

**Decision 027/2008 Mr Brian Ross and Dundee
City Council**

*Bill of quantities for re roofing work carried out by Dundee
Contract Services*

**Applicant: Mr Brian Ross
Authority: Dundee City Council
Case No: 200700060
Decision Date: 18 February 2008**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 027/2008 Mr Brian Ross and Dundee City Council

Request for a bill of quantities for re roofing work carried out by Dundee Contract Services – information withheld by virtue of section 33(1)(b)(prejudice to commercial interests) – Commissioner ordered disclosure

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 33(1)(b) (Commercial interests and the economy).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Brian Ross requested from Dundee City Council (the Council) a bill of quantities for re roofing works carried out by Dundee Contract Services. The Council responded, withholding the information from Mr Ross by virtue of section 33(1)(b) of FOISA, which relates to information which is commercially sensitive, and upholding that decision on review.

Following an investigation, the Commissioner did not accept that disclosure of the information would (or would be likely to) cause the substantial prejudice the Council had claimed to the commercial interests of Dundee Contract Services, its suppliers or subcontractors or the Council more widely, and therefore found that the Council had failed to deal with Mr Ross's request for information in accordance with Part 1 of FOISA. He required the Council to release the bill of quantities to Mr Ross.

Background

1. On 23 October 2006, Mr Ross wrote to the Council requesting the bill of quantities for the recent re roofing of 2-24 Greenbank Place, Dundee.



2. The Council wrote to Mr Ross in response to his request for information on 16 November 2006. It withheld the bill of quantities on the basis that it was exempt from disclosure by virtue of section 33(1)(b) of FOISA.
3. Mr Ross wrote back to the Council on 16 November 2006, indicating that he was unhappy with the decision and requesting a review.
4. On 3 January 2007, the Council wrote to notify Mr Ross of the outcome of its review. It provided a more detailed explanation of its application of the public interest test in this case, but overall upheld its initial response to Mr Ross's request.
5. On 11 January 2007, Mr Ross wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Ross had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

7. On 14 February 2007, the Council was notified in writing that an application had been received from Mr Ross and asked to provide my Office with comments on it, in accordance with section 49(3)(a) of FOISA. In particular, the Council was asked to justify its reliance on section 33(1)(b) of FOISA and to provide copies of the information withheld. The Council responded with the information requested, following the service of an information notice under section 50(1)(a) of FOISA, and the case was then allocated to an investigating officer.
8. During the process of the request and my investigation, the Council made a number of submissions relating to its handling of the case and the application of section 33(1)(b) of FOISA to the information requested. I will summarise these submissions below.
9. The Council submitted that as a competitive environment for building services existed, it considered that it was entitled to argue that disclosure of the information would be likely to prejudice its commercial interests substantially.



10. It went on to say that local authorities were obliged to secure best value in their dealings with actual and potential service providers and that disclosure of the information would interfere with commercial competition amongst such providers and thereby damage the Council's ability to do so.
11. The Council also argued in some detail that disclosure of the information would prejudice substantially the commercial interests of Dundee Contract Services, the entity which won the tender to carry out the re roofing work on behalf of the Council. These arguments related in particular to its competitiveness and its relations with suppliers and subcontractors.
12. Additionally, the Council referred in its submissions to my *Decision 034/2006 Mr David Smith of Pentland Homeowners' Association and Dundee City Council* (which related to a request for information of a similar type) and argued that my findings in that case could not in fact be relied upon to support withholding the information requested here, the circumstances of the two cases being significantly different.
13. Finally, the Council argued that a potential consequence of Dundee Contract Services becoming less competitive would be a reduction in the contribution it could make to the Council's reserves. Dundee Contract Services' surpluses were transferred to the Council's reserves, which were used, amongst other things, to keep the level of Council tax down. A reduction in the sums transferred to reserves would therefore, it was argued, affect the Council's interests adversely.
14. Both the Council and Mr Ross made a number of further submissions relating to whether the information requested should be released. Where relevant, I shall consider these submissions, and expand upon the arguments presented to me, in my analysis and findings below.

