

Decision Notice



Decision 131/2008 Mr N and East Ayrshire Council

Tender Documents

Reference No: 200800298
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Summary

Mr N requested from East Ayrshire Council (the Council) a copy of all tenders for a specified IT support contract. The Council responded by providing some information but withheld the tender documents in terms of section 33(1)(a) and (b) of FOISA. Following a review, during which the Council also cited section 38(1)(b) of FOISA in relation to personal information, Mr N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council also applied section 36(2) of FOISA while Mr N accepted the Council's redactions under section 38(1)(b), the Commissioner found that the Council had dealt with Mr N's request for information in accordance with Part 1 of FOISA by withholding the information under sections 33(1)(b) and 36(2) of FOISA, being satisfied that its disclosure would either be an actionable breach of confidence (section 36(2)) or substantially prejudicial to the commercial interests of any person (section 33(1)(b)).

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 33(1)(a) and (b) (Commercial interests and the economy); and 36 (2) (Confidentiality).

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

1. On 11 January 2008, Mr N wrote to the Council requesting a copy of all tenders for "the recent IT support contract awarded to Conscia in November 2007".
2. The Council responded on 17 January 2008, and provided Mr N with a list of the companies which had submitted tenders, a copy of a blank tender document (which set out the criteria used to evaluate the tenders), a list of percentage evaluation scores for the bidders (in rank order) and the total price of the winning bid. The Council withheld the tender documents requested in terms of section 33(1)(a) and (b) of FOISA.



3. On 17 January 2008, Mr N wrote to the Council requesting a review of its decision. In particular, Mr N stated that those submitting tenders were well aware of FOISA and fully understood that tender information might have to be disclosed.
4. The Council notified Mr N of the outcome of its review on 15 February 2008, stating that it was extending the information being made available to him. The Council stated that the tender documents could be released with the redaction of personal information under section 38(1)(b) of FOISA and certain other information in terms of section 33(1)(a) and (b) of FOISA.
5. On 28 February 2008, Mr N wrote to the Commissioner's Office, 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.
6. The application was validated by establishing that Mr N had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 25 March 2008, the Council was notified in writing that an application had been received from Mr N and asked to provide the Commissioner with any information withheld from the applicant. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. 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 the provisions it had cited earlier in sections 33 and 38 of FOISA.
9. On 24 April 2008 the Council responded with detailed comments on this case, including its reasons for relying upon the exemptions in section 33(1)(a) and (b) and 38(1)(b) of FOISA. The Council also intimated at that stage it was further relying upon section 36(2) in relation to certain information within the tender documents, since that information had been supplied in confidence. In this connection, it drew the Commissioner's attention to his *Decision 050/2008 Mr Q and the University of Glasgow*, issued on 31 March 2008.
10. Further communication with the Council confirmed that the release at the review stage did not consist of the tenders with redactions, but merely a further blank tender document and a document which gave instructions to tenderers. The Council accepted that this could have been made clearer.



11. During the investigation, Mr N confirmed that he accepted the redactions of personal information as it related to names, qualifications, telephone numbers, email addresses etc of person not employed by the Council. As a consequence, it has not been necessary for the Commissioner to consider the redactions in terms of section 38(1)(b) of FOISA.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions that have been presented to him by both Mr N and the Council and is satisfied that no matter of relevance has been overlooked.
13. Analysis of the tender documents showed that the information withheld could be broken down into the following categories: company details with authorised signatories and their contact details, insurance details, price, staff skills and experience, client lists and referees, and method statements including project plans and related documents.

Section 36(2) of FOISA – confidentiality

14. The Commissioner will first of all consider the exemption in section 36(2) of FOISA, which the Council applied to information within the tender documents covering client lists, insurance, referees, pricing, and staff skills and experience.
15. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
16. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person.
17. The Commissioner is satisfied that the information withheld by the Council was obtained from other persons, namely those organisations submitting tenders, and therefore that the first part of the section 36(2) test has been fulfilled.



18. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.
19. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - a. the information must have the necessary quality of confidence;
 - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - c. unauthorised disclosure must be to the detriment of the person who communicated the information.
20. Having considered the information requested by Mr N and the arguments put forward by the Council, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence, in that the information is not common knowledge and could not readily be obtained by Mr N through any other means.
21. The Council made reference to *Decision 050/2008 Mr Q and the University of Glasgow*, stating that it considered the subject matter of this particular case to very similar to the situation in that decision. It referred with approval to the passage of that decision which accepted that, “*the inherent nature of the tendering process implied an obligation of confidentiality with respect to certain types of information, at the time of submission of tenders and their evaluation.*” The Council argued that the implied obligation of confidentiality confirmed in this passage must also extend for a reasonable time after the submission and evaluation of tenders. In this case, the tender had been concluded in July 2007 (approximately 6 months before Mr N’s request) and the Council considered it reasonable for the confidence to be maintained when it dealt the request, as the information was then still current and of value to interested parties. In support of this position, it referred to a subsequent passage of *Decision 050/2008*, where the Commissioner accepted that the information withheld in that case was subject to an implied obligation of confidentiality which (given the proximity of the request in that case to the process of evaluating tenders and awarding a contract) remained in existence when that request was dealt with.
22. In this case there was no explicit obligation of confidentiality, but the Commissioner reiterates his view that the inherent nature of the tendering process in this case implied an obligation of confidentiality, at least at the time at which tenders were submitted and when they were being evaluated.



23. Having accepted that the information submitted in the tender would have been confidential at the time of submission and evaluation, the question is whether such an obligation remained in force at the time the Council considered Mr N's request for information and his request for review. As the Commissioner said in *Decision 034/2006 Mr David Smith of Pentland Homeowners Association and Dundee City Council* (at paragraph 51) - pricing information will lose relevance (and therefore any element of confidentiality) with the passage of time in all but exceptional circumstances. The same can be said, in the Commissioner's view, for the other kinds of information under consideration here. In this case, as indicated above, the Council submitted that the tender had been concluded approximately 6 months before Mr N's request. In fact, it appears that the information under consideration was provided to the Council in tenders submitted in July 2007, the contract was awarded in November 2007 and Mr N's request was received by the Council in January 2008 (with the review being carried out in February of that year).
24. In considering whether there remained an obligation to maintain confidentiality at the relevant time, the Commissioner has also borne in mind that individuals or companies bidding for and entering into contracts with Scottish public authorities should by the time of the tendering exercise under consideration here have been well aware that details of their tenders might be the subject of requests under FOISA, and that their expectations as to confidentiality should have been adjusted accordingly. In the circumstances of this case, though, given the relative proximity of the time the request was dealt with to the award of the contract, the Commissioner is satisfied that a subsisting obligation of confidentiality remained in force when the Council's review was carried out.
25. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence (in that respect, the test of detriment is different from establishing whether, for example, disclosure would prejudice substantially the commercial interests of any person when considering the exemption at section 33(1)(b)).
26. The Council noted the Commissioner's acceptance in *Decision 050/2008* that the requisite degree of damage could have resulted from the disclosure of certain information (which he considered commercially unique to each tendering organisation) and argued that the information in question was similar in nature to the information withheld under section 36(2) in this case.
27. Here, it is clear that the Council believes that release would in some sense be detrimental to the interests of those who submitted the tenders. The Commissioner accepts that the IT market is highly competitive and that the information in question would have retained sufficient relevance for it to provide competitors with at least a degree of commercial advantage over those who submitted tenders in this case, as they would be aware of details such as hourly rates, daily rates and methods of work (which would not be generally available) and would be able to develop their proposals for similar work accordingly.



28. Having considered the submissions from the Council and Mr N, the Commissioner is satisfied that there would have been relevant detriment to those who submitted the tenders, in the sense required for there to be an actionable breach of confidence, should the information have been released in response to Mr N's request or his request for review.
29. Whilst the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) and not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure.
30. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. In coming to a decision on this matter, the Commissioner has taken account of the submissions made by Mr N to the effect that he cannot see how the information would damage the commercial interests of any one person and that FOISA was created to allow citizens to see information about the way that Government and local authorities operate. On the other hand, the Commissioner notes the Council's argument that, as in the case of *Decision 050/2008*, there is no reasonable basis for concluding that disclosure could be justified by a public interest defence.
31. While there may be a general public interest in economy, efficiency and effectiveness in the expenditure of public funds and more particularly in transparency and fairness in the award of public contracts, there has been no suggestion in this case of wrong doing or specific concern over the awarding of the contract in question or the price being paid for it. In the circumstances, therefore, the Commissioner does not see that there is a reasonable argument in this case for the release of confidential information on public interest grounds.
32. The Commissioner, having considered all the relevant tests, accepts that the Council was correct to withhold the information in the tender documents relating to insurance, referees, client lists, pricing, and staff skills and experience under section 36(2) of FOISA.
33. In relation to other information contained within the tender documents, the Council relied upon section 33(1)(a) and (b) of FOISA. The Commissioner will first of all consider the exemption contained in section 33(1)(a).

