

# Decision Notice

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## Decision 139/2018: Stuart and Nan Greaves and VisitScotland

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### VisitScotland Quality Assurance report

Reference No: 201800440

Decision Date: 31 August 2018



Scottish Information  
Commissioner

## Summary

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VisitScotland was asked for a copy of the Quality Assurance (QA) report for a specified rental property.

VisitScotland withheld the information, arguing that disclosure would cause substantial prejudice to their commercial interests, to the commercial interests of the property's operator and to the commercial interests of tourism business in Scotland as a whole.

Following an investigation, the Commissioner found that some of the information would be likely to cause substantial prejudice to the operator's commercial interests, if disclosed. However, he did not accept this argument for all information in the QA report. He required VisitScotland to disclose the information which was wrongly withheld.

## 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); 33(1)(b) (Commercial interests and the economy)

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.

## Background

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1. On 13 September 2017, Mr and Mrs Greaves made a request for information to VisitScotland. They asked for "...details of your Quality Assurance [QA] report on [a specified property]".
2. VisitScotland responded on 11 October 2017, stating that it could not disclose details of the QA report as this would give the operator's competitors an unfair advantage and could prejudice substantially the operator's commercial interests. VisitScotland relied on section 33(1)(b) of FOISA (Commercial interests and the economy) to withhold the information.
3. On 19 October, Mr and Mrs Greaves wrote to VisitScotland requesting a review of its decision on the basis that:
  - (i) If the report was positive and dismissed their complaint then it could not substantially prejudice the operator's commercial interests.
  - (ii) Section 33(1)(b) can only apply where substantial prejudice is likely, requires a genuine link between disclosure and damage is not a remote or hypothetical possibility. The exemption had been cited without explanation of how the information could be used by competitors to their advantage.
  - (iii) If the report upheld all or some of their complaints, then the public interest in disclosure should outweigh the operator's commercial interests. Potential guests should have access to available information about the quality and safety of accommodation. Mr and Mrs Greaves considered that the property's rating and website were misleading and argued that, if the report supported that view, it should be made publicly available.

Mr and Mrs Greaves stated they were, at the very least, seeking confirmation of the outcome of their complaint.

4. VisitScotland notified Mr and Mrs Greaves of the outcome of its review on 24 November 2017. It upheld the original decision and continued to rely upon section 33(1)(b) of FOISA. VisitScotland stated that the exemption applied to the withheld information in relation to the effect that disclosure would, or would be likely to have on the commercial interests of:
  - (i) tourism businesses in Scotland as a whole;
  - (ii) the operator of the specified property; and
  - (iii) VisitScotland.

The arguments put forward by VisitScotland are considered later in this decision notice.

5. On 8 March 2018, Mr and Mrs Greaves applied to the Commissioner for a decision in terms of section 47(1) of FOISA. They were dissatisfied with the decision by VisitScotland to withhold the information they had asked for, for a number of reasons (discussed later in the decision). In summary, they did not accept that the exemption in section 33(1)(b) of FOISA had been correctly applied.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr and Mrs Greaves made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 27 March 2018, VisitScotland was notified in writing that Mr and Mrs Greaves had made a valid application. VisitScotland was asked to send the Commissioner the information withheld from Mr and Mrs Greaves. VisitScotland 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. VisitScotland was invited to comment on this application and answer specific questions including justifying their reliance on section 33(1)(b) of FOISA to withhold information in the QA report.

## Commissioner's analysis and findings

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9. 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 him by both Mr and Mrs Greaves and VisitScotland. He is satisfied that no matter of relevance has been overlooked.

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

10. Section 33(1)(b) of FOISA provides that information is exempt under FOISA if its disclosure 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.
11. There are certain elements which an authority needs to demonstrate are present when seeking to rely on this exemption. In particular, it must show:

- (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. 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, and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be prejudiced substantially.