The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have considered all of the information and submissions that have been presented to me by both Mr Ross and the Council and I am satisfied that no matter of relevance has been overlooked.



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

16. The Council has withheld the bill of quantities for the re roofing work carried out by Dundee Contract Services on 2-24 Greenbank Place, Dundee, on the basis that the information is exempt from disclosure by virtue of section 33(1)(b) of FOISA. This bill of quantities was completed and submitted to the Council in response to a competitive tendering exercise with a return date of 31 August 2005. On the basis of this tender (the lowest submitted), the Council's Housing Committee agreed to award the work to Dundee Contract Services (the Council's own contracting arm) on 19 September 2005.
17. The Council has argued that to disclose the information would, or would be likely to, prejudice substantially the commercial interests of both itself and Dundee Contract Services.
18. Section 33(1)(b) of FOISA is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that I may be required to determine two questions when considering the use of section 33(1)(b). First of all, I must consider whether the Council's or Dundee Contract Services' commercial interests would (or would be likely to) be prejudiced substantially by disclosure of the information. Then, if I am satisfied that release of the information would prejudice either party's commercial interests substantially, I must go on to consider whether, in all the circumstances of the case, the public interest lies in favour of disclosure or in favour of the exemption being maintained and the information withheld. If I find that the public interest would be better served by the information being released, then I must order release of the information.

The commercial interests of Dundee Contract Services and its subcontractors/suppliers

19. Dundee Contract Services is, as I have indicated above, the Council's own internal contracting arm. It provides the Council with various building services, generally in competition with the private sector. It is required to break even on its activities, and would appear to be expected to provide a rather better financial return than that. It is not, however, wholly free to trade with the world at large.
20. In its submissions to me, the Council informed me that it had sought Dundee Contract Services' view on disclosure of the information. Dundee Contract Services argued that its commercial interests would be substantially harmed for the following reasons if the bill of quantities were to be disclosed to Mr Ross.



21. The Council advised that the contract to carry out re roofing work at 2-24 Greenbank Place, Dundee had been won by Dundee Contract Services in an open tender against four other contractors. All such tenders, it argued, were submitted with the expectation of confidentiality (although it conceded that this expectation was not mirrored explicitly in the tender or contract documentation).
22. The Council went on to argue that to disclose the winning tender would be to disclose information to Dundee Contract Services' competitors on how its rates for various elements of work were made up and thereby to reveal its pricing strategies. Competitors would be able to use that information to manipulate their own pricing strategies and thereby successfully outbid it for future tenders. Dundee Contract Services would not have the same advantages in relation to pricing information held by those competitors.
23. Referring to *Decision 034/2006* (see paragraph 12 above), the Council pointed out that this related to a bill of quantities which had been submitted to it six years before the relevant information request, whereas in this case the bill of quantities had been submitted just one year prior to Mr Ross's request. It took the view that the sensitivity of the information requested by Mr Ross and its interest and value to potential competitors had not decreased significantly by the time of his request, and that the prices quoted in the bill of quantities he had requested would remain a guide for similar tenders in future. This, the Council argued, was contrary to the position as I had found it to be in the earlier decision and therefore I was invited to reach a different conclusion in this case.
24. Considering the nature of Dundee Contract Services' activities as a whole, and in particular the activities under consideration in this case, I am satisfied that these are sufficiently commercial in character for its commercial interests to be engaged for the purposes of section 33(1)(b) of FOISA. Its operations are generally of a commercial nature and I am content that it had a commercial interest in the process of tendering for and carrying out the work which was the subject of the bill of quantities, and that the arguments narrated above relate substantially to its ability to trade competitively and therefore to that commercial interest. The question for me to consider, therefore, is whether disclosure of the bill of quantities would, or would be likely to, have the effect of causing substantial prejudice to that interest.
25. I have noted the Council's arguments in relation to expectations of confidentiality at the time the tenders were submitted. I have no doubt that was the case, but I do not consider the arguments to be particularly relevant to consideration of the section 33(1)(b) exemption. The question for me to consider is the effect of disclosure rather than any expectations of Dundee Contract Services and other bidders, and that at the time the Council dealt with Mr Ross's request rather than the time (16 months earlier, counting back from the date of the Council's review letter) when the tenders were submitted.



