Commissioner notes that some of the information which the Council considered fell within the scope of Mr Doris's information request was created after it received his request on 20 February 2013. Accordingly, the Commissioner has discounted from consideration any information created by the Council after it received Mr Doris's request. Five documents remain to be considered (documents 14, 15, 17, 18 and 21).

### Section 3(2)(a)(i) of FOISA – Scottish public authorities

17. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. However, section 3(2)(a)(i) of FOISA makes it clear that if the authority holds the information on behalf of another person, then the information is not held by the authority for the purposes of FOISA.
18. The question for the Commissioner to consider here is whether the information under consideration is held by the Council for the purposes of FOISA. The word "held" has a specific meaning in section 3(2) of FOISA that is not simply determined by the presence of information within the premises or information systems of a public authority. When information is present within a public authority's premises and systems only because it is held on behalf of another person, the public authority does not hold that information for the purposes of FOISA.
19. The Council submitted that it held some of the information sought by Mr Doris on behalf of elected members and therefore was not subject to FOISA. In the Council's view, information created by Councillors as part of their duties and stored by the Council either on its IT systems or as part of a paper file was information which the Council held on behalf of the Councillors. The Council considered that it did not hold documents 14, 15, 17, 18 and 21 for the purposes of FOISA.
20. The Commissioner has considered each of these documents in turn. The Commissioner accepts that document 18 is held by the Council on behalf of an individual Councillor. This document comprises a communication between a Councillor and a Council officer, and, in the Commissioner's view, does not demonstrate the Councillor acting on behalf of the Council as part of Council business. Instead, the Councillor is acting in an individual capacity, in their role as an elected member, in relation to political and constituency work. Accordingly, the



Commissioner is satisfied that that this document is held by the Council on behalf of another person and that the Council does not hold it for the purposes of FOISA.

21. The Commissioner has reached a different conclusion in relation to the remaining documents. In her view, these documents clearly demonstrate Councillors acting on behalf of the Council as part of Council business: in this case, in their capacity as office bearers of the Council.
22. These communications were sent and received by Councillors in pursuance of the Council's corporate functions; they do not concern political or constituency work. They contain information on matters relating to Council business and the Council's corporate policy regarding the closure of the day centres in question and the consultation that it had undertaken. The communications are clearly intended to represent the Council's views and interests on these matters.
23. Although not bound by it, the Commissioner has considered guidance issued by the UK Information Commissioner<sup>1</sup> to help assess whether information is held by a public authority for the purposes of the Freedom of Information Act 2000. This guidance suggests that where the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information, this would be a factor indicating that information is held solely on behalf of another person.
24. In this case, the Commissioner notes that the communications under consideration were drafted by Council Officers on behalf of a Councillor, or were sent by Council Officers on behalf of a Councillor. In the Commissioner's view, the provision of this kind of support by the Council adds weight to the argument that the information is not held by the Council solely on behalf of the individual Councillors.
25. The Commissioner does not consider that these communications relate to private, political or constituency matters. Consequently, she is unable to accept that the Council holds the information in these communications on behalf of individual Councillors. Accordingly, the Commissioner considers that documents 14, 15, 17 and 21 are held by the Council for the purposes of FOISA.
26. Having reached this conclusion, the Commissioner will now go on to consider whether the Council was entitled to withhold the information contained in these documents under the exemption in section 30(b)(ii) of FOISA.

### **Section 30(b)(ii) – Prejudice to effective conduct of public affairs**

27. In order to rely on the exemption laid down in section 30(b)(ii), the Council must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx)



28. In applying this exemption, the chief consideration is whether the release of the information would, or would be likely to, inhibit substantially the free and frank exchange of views. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.
29. The Council submitted that Councillors and Officers exchange correspondence in the expectation of confidentiality. The Council stated that these communications may be very frank where necessary if there is to be a shared understanding of the issues involved. The Council submitted that there was a significant difference between putting forward one's views or advice on sensitive and complex issues in a forum which one did not anticipate would be made public, and doing so in the knowledge that these matters were accessible by the public.
30. The Council submitted that disclosure of the information would enable the advice or views of individual Councillors to be considered publicly, which would be damaging on a number of levels. The Council argued that the withheld information did not contain formal minutes or records of meetings, but, rather, comprised draft responses and the opinions of the writers expressed in frank terms. In the Council's view, disclosure of the information would be likely to result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation.
31. The Council stated that, if the information were to be disclosed, Officers would feel constrained in providing views. Additionally, the Council submitted that Officers would feel constrained in recording information and advice to assist Councillors in taking decisions. In the Council's view, Councillors and Officers required a private space in which to carry out discussions with a view to reaching satisfactory conclusions. The Council submitted that Councillors and Officers needed a private forum not open to public scrutiny in which to discuss sensitive, pressing issues requiring frank discussion involving their internal thinking processes.
32. The Commissioner has considered the content of the withheld information along with the Council's submissions. Having done so, she accepts that the exemption is engaged in relation to the first paragraph in the draft email in document 21. The Commissioner considers that disclosure of this information would be likely to result in such points not being made as fully in future. She also accepts this would amount to substantial inhibition of the free and frank exchange of views for the purposes of deliberation.
33. The Commissioner can identify nothing in the content or context of the remainder of the withheld information which might reasonably be expected to have the inhibiting effect on the free and frank exchange of views suggested by the Council in future. The information does not appear to be particularly sensitive, merely conveying factual information, the Council's position and a reasonably presented point of view.



