

Decision Notice

Decision 161/2017: Mr Derrick Rawson and Perth and Kinross Council

Bill of quantities

Reference No: 201701097

Decision Date: 29 September 2017



Scottish Information
Commissioner

Summary

The Council was asked for the costings contained within a specified bill of quantities.

The Council refused to disclose the information on the basis that disclosure would cause substantial prejudice to the commercial interests of the contractor.

The Commissioner agreed the information was exempt from disclosure.

Relevant statutory provisions

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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 12 May 2017, Mr Rawson made a request for information to Perth and Kinross Council (the Council). The information requested was the costings contained within a bill of quantities supplied to the Council by Tayside Contracts. The bill of quantities concerned a specified piece of work instructed by the Council.
2. The Council responded on 29 May 2017. It withheld the information under section 33(1)(b) of FOISA, on the basis that disclosure would, or would be likely to, cause substantial prejudice to the commercial interests of Tayside Contracts.
3. On 4 June 2017, Mr Rawson wrote to the Council requesting a review of its decision. He did not agree that the information was exempt from disclosure.
4. The Council notified Mr Rawson of the outcome of its review on 16 June 2017, upholding its original decision without modification.
5. On 20 June 2017, Mr Rawson wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Rawson stated he was dissatisfied with the outcome of the Council’s review because he did not consider the information was exempt from disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Rawson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 10 July 2017, the Council was notified in writing that Mr Rawson had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Rawson. The Council 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. The Council was invited to comment on this application and answer specific questions, focusing on the requirements of section 33(1)(b) of FOISA.
9. The Council responded with submissions.

Commissioner's analysis and findings

10. 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 Rawson and the Council. She is satisfied that no matter of relevance has been overlooked.

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

11. The exemption in section 33(1)(b) of FOISA applies to information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. "Person" must be interpreted widely, to include a legal person (such as a company) as well as an individual: specifically, in this context, it includes a Scottish public authority. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
12. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial: in other words, of real and demonstrable significance.
13. The information withheld under this exemption is the pricing information contained in the bill of quantities and held by the Council at the time it received Mr Rawson's request.
14. The Council submitted that the commercial interests of Tayside Contracts would be prejudiced directly by disclosure of the information. It submitted that its own commercial interests would be prejudiced to a lesser extent, in terms of loss of trust from existing and potential suppliers.
15. The Council noted that the withheld information was the unit cost and total amount Tayside Contracts would charge for each item required to undertake the overall piece of work requested by the Council. The Council stated that the details of each item and the corresponding quantity had been disclosed, but not the unit costs. The Council submitted that these rates were a core part of Tayside Contracts' business and reflected implicitly Tayside Contracts' costs and charging policies and, consequently, its profit margins.
16. The Council submitted that these rates represented commercial information provided by a supplier, with the expectation that they would not be disclosed under circumstances which would significantly disadvantage that supplier. The Council argued that its ability to maintain the appropriate level of confidentiality was crucial in its current and future commercial dealings with other organisations.

17. The Council described Tayside Contracts as a commercial enterprise, competing with private companies. At the time of Mr Rawson's request, the work had not actually started and the rates quoted were, therefore, current rather than historical. In the Council's view, disclosure of the information would clearly give Tayside Contracts' competitors an advantage in bidding against it and would, therefore, threaten its commercial viability.
18. The Council pointed out that it issues tenders and requests for quotations for significant amounts of work every year, much of it done under EU procurement legislation providing for both a transparent process and a regime of confidentiality. The Council submitted that many of the agreements provide for work to be undertaken on some kind of schedule of rates. In the Council's view, it has generally been recognised under both FOISA and the Environmental Information (Scotland) Regulations 2004 that an organisation's detailed job/task rates are commercially sensitive while they remain current.
19. Mr Rawson disagreed that the information was exempt from disclosure, but did not provide any specific submissions in support of his view.
20. Having considered the Council's submissions, the Commissioner is satisfied that the interests identified in relation to Tayside Contracts are commercial interests for the purposes of this exemption. The information comprises the charges levied by Tayside Contracts for specific types of work. It forms part of Tayside Contracts' core pricing structure and reveals the method by which it formulates a price for specific contracts and tenders.
21. Having accepted that the information concerns the commercial interests of Tayside Contracts, the Commissioner must now go on to consider whether those commercial interests would, or would be likely to, be prejudiced substantially by disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
22. The Commissioner has considered the Council's submissions carefully. As in any case, she must consider the position as it stood when the Council notified Mr Rawson of the outcome of its review, on 16 June 2017.
23. Taking into account all of the Council's submissions, the Commissioner accepts that disclosing the detail of prices for the various works of maintenance and repair contained in the bill of quantities under consideration would have caused, or would have been likely to cause, considerable harm to Tayside Contracts' commercial activities at that time. In the Commissioner's view, such disclosure would have hampered significantly Tayside Contracts' ability to bid competitively in any future tendering exercises, thus threatening its commercial viability.
24. Accordingly, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA is engaged in relation to this information. In the circumstances, she has not found it necessary to consider the commercial interests of the Council.

The public interest test

25. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the information under consideration, she has gone 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 withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

26. The Council submitted that the public interest favoured maintaining the exemption in this case. The Council argued that the public interest had been satisfied to an extent by the previous disclosure of the overall total cost of the work. In its view, it was essential that it be allowed to continue to operate effectively in a commercial environment; disclosure of the information would put that in doubt.
27. The Council argued also that the issue did not add to a matter of general public debate, but was of interest only to a group of local residents. The Council submitted also that the residents' primary interest was not the work in question, or the costs, but an ongoing dispute about planning permissions and enforcement in relation to the site in question.
28. Mr Rawson did not make any submissions regarding the public interest test.
29. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the scrutiny of public finances.
30. On the other hand, the Commissioner accepts that there is a public interest in ensuring that there is fair competition in the commercial environment in which Tayside Contracts operates. She has already acknowledged the Council's submissions in favour of maintaining this exemption and has acknowledged the likelihood of substantial commercial prejudice to Tayside Contracts in this case in relation to the withheld information.
31. In the Commissioner's view, it is in the public interest for an organisation such as Tayside Contracts to be able to trade fairly and provide a viable service in a competitive market. The Commissioner also considers it is in the public interest that Tayside Contracts is not treated unfairly simply as a result of having entered a contractual agreement with a public body, with a consequential adverse impact on its ability to participate effectively in a competitive market (the Council's public interest submissions focus on its own ability to do this, but the Commissioner is satisfied from the submissions on harm that this is an issue applying equally to Tayside Contracts).
32. Having concluded that the Council was right to decide that disclosure in this case would, or would be likely to, cause substantial harm to Tayside Contracts' commercial interests, the Commissioner recognises that it would be contrary to the public interest to place Tayside Contracts in a disadvantageous position with respect to its competitors.
33. The Commissioner has considered all of the arguments and facts set out above. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice might result, the Commissioner does not believe that would be justified in this case.
34. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration. The Commissioner therefore finds that the Council was entitled to withhold the information under section 33(1)(b) of FOISA.

Decision

The Commissioner finds that Perth and Kinross Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Rawson.

Appeal

Should either Mr Rawson or Perth and Kinross 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.

Margaret Keyse
Acting Scottish Information Commissioner

29 September 2017

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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