- 12. VisitScotland provided some information about the QA scheme, describing it as a widely used accreditation scheme adopted by all the UK's National Tourist Boards. Under the QA scheme, VisitScotland assesses both the quality of the facilities offered in a property and the services standards being provided, as well as highlighting areas in which operators can make improvements. It stated that this raises overall standards within the industry and encourages investment: a study in 2016 showed that 95% of tourism businesses in the QA scheme had invested in their business.
- 13. VisitScotland applied the exemption in section 33(1)(b) to the whole QA report. It maintained that the disclosure would, or would be likely to, prejudice substantially commercial interests.

#### *Commercial interests*

- 14. "Commercial interests" is not defined in FOISA. In his briefing on section 33<sup>1</sup>, the Commissioner stated that commercial interests will usually relate to any commercial trading activity an organisation undertakes, such as the ongoing sale and purchase of goods and services, commonly for the purposes of revenue generation. Such activity will normally take place within a competitive environment.
- 15. VisitScotland has argued that disclosure of the information would, or would be likely to prejudice substantially, the commercial interests of:
  - (i) tourism businesses in Scotland as a whole;
  - (ii) the operator of the specified property; and
  - (iii) VisitScotland.
- 16. The Commissioner is satisfied that the interests identified by VisitScotland are commercial interests for the purposes of the exemption in section 33(1)(b). Clearly, the interests of the operator of the property in question and of other Scottish tourism businesses relate to a commercial trading activity. In the case of VisitScotland, the Commissioner accepts that it has commercial interests in relation to its QA scheme.
- 17. The Commissioner will now go on to consider whether disclosure of the information would, or would be likely to, cause substantial prejudice to those commercial interests.

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

### *Tourism businesses in Scotland as a whole*

18. VisitScotland submitted that disclosure of the QA report would be likely to prejudice the commercial interests of tourism businesses in Scotland as a whole by causing real and significant harm to the commercial operators in the QA scheme. They argued that QA reports intentionally highlight improvements which could be made to improve business standards, and are prepared on a confidential basis. In highlighting improvements which could be made, the QA scheme differs from “private scheme providers who reflect the standards offered”. VisitScotland considered that information disclosed from QA reports could be removed from their overall context and posted on social media or websites, with a note that VisitScotland had made this comment about the business. It argued that, when taken selectively, or out of context, a comment which was originally intended to help the operator could have a significant adverse impact on the operator’s business.
19. VisitScotland accepted that there are already numerous positive and negative comments online with regard to the holiday rental market, but argued that the analysis and comments from trained Quality Tourism Advisers would carry considerably more weight and would have a more significant, disproportionate and unwarranted impact on tourism businesses, if disclosed.
20. The Commissioner understands the general concerns raised by VisitScotland, but is not persuaded that it has demonstrated why disclosure of information from a single QA report on one property would, or would be likely to, prejudice substantially the whole tourism business within Scotland. The tourism industry relies upon numerous markings and ratings upon which visitors can make their decisions. While the Commissioner accepts that comments and criticisms from VisitScotland would be likely to carry more weight, VisitScotland has not provided any evidence or reasoning to support its view that disclosure of one QA report would deter other accommodation providers from joining the QA scheme, or, if it did, how this would be likely to damage the commercial interests of tourism businesses across Scotland.
21. The Commissioner understands that VisitScotland has a general apprehension that the commercial standing and attractiveness of the QA scheme may be detrimentally affected by the disclosure of information which highlights any potential issues at tourism businesses to the public. However, the arguments it has provided in relation to these concerns are general in nature and do not provide evidence to support its view that disclosure of the information in the QA report would cause substantial prejudice to tourism business in Scotland as a whole.
22. As such, the Commissioner is not satisfied that disclosure of the information would, or would be likely to, prejudice substantially the commercial interests of tourism businesses in Scotland as a whole.

### *VisitScotland*

23. VisitScotland also considered that disclosure would, or would be likely to, cause significant harm to its own commercial interests, if it resulted in reduced participation in its QA scheme in preference to private schemes.
24. VisitScotland told the Commissioner that its QA scheme differs from other private quality assurance or rating schemes in aiming to raise standards by highlighting potential improvements. VisitScotland considers that there is a risk that operators will decide not to be a part of the QA scheme if the process is not confidential, and would be driven away from a scheme of public benefit. VisitScotland stated that if its QA scheme was not well respected within the industry, this would impact its statutory objective to encourage tourism businesses and encourage the provision and improve tourist facilities and amenities in Scotland.