Section 33(1)(a) – trade secret

34. The Council stated that each tenderer was asked to provide it with specific detailed information, including method statements and details of pricing for the various components of the contract and specific work within it. This information was withheld under section 33(1)(a) and (b) of FOISA. As the Commissioner has determined that the withheld information relating to pricing was correctly withheld by the Council under section 36(2) of FOISA, he shall not consider that information again under this exemption.



35. In this case the Council submitted that section 33(1)(a) applied to the method statements supplied with each tender, which included project plans, organisational and team structures, methods of working, policies, procedures and other information specific to each company. In support of its arguments that the information was a trade secret, the Council simply provided examples of the types of information previously identified as trade secrets by the courts.
36. Section 33(1)(a) of FOISA provides that information is exempt from disclosure if it constitutes a trade secret. This is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
37. There is no definition of a trade secret in FOISA, although this term was discussed when the Freedom of Information (Scotland) Bill was considered in the Scottish Parliament. The Commissioner outlined his views regarding trade secrets within the context of tendering in some detail in his *Decision 104/2008 Streetwork UK and Glasgow City Council*.
38. In that case the Commissioner did not dismiss the possibility that tender documents would on occasion include information falling within the definition of a trade secret, or that the way in which a tender was presented as a whole might constitute a trade secret. For instance, the trade secret might exist by virtue of a unique and secret technique to preparing or presenting a successful bid or in a unique and closely guarded approach to delivering the service.
39. The Commissioner has considered the Council's arguments carefully, but he is unable to accept that any of the withheld information in the method statements and related documents constitutes a trade secret. Bearing in mind the detailed analysis of the requirements of this exemption undertaken in *Decision 104/2008*, he can identify nothing novel or secret about either their content or the manner or form in which these statements were drawn up or presented. In the absence of the Council making a more specific case as to why any particular part(s) of the withheld information should be considered trade secret, the Commissioner (while accepting that the examples given by the Council may be relevant to any consideration of what constitutes a trade secret, depending on the circumstances) therefore finds that the exemption in section 33(1)(a) was wrongly applied by the Council in this case.

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

40. Section 33(1)(b) of FOISA, 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 also a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
41. Under this exemption, as with the exemption in section 33(1)(a) of FOISA, the Commissioner is considering the method statements and related documents setting out each tenderer's specific approach to the performance of the contract (i.e. all of the withheld information he has not found exempt under section 36(2)). The Council argued that the release of this information would prejudice substantially the commercial interests of the companies involved.



42. The Commissioner has first considered whether the companies submitting the tenders in this case have relevant commercial interests and he is satisfied that they do. 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.
43. When considering this exemption, the Commissioner has had regard to the views expressed in numerous previous decisions and reiterated in his briefing on the section 33(1)(b) exemption. In particular, the briefing says:
- "The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.*
- FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied."*
44. The Council indicated that the information requested was current rather than historical. Each tenderer had been, as indicated above, required to submit detailed information to the Council including specific method statements, and the Council argued that disclosure of this information would prejudice the tenderers' commercial interests substantially. The basis of this argument was that disclosure of details in the method statements would enable competitors to copy beneficial information, such as methods of work, and develop their proposals accordingly, placing them at a significant advantage. This was considered to be of particular significance in an environment as competitive as the IT market, where local authorities placed contracts on a regular basis.
45. In this case, each tenderer was informed that the tenders would be evaluated on the basis of price (60% of the overall score) and a number of specified quality criteria (40% of the overall score). In relation to the quality criteria, each tenderer was asked to supply method statements for evaluation in accordance with the specified criteria. It is therefore apparent that the content of the method statements had a significant bearing on the award of the contract.



