



Scottish Information
Commissioner

**Decision 216/2006 Mr David McNie and West
Lothian Council**

*Request for information regarding the costs of photographic
services and information relating to the tendering for these
services.*

**Applicant: Mr David McNie
Authority: West Lothian Council
Case No: 200503281
Decision Date: 30 November 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 216/2006 Mr McNie and West Lothian Council

Request for information on West Lothian Council's photographic service costs – information withheld under sections 33(1)(b) (Commercial interests and the economy) and 36(2) (Confidentiality)

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 33(1)(b) (Commercial Interests and the economy); 36 (2) (Confidentiality); section 21(1) (Review by Scottish public authority)

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

Previous Decisions:

Decision 056/2006 MacRoberts and the City of Edinburgh Council

Facts

Mr McNie requested from West Lothian Council information on the tendering process for its photographic services. In particular, Mr McNie requested specific photographic service costs, copies of the notes and minutes taken at the tender interview and a copy of an audit report which examined the Council's handling of the photography tender award.

West Lothian Council supplied Mr McNie with the information requested, but redacted certain monetary values from the photographic service costs, on the grounds that the information was exempt from disclosure under sections 33(1)(b) and 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA).

West Lothian Council upheld this decision following Mr McNie's request for review.



Following investigation, the Commissioner found that West Lothian Council had acted in accordance with Part 1 of FOISA by applying the exemption in section 36(2) to the information withheld from Mr McNie. However, he found that its application of the exemption in section 33(1)(b) was not appropriate.

The Commissioner found that West Lothian Council failed to act in accordance with Part 1 of FOISA in its failure to respond to Mr McNie's request for review within the requisite timescale set out in section 21(1) of FOISA.

Background

1. On 10 January 2005 Mr McNie requested by letter from West Lothian Council (the Council) information on its photographic service costs in relation to 10 particular aspects (points 1-10) of the successful tender, copies of the notes and minutes taken at the tender interview attended by Mr McNie and a copy of an audit report which examined the Council's handling of the photography tender award.
2. The Council responded on 26 January 2005 and supplied Mr McNie with:
 - i. a copy of the minutes and interviewers' notes made at the tender interview attended by Mr McNie;
 - ii. a copy of the audit report which examined the Council's handling of the photography tender award; and
 - iii. a copy of the tender price analysis sheet.
3. For the successful tender, the tender price analysis sheet supplied to Mr McNie combined the cost for points 6-9 and withheld individual monetary values for points 1-5 and 10.
4. The Council redacted these monetary values from the information supplied on grounds that the information was exempt from disclosure under sections 33 and 36 of FOISA.
5. Mr McNie wrote to the Council 2 February 2005, detailing his dissatisfaction with the response supplied. As this letter had not been addressed to the appropriate person, as instructed in Mr McNie's initial response of 26 January 2005, it was not treated as valid request for review.



6. Mr McNie subsequently submitted a valid request for review on 8 March 2005. Mr McNie requested that the Council review its decision to withhold the individual monetary values for points 1-10.
7. The Council responded to Mr McNie's request for review on 17 June 2005. It upheld the decision communicated on 26 January 2005, indicating that the information was exempt from disclosure under sections 33(1)(b) and 36(2) of FOISA and that the public interest in maintaining these exemptions outweighed that in disclosure.
8. On 12 December 2005 Mr McNie applied to me for a decision. Mr McNie was dissatisfied with the redaction of the individual monetary values for points 1-5 and 10.
9. This case was then allocated to an investigating officer and the appeal was validated by establishing that Mr McNie had made a valid information request to a Scottish public authority and had appealed to me only after asking the authority to review its response.