26. Having considered the bill of quantities withheld by the Council, I accept that the price submitted by Dundee Contract Services for the re-roofing work is broken down into individual rates for quite small discrete elements of the job. There is also an overall sum quoted for “preliminaries” (basically, meeting various contractual and other requirements of the Council, along with general costs of the contractor such as management and staff, site accommodation and temporary works). Global sums are quoted for labour, materials and plant under the heading of “dayworks” (i.e. “for works or costs which cannot entirely be foreseen, defined or detailed”), no percentage uplifts being identified for overheads and profit. While the bill goes into some detail, therefore, nowhere in it can I identify anything that would enable the calculation of Dundee Contract Services’ costs or profit margins without other information which is not publicly available and which would not be available to the applicant. Detailed information as to what a particular contractor charges for particular elements of a particular job is rather different from information as to how those prices are made up and I am unable to see how, with the information in the bill of quantities, it would be possible to glean or create useful information as to the pricing strategies adopted by Dundee Contract Services.
27. I note and understand the Council’s arguments in relation to Decision 034/2006 and the passage of time. The information under consideration in this case is certainly more recent than the tender discussed in that earlier decision, but it was (as I have indicated above) more than a year old at the time Mr Ross’s request for the bill of quantities was made, and approximately 16 months old by the time the Council dealt with Mr Ross’s request for review. I can accept that pricing information of that kind might have been of some interest to competitors after that period of time, but I am not satisfied that the effect of disclosure on Dundee Contract Services’ commercial interests could be described as substantially prejudicial. I have noted that this information is not in fact particularly revealing of how the prices in question are made up and in any event I think it highly unlikely that other contractors would have put much of a premium on information which was considerably more than a year old, as pricing in construction-related trades will always be subject to the vagaries of the marketplace and the value of the information contained in this particular bill of quantities would already have decreased significantly, given the passage of time.
28. The Council also submitted that disclosure of the bill of quantities would reveal some of the rates submitted to Dundee Contract Services by its suppliers and subcontractors. This, it argued, might lead to legal challenges from those parties and to future difficulties in obtaining suppliers and subcontractors. It was also argued that disclosure of these rates, provided in confidence, might affect the suppliers’ and subcontractors’ dealings with other persons with whom they did business, to the extent of causing significant harm to their respective commercial interests.



29. While I accept that this argument might have a degree of force if the bill of quantities were indeed revealing of the suppliers' and subcontractors' rates, with one exception I see (and have received) no justification for this contention. Nothing in the bill of quantities gives the remotest indication of the identities of Dundee Contract Services' suppliers and I have neither been advised of nor been able to trace any other publicly available source where such information might be found. In any event, while the bill of quantities includes detailed rates for component elements of the work, it is not apparent to me (nor I imagine to any other reasonably informed observer) that the prices charged by suppliers for the component materials can be deduced at all readily from this information.
30. The bill of quantities and the associated (public) committee report do name the subcontractors to be used for this job, but only in the case of one subcontractor (for TV aerial installation) can I identify detailed rates for the relevant work. I think it reasonable to conclude that the rates in question were those charged on this job by the subcontractor in question. As with the rates quoted by Dundee Contract Services for the remaining elements of the work, however, there is nothing to indicate how these are made up. The contractor's pricing of this particular job is likely to have been informed by a number of commercial considerations, some of which will have been peculiar to the job and indeed the customer. In all the circumstances, taking account of the passage of time, I am not persuaded that the disclosure of these rates would have been capable of causing substantial prejudice to the commercial interests of the contractor in question.