34. The Commissioner does not consider that the Council has demonstrated adequately how and why the disclosure of the information (with the exception of the information specified in paragraph 32) would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
35. Therefore, the Commissioner is unable to agree with the Council that disclosure of this information would cause the harm envisaged. Having reached this conclusion, the Commissioner does not accept that this information is exempt from disclosure in terms of section 30(b)(ii) of FOISA and requires the Council to disclose it to Mr Doris. As Mr Doris has indicated that he does not require the personal data of junior members of staff or individual service users (see paragraph 12), the Commissioner is content for such personal data to be redacted from the information to be disclosed.
36. As noted above, the Commissioner has concluded that the information referred to in paragraph 32 is exempt from disclosure in line with section 30(b)(ii) of FOISA. The Commissioner must go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to that information.

*The public interest test*

37. In his application, Mr Doris argued that there was a strong public interest in establishing the extent of Councillors' involvement in the closure of day centres. Mr Doris also considered it was strongly in the public interest to know when proposals were first suggested and the process that the Council went through.
38. The Council submitted that there was a strong public interest in protecting high quality decision making by ensuring Councillors can receive advice and conduct discussions in contentious matters without the prospect of these being made public. The Council considered that disclosure would be to the detriment of efficient, high quality decision making and would not be in the public interest.
39. The Commissioner has considered the arguments from both Mr Doris and the Council in relation to the specific information she has found to be exempt under section 30(b)(ii).
40. The Commissioner recognises that there is always a public interest in transparency and accountability and in scrutinising the decision making processes followed by authorities. The processes followed by the Council in this case are clearly of considerable public significance. The Commissioner also recognises that there is some controversy surrounding the decisions taken by the Council in this instance, lending some weight to the public interest in disclosure.
41. The Commissioner further recognises that there is a public interest in allowing officials an opportunity to share opinions and views with candour. The Commissioner has already concluded that disclosure of the information would be likely to substantially inhibit officials from expressing their opinions and views. She considers that such inhibition would hamper future policy and decision making within the Council and would be contrary to the public interest. The Commissioner finds that the public interest in favour of disclosure is outweighed by that in favour of maintaining the exemption contained in section 30(b)(ii) of FOISA.





42. Accordingly, the Commissioner has concluded that the Council was entitled to withhold the information specified in paragraph 32 in terms of section 30(b)(ii) of FOISA.

#### **Whether all relevant information has been identified by the Council**

43. 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. This is subject to certain qualifying provisions which do not apply here. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
44. Mr Doris expressed dissatisfaction with the Council's position that it held no relevant information prior to November 2012. In his view, it would be "bizarre" for officials to be working for months on a proposal for closing day centres with no input from Administration Councillors. Mr Doris considered the wording of the Council's review response of 2 May 2012 to be evasive. In his view, the Council had not stated expressly that no information was held prior to 15 November 2012; merely that it did hold information from that date onwards.
45. In its initial response to Mr Doris on 20 March 2013, the Council informed Mr Doris that a proposal paper on the future of day services for adults with learning disabilities had been issued on 12 November 2012, but that the subsequent engagement process had only commenced thereafter. In its response to Mr Doris's requirement for review, the Council informed him that officials had not been instructed to work on the proposals prior to the Council elections (in May 2012). The Council stated that officials had developed the proposed reforms and presented them to elected members for consideration and approval. The Council explained that the background to the proposals was informed by Council policy and forthcoming legislation relating to personal care.
46. In its submissions to the Commissioner, the Council explained that its Strategic Head of Adult Services was the Council Officer responsible for creating, developing and communicating the proposed strategy relating to the suggested closure of the day centres. The Council stated that this Officer's email systems and diaries had been searched in order to ascertain whether any relevant information was held prior to November 2012; these searches had not identified any such information. The Council further submitted that this Officer had stated categorically that no such communications with Councillors on this subject had taken place prior to November 2012.
47. The Commissioner has considered the Council's submissions, the searches that it has undertaken and its explanation of why no relevant information was held prior to 15 November 2012. Having done so, she is satisfied that the Council has undertaken relevant, proportionate searches to establish what information it held falling within the scope of the request.
48. It might have been good practice for the Council to have explained in more detail to Mr Doris why it did not hold any information prior to 15 November 2012, but the Commissioner is unable to conclude that the Council breached Part 1 of FOISA in this respect.



## DECISION

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

The Commissioner finds that the Council was entitled to withhold document 18 on the basis that, in terms of section 3(2)(a)(i) of FOISA, the Council did not hold it for the purposes of FOISA.

The Commissioner also finds that the remaining information (documents 14, 15, 17 and 21) was held by the Council in its own right and not on behalf of Councillors. The information in those documents is, therefore, subject to FOISA.

The Commissioner accepts that the Council was entitled to withhold the information described in paragraph 32 under the exemption in section 30(b)(ii) of FOISA and that the public interest lies in maintaining the exemption. The Commissioner does not accept that the remainder was exempt from disclosure under section 30(b)(ii) and finds that, by incorrectly withholding this information, the Council breached section 1(1) of FOISA. The Commissioner now requires the Council to disclose this information to Mr Doris by 22 September 2014.

## Appeal

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Should either Mr Doris or Glasgow City 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**08 August 2014**



## 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

##### 3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
- (i) on behalf of another person;



...

## 17 Notice that information is not held

(1) Where-

- (a) a Scottish public authority receives a request which would require it either-
  - (i) to comply with section 1(1); or
  - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

## 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

(b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...