46. The Commissioner cannot comment fully on his analysis of the information contained within the method statements and related documents as to do so would of necessity involve disclosure of elements of the information in these statements. However, having considered the content of this information in the context of the timing of Mr N's request and its handling by the Council (only four months passing between the award of the contract and the Council's notification to Mr N of the outcome of its review) he is satisfied that the disclosure of this information in response to Mr N's request would have prejudiced substantially, or would have been likely to prejudice substantially, the commercial interests of the companies submitting tenders. He has reached this conclusion on the basis that the information, while not containing trade secrets, does set out each company's unique approach to the provision of the services for which tenders were sought, in such a way as to confer significant competitive advantage on each company. He does not consider that by the time of the Council's review that advantage would have diminished to such an extent that substantial prejudice to the relevant commercial interests would have ceased to be likely to follow from disclosure.

Public Interest Test

47. As the Commissioner is satisfied that the Council was correct to exempt the information in the method statements submitted by the tenderers under section 33(1)(b) of FOISA, he is now required to consider the application of the public interest test to the information. The exemption is a qualified one, in that (under section 2(1)(b) of FOISA) information which is exempt under it can be withheld only if, in all the circumstances of the case, the public interest in disclosing it is outweighed by the public interest in maintaining the exemption.
48. As indicated above, Mr N submitted that FOISA was created to allow citizens to see information about the way in which Government and local authorities operated and he did not see how the public interest in withholding the information would be greater than that in disclosing. He did not see how the information could damage anyone's commercial interests and pointed out that tenderers in this case had been advised that their tenders might be the subject of a Freedom of Information request and that in this case such a request had been made.
49. The Council submitted that there was a strong public interest in ensuring that procurement processes were conducted fairly and that public money was spent wisely. In addition, it considered there to be a strong public interest in the total sums of public money spent by Councils on specific contracts, and submitted that its Standing Orders on contracts and the general requirement to achieve Best Value supported these public interest considerations. Its normal practice, it advised, was to publish summary details of all tenders awarded to let the public see the names of the companies involved, the range of bids submitted and the sum of public money being spent. In this case, the Council had supplied Mr N with the details of the total cost of the winning bid and summary details of the relative merits of all bids.



50. The Council went on to argue, however, that providing full details of all tenders submitted would make future tenders less competitive, as everyone would know details of recent submissions. That would discourage companies from seeking to do business with the Council for fear of information being disclosed and could lead to reductions in service and increased prices if fewer companies were competing for Council business. This, it submitted, would not be in the public interest. It could identify no public interest in disclosing details of the losing tenders in particular, as no public money was being spent on the companies concerned. In conclusion, it considered the public interest in maintaining the exemption to outweigh any public interest in release.
51. Although the Commissioner recognises the importance of transparency of decision-making processes, particularly where they relates to the expenditure of public funds, he has considered the information supplied to Mr N, which includes the total price in the winning tender, the names of the successful and unsuccessful tenderers, the evaluation criteria and the total scores awarded to each tender on evaluation. In this case, the Commissioner is not satisfied that the public interest in transparency and accountability could be furthered significantly by the provision of the information which has been withheld in the method statements. In all the circumstances, therefore, he is satisfied that the public interest in maintaining the exemption, and in particular in protecting the competitive advantages conferred by the withheld information, outweighed that in disclosure at the time the Council dealt with Mr N's request for information and his request for review.
52. The Commissioner is therefore satisfied that the Council was correct in withholding the information in the method statements under section 33(1)(b) of FOISA. As he is satisfied that all of the withheld information has been properly withheld under either section 33(1)(b) or section 36(2) of FOISA, he is not required to consider the application of section 33(1)(a) to the information.

DECISION

The Commissioner finds that East Ayrshire 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 N.

The Commissioner finds that by withholding information in terms of sections 33(1)(b) and 36(2) of FOISA, the Council complied with Part 1. He does not require the Council to take any action.



Appeal

Should either Mr N or East Ayrshire 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.

Kevin Dunion
Scottish Information Commissioner
7 October 2008



Appendix

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (c) section 36(2);
 - ...

33 Commercial interests and the economy

- (1) Information is exempt information if-
 - (a) it constitutes a trade secret; or
 - (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).



36 Confidentiality

...

- (2) Information is exempt information if-
- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.