The wider commercial interests of the Council

31. In its response to Mr Ross, the Council argued that it had an obligation to achieve best value in its dealings with actual and potential service providers, which would be prejudiced substantially if the bill of quantities were to be released. It also argued the harm caused to Dundee Contract Services by disclosure could have a knock-on effect on the Council more widely, in that there could be a reduction in the sums Dundee Contract Services could transfer to the Council's reserves from its surpluses.
32. The first question I need to consider is whether any commercial interest of the Council is engaged by either of these points. As I have indicated above in relation to Dundee Contract Services, there are cases in which I will accept that public authorities have commercial interests, but only in specific circumstances where I am satisfied that a particular commercial activity is being carried on. It will be clear from previous decisions on this exemption (for example *Decision 233/2006 Mr Mike Portlock and Glasgow City Council*) that I draw a distinction between an authority's commercial interests and its financial interests.



33. An authority's financial interests will relate to its financial affairs and will include such matters as the management of its financial assets and the revenue it generates. These activities will not necessarily be commercial in nature. Commercial interests will relate more directly to trading activity and will include activity relating to the ongoing sale and purchase of goods and services, frequently for the purpose of revenue generation. It would be usual to expect a commercial enterprise to be organised for the purpose of generating a profit, although this is not essential.
34. If an activity is to be commercial for the purposes of section 33(1)(b) of FOISA, I will expect something in its character that goes beyond the straightforward purchase of goods and services required for the effective discharge of the authority's functions, statutory or otherwise, or for that matter the simple generation of revenue for the discharge of those functions.
35. I accept that local authorities are under an obligation to make arrangements which secure best value in the performance of their functions, including when procuring goods and services. This is simply a statutory duty, however, under section 1 of the Local Government in Scotland Act 2003. It has nothing particular about it which makes it inherently commercial. It will be clear from the preceding paragraphs that I do not regard the procurement of goods and services as being inherently commercial. I have not been presented with any more specific arguments in this case which would persuade me that there is anything about this procurement activity, whether in the duty to secure best value or in any other respect, which would make it commercial in nature.
36. I also accept that it is to the Council's overall financial benefit that it can maintain a revenue stream from the activities of Dundee Contract Services, which I do accept to be commercial. Once again, however, that does not make the receipt of surpluses from Dundee Contract Services, or for that matter the maintenance of the Council's reserves, commercial activities in themselves. On the contrary, it appears to me that the issues raised by the Council under this heading relate far more clearly to its financial interests and the Council has advanced nothing in its submissions which would persuade me otherwise.
37. It follows that I have not been persuaded that the Council (except as Dundee Contract Services) has commercial interests that would be capable of being engaged by Mr Ross's request, and consequently I do not require to give further consideration to the application of section 33(1)(b) of FOISA on the basis of such interests.



Conclusions

38. I have looked at the arguments submitted to me by the Council on why it holds that its commercial interests and those of Dundee Contract Services would be prejudiced substantially by disclosure of the information requested by the disclosure of the bill of quantities requested by Mr Ross. Having considered those arguments, and having examined the information requested in detail, I have not found sufficient evidence to conclude that the bill of quantities requested by Mr Ross falls under the category of information described in section 33(1)(b) of FOISA. I therefore conclude that the Council incorrectly withheld the information requested by Mr Ross under section 33(1)(b) of FOISA.
39. As I have found that the information requested is not subject to the exemption contained in section 33(1)(b) of FOSIA, I am not required to go on to consider the public interest in this case.

Decision

I find that Dundee City Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Mr Ross. In failing to release the information requested by Mr Ross (that information not being exempt under section 33(1)(b) of FOISA as the Council had claimed, Dundee City Council failed to comply with section 1(1) of FOISA.

I therefore require Dundee City Council to release the information requested by Mr Ross within 45 calendar days after the date of intimation of this decision notice.

Appeal

Should either Mr Ross or Dundee City 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
18 February 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.

...

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).

...