

# Decision Notice



Decision 184/2011 Mr Stephen Mitchell and North Lanarkshire Council

Tender document

Reference No: 201101169

Decision Date: 9 September 2011

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
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## Summary

Mr Mitchell requested from North Lanarkshire Council (the Council) information relative to a tender document submitted by a named company. The Council responded by informing Mr Mitchell that the information was exempt in terms of section 33 of FOISA in that disclosure would prejudice substantially the commercial interests of other tenderers and fundamentally flaw the tendering process. Following a review, Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation the Commissioner found that the Council had failed to deal with Mr Mitchell's request for information in accordance with Part 1 of FOISA, by wrongly applying the exemption in section 33(1)(b) of FOISA to the withheld information. He also did not accept that the information was exempt in terms of section 30(c) of FOISA (not being persuaded that disclosure would prejudice substantially the effective conduct of public affairs). Given that the information was provided to Mr Mitchell during the investigation, 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); 30(c) (Prejudice to effective conduct of public affairs) 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 19 November 2010, Mr Mitchell wrote to the Council requesting the following information:
  - i) a copy of the tender submitted by Abbeyford Caravan Company for the lease of Strathclyde Park Campsite on 6 March 2010;
  - ii) why this tender was not awarded to Abbeyford;
  - iii) in the Campsite Tender of 13 August 2010, how the proposed rent of £20,000 was calculated;



- iv) how much the Council spends annually on running the Campsite.
2. The Council responded on 20 December 2010, providing answers to points ii) to iv) above. In relation to point i) above, the Council informed Mr Mitchell that the information held was exempt from disclosure in terms of section 33 of FOISA and explained that, as the opportunity to lease the campsite was in the process of being re-marketed, disclosure would be likely to prejudice substantially the commercial interests of other tenderers and fundamentally flaw the competitive tendering process.
  3. Following further correspondence between him and the Council, on 27 May 2011 Mr Mitchell wrote to the Council requesting a review of its decision not to provide the tender requested.
  4. Following further correspondence, the Council notified Mr Mitchell of the outcome of its review on 24 June 2011. The Council upheld the original decision that the information was correctly withheld as exempt in terms of section 33 of FOISA.
  5. On 30 June 2011, Mr Mitchell 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.
  6. The application was validated by establishing that Mr Mitchell 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

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7. On 7 July 2011, the Council was notified in writing that an application had been received from Mr Mitchell and was 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.
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 any provisions of FOISA it considered applicable to the information requested. It was also asked to comment on whether any of the withheld information could be provided to Mr Mitchell at that time.
9. The Council responded on 17 August 2011, submitting that section 33(1)(b) of FOISA applied to the withheld information. It also claimed that the exemption in section 30(c) of FOISA was applicable.



10. The Council confirmed that, while it considered the information to be exempt from disclosure at the time it had dealt with the request, given further developments in the tendering process, it was prepared (with the consent of the relevant tenderer) to provide the information to Mr Mitchell, subject to the redaction of personal data. The Council then provided Mr Mitchell with the information.
11. Mr Mitchell confirmed receipt of the requested information, while still seeking a decision by the Commissioner as to whether the Council had complied with Part 1 of FOISA in dealing with his request. He did not take issue with the withholding of personal data.

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

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12. 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 Mitchell and the Council and is satisfied that no matter of relevance has been overlooked.
13. The Commissioner notes that the Council undertook a tender process in 2009 for the lease of the campsite in question. Abbeyford Caravan Company submitted a tender, which was deemed to be successful. Certain details surrounding the tenders received at that time were published on the Council's website, in a report to the Environmental Services Committee dated 19 August 2009 (Agenda Item 26). Following Abbeyford's withdrawal, the lease was retendered in August 2010.

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

14. The Council submitted that any information held in relation to request i) 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.
15. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
  - a) whose commercial interests would (or would be likely to) be harmed by disclosure,
  - b) the nature of those commercial interests and
  - c) how those interests would (or would be likely to) be prejudiced substantially by disclosure.



16. 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.
17. In this case, the Council submitted that (both at the time it dealt with the request and when the review was conducted) disclosure of the information would have prejudiced, or would have been likely to prejudice, substantially both its own commercial interests and those of another person. This was on the basis that the disclosure of detailed information provided by one tenderer at an earlier stage of the tender process would have given a potential tenderer what would have amounted to a competitive advantage over that tenderer in circumstances where it was specifically known by the authority that competitive re-tendering of the contract was being undertaken. The Council therefore submitted that the exemption under section 33(1)(b) of FOISA applied.
18. Despite being asked to do so, the Council made no submissions as to the nature of the commercial interests which would (or would be likely to) be harmed by disclosure, beyond those set out in the preceding paragraph. In the circumstances, however, the Commissioner accepts that both the Council (in procuring the service in question in a commercial market) and those submitting tenders would have relevant commercial interests in the information requested.
19. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests he has identified would, or would likely to, be prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 16 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.
20. The Commissioner has considered all of the information withheld, along with the submissions received. In this case, he acknowledges that, at the time the Council dealt with Mr Mitchell's request, it was actively undertaking the re-tendering of the contract for the campsite.
21. On the question of harm, however, the Commissioner must be persuaded by the submissions he has received from the Council. In his view, these do not explain how the disclosure of the requested information would have had, or would have been likely to have (at the time the Council dealt with Mr Mitchell's request) a substantially prejudicial effect on the commercial interests of either the Council's or any other person. Based on these submissions, therefore, he is not satisfied that in this case the information requested is exempt under section 33(1)(b), not being satisfied that its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council and of those submitting tenders.



### Section 30(c) - of FOISA

22. During the investigation, the Council further submitted that the information also fell to be withheld in terms of section 30(c) of FOISA. As there was a competitive re-tender of the contract being undertaken, the release of the information would have prejudiced substantially, or would have been likely to prejudice substantially, the effective conduct of public affairs on the part of a Scottish Public Authority.
23. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the effective conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure
24. In this case, the Council has simply asserted that such harm would, or would be likely to, follow from disclosure, by virtue of the existence of a relevant ongoing tendering exercise. In the absence of further submissions as to the nature of the harm in question and how it would have been expected to result from disclosure, the Commissioner cannot accept that the section 30(c) would apply in the circumstances. He does not accept, as the Council appears to suggest, that there is a necessary and self-evident link between the existence of such a tendering exercise and harm of the kind envisaged by section 30(c).
25. In conclusion, therefore, the Commissioner has not been persuaded by the Council that the exemptions in either section 33(1)(b) or section 30(c) of FOISA were applicable to the withheld information. Given that the information has now been provided to Mr Mitchell, subject to redactions about which Mr Mitchell has not expressed any dissatisfaction, he does not require the Council to take any action.



## DECISION

The Commissioner finds that North Lanarkshire Council (the Council) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mitchell. In particular, the Commissioner finds that the Council incorrectly applied the exemption in section 33(1)(b) to the requested information, and also that it was not entitled to withhold that information in terms of section 30(c) of FOISA.

Given that the Council provided Mr Mitchell with the information during the investigation, he does not require the Council to take any action.

## Appeal

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Should either Mr Mitchell or the 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**  
**9 September 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.

...

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.





**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).

...