25. VisitScotland also argued that, as the QA scheme is funded through participation, any decrease in income would impact on the financial viability of the entire QA scheme and would therefore substantially prejudice VisitScotland's ability to deliver the scheme and raise standards across the industry.
26. Again, the Commissioner finds that the submissions provided by VisitScotland do not show why disclosure of the specific information withheld from Mr and Mrs Greaves would, or would be likely, to have the effect anticipated and cause substantial prejudice to its own commercial interests. Whilst the Commissioner accepts that VisitScotland may have commercial interests associated with the QA scheme, its submissions have not demonstrated that it is reasonable to accept that disclosure of one QA report would be likely to have a significant impact upon the commercial viability of the QA scheme. VisitScotland has not provided any evidential basis to show that the mass withdrawal of businesses from the QA scheme is a likely outcome, if the information was disclosed.
27. As such, the Commissioner is not satisfied that disclosure of the information would, or would be likely to, prejudice substantially the commercial interests of VisitScotland.

*Operator of the specified property*

28. VisitScotland also argued that the commercial interests of the operator of the property in question would be prejudiced substantially by the release of the report. VisitScotland expressed concern that, if disclosed, the information from the QA report would be placed into the public domain by Mr and Mrs Greaves, who had told VisitScotland that they believed the public and any potential future guests should be aware of any issues with the property. VisitScotland was concerned that negative comments, taken out of the context of the report, and made by an independent public body could have a very significant, disproportionate and unwarranted impact on the commercial interests of the operator of the specified property, causing unfair damage to reputation and loss of trading activity.
29. VisitScotland advised the Commissioner that it had not consulted the operator to discuss whether the information should be disclosed under FOISA. Given the significant harm that disclosure could cause to commercial interests, this was not considered necessary.
30. The Commissioner accepts that some of the withheld information in the report would be likely to have an impact on the commercial viability of the specified property. As VisitScotland has said, the QA report is designed to highlight improvements which could be made, as well as assessing the current standard of accommodation. The Commissioner accepts that, if information describing potential improvements was to be published outwith the context created by the QA report, this could discourage bookings. While there are significant numbers of published reviews, both positive and negative, with regard to the accommodation in the specified property, the Commissioner accepts that these are unlikely to have the same impact or carry the same weight as the detailed comments within the QA report would have.
31. The Commissioner therefore accepts that disclosure of parts of the QA report would be likely to have a detrimental impact on the commercial interests of the operator, by leading to negative publicity which would be likely to impact upon the accommodation bookings. For this reason, he accepts that disclosure of some parts of the QA report would, or would be likely to, prejudice substantially the commercial interests of the operator of the specified property, and that the exemption in section 33(1)(b) applies to this information.
32. However, the Commissioner considers that there is information in the QA report disclosure of which would be unlikely to have a similar negative impact on the commercial interests of the

operator. The Commissioner considers that it would be possible to disclose some top level information from the report, specifically the assessors' conclusions on the rating level for the different parts or aspects of the property, without causing substantial prejudice to those commercial interests.

33. The Commissioner has therefore concluded that the exemption in section 33(1)(b) of FOISA was wrongly applied to some of the information in the QA report, and requires VisitScotland to disclose that information.
34. In relation to the information to which the exemption was correctly applied (i.e. all but some top-level information in the report), the Commissioner must go on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

### **Consideration of the public interest**

35. The Commissioner is considering only the public interest in disclosure of the information in the QA report which he has found would, or would be likely to cause substantial prejudice to the commercial interests of the operator of the specified property.
36. VisitScotland provided public interest arguments for and against disclosure of the information. It considered that disclosure could increase the amount of information available to potential visitors about the quality of the accommodation, and increase transparency around the VisitScotland grading process.
37. However, VisitScotland considered that there was a greater public interest in withholding the information under the exemption in section 33(1)(b) of FOISA. Some of its arguments relate closely to the views already considered in relation to potential harm to commercial interests: VisitScotland considered it would not be in the public interest to deter operators from joining the QA scheme, given that its core purpose is to raise the standard of accommodation services offered to visitors by encouraging investment. It also argued that the QA reports provide a snapshot of the accommodation at a particular point in time, and there was a danger that the public would be relying on outdated information.
38. VisitScotland stated that it already makes available its criteria and guidance in relation to the grading scheme. It considered that disclosure of the QA report, with the resultant harm to commercial interests, could result in an operator seeking to withdraw from the scheme. Given that it is in the public interest to raise standards within the industry, VisitScotland believed that this outcome would not be in the public interest.
39. In summary, VisitScotland took the view that it was in the greater public interest to protect a QA scheme that could encourage investment and drive up standards in the tourism industry in Scotland for the benefit of visitors. It would not be in the public interest to disclose information which would have a negative impact on the scheme by discouraging operators from taking part. Nor was it in the public interest to cause harm to a commercial business. On balance, the public interest lay in withholding the information under section 33(1)(b) of FOISA.
40. Mr and Mrs Greaves also provided public interest considerations to the Commissioner. They considered that it would not be in their interests alone for the information to be disclosed, but also in the interest of any member of the public relying on the VisitScotland website and ratings before selecting and booking accommodation. Potential customers should be aware of any issues as they rely upon the rating to assess the suitability of the accommodation. Mr

and Mrs Greaves also considered the public interest would be served in allowing the public to differentiate between properties with the same rating, based on clear description of outstanding issues. They considered that the potential loss of confidence in a body such as VisitScotland should not be relevant when considering the public interest test.

41. The Commissioner accepts that it is in everyone's interests to have a robust inspection scheme which is known to be reliable. Disclosure could be in the public interest by demonstrating to the public that VisitScotland takes complaints seriously, carries out thorough inspections, ensures proper follow up and that improvements are carried out. Disclosure would allow some public scrutiny of the process in place for this purpose.
42. However, the Commissioner has taken into account that disclosure of the information which he has found not to be exempt under section 33(1)(b) would go some way towards meeting that public interest, without requiring disclosure of information which he has accepted would, or would be likely to cause substantial prejudice to the commercial interests of the operator.
43. The Commissioner accepts that it is in the public interest for the QA scheme to attract as many participating businesses as possible, so that standards can be maintained and improved within the tourism industry. He accepts that disclosing information which would cause substantial prejudice to the commercial interests of one participant would be unlikely to encourage other operators to take part in the QA scheme.
44. The Commissioner has also taken into account that other information about the standard of the accommodation at the specified property is available online, from customer reviews, while accepting that this information does not allow a detailed comparison with the standard of accommodation offered by other properties with a similar rating (as Mr and Mrs Greaves have suggested would be in the public interest).
45. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure. While he does not accept all the arguments offered by VisitScotland, he finds that the harm to the commercial interests of the operator of the property which would follow disclosure of some of the information in the QA report outweighs any potential benefit to the public from its disclosure. The Commissioner therefore finds that VisitScotland was correct to withhold some information in the QA report under section 33(1)(b) of FOISA.

## **Conclusion**

46. The Commissioner requires VisitScotland to disclose the information in the QA report which was wrongly withheld under section 33(1)(b) of FOISA. To assist VisitScotland in identifying what should be disclosed to Mr and Mrs Greaves, the Commissioner will provide it with a marked up copy of the report.



## Decision

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The Commissioner finds that VisitScotland partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr and Mrs Greaves.

The Commissioner is satisfied that VisitScotland was entitled to withhold some information under section 33(1)(b) of FOISA. However, by withholding other information which was not exempt from disclosure, VisitScotland failed to comply with Part 1 of FOISA.

The Commissioner requires VisitScotland to disclose the information which was wrongly withheld, by **15 October 2018**.

## Appeal

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Should either Mr and Mrs Greaves or VisitScotland 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 VisitScotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that VisitScotland has failed to comply. The Court has the right to inquire into the matter and may deal with VisitScotland as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**31 August 2018**

### 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).

....

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