The Investigation

10. A letter was sent to West Lothian Council on 26 January 2006, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was invited to comment on matters raised by the applicant and on the application as a whole, in terms of section 49(3)(a) of FOISA. In particular, the Council was asked to provide a copy of the information withheld and explanations in support of its application of the two exemptions.
11. The Council replied on 2 March 2006 enclosing its statements on the case and supporting documentation.
12. In its response to this Office, the Council stated that it no longer considered the information which it had refused Mr McNie as commercially sensitive and that it would be willing to release the information after consultation with the incumbent contractor and consideration of his views (the Council being of the view that there remained a subsisting obligation of confidentiality to that contractor). It reverted to its original position, however, following consultation with the contractor, arguing that Mr McNie and the contractor could reasonably expect to be in competition with each other for similar work locally, and that the individual figures withheld retained a commercial relevance. It referred back to the arguments presented to Mr McNie in its letter of 17 June 2005.



The Commissioner's Analysis and Findings

13. In arguing that the individual figures relating to points 1-5 and 10 should be withheld, the Council stated that two separate exemptions applied to the information. The exemptions cited were those contained in sections 33(1)(b) and 36(2) of FOISA. I will address the Council's application of each of these exemptions in relation to the information withheld in turn.

Section 33(1) (b)-Commercial Interests

14. Section 33(1)(b) exempts 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 exemption is subject to the public interest test, which means that, even if the information falls under section 33(1)(b), the information will require to be disclosed unless the public interest in maintaining the exemption outweighs that in disclosure.
15. The Council submitted that the information withheld from Mr McNie was exempt under section 33(1)(b) of FOISA, in that disclosure would, or would be likely to, prejudice substantially the commercial interests of the incumbent contractor.
16. The Council stated that due to similarities between their respective businesses, the release of the information would allow Mr McNie to make a reasonable estimate of the incumbent contractor's contract prices and rates in any re-tendering exercise by applying inflation rates. This would give him a competitive edge over the other contractor in that and other contracts.
17. The Council then went on to consider the public interest test.
18. The Council asserted that if this information were to be released in this or similar situations involving contracts, it would undermine the confidence of bidders in the Council's tendering process, jeopardise the Council's relationship with contractors, and compromise the Council's role as a purchaser of services. The Council considered that there would be a real risk that those submitting tenders would be discouraged from dealing with it for fear of disclosure of information which could damage them commercially.
19. The Council also asserted that the release of the information would not improve or enhance the scrutiny of the decision-making process as the reasons for the award of this contract had been made fully available to Mr McNie, particularly the minute of the relevant meeting of the interviewers and their interview notes.



20. In addition, the release of information would not, in the Council's view, contribute to the effective oversight of public expenditure and obtaining value for money, as the letting of this contract had been the subject of an internal audit, a copy of the report from which had been made available to Mr McNie. This audit concluded that the incumbent contractor was the clear winner on quality factors and not price, and concluded that both the current contractor and other tenderers had been treated equally and fairly.
21. Having considered all of the above points, the Council concluded that the public interest in maintaining the exemption outweighed that in disclosure.
22. In my consideration of this case, I note that the financial information in question was submitted to the Council on 25 November 2002 and was in fact three years old at the time of Mr McNie's request.
23. It has also been clearly stated by the Council that should it re-tender its photographic services, the specification is expected to be "significantly different" from that of the previous contract.
24. In addition, the Council provided this Office with information which demonstrated that the tender was not awarded on the basis of this financial information alone.
25. In my briefing covering the exemption in section 33(1)(b) (Section 33: Commercial interests and the economy) I said: "...in order to claim these exemptions, the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time. Authorities should therefore consider disclosing the information asked for unless it would cause real, actual and significant harm"
26. While I acknowledge the Council's comment that individual prices could be easily adjusted by inflation, given the significant time period that has elapsed and the unique specifications that future invitations to tender are likely to present, I am not satisfied that the disclosure of this information would result in significant harm to the incumbent tenderer.
27. In particular, I would highlight that the passage of time has reduced the potential value of the information to any competitors for future tenders, as prices (even allowing for inflation), service delivery methods and market conditions will undoubtedly have changed.
28. In light of these circumstances, I am not satisfied that release of this information would automatically give a significant advantage to future tenderers over the previously successful party with respect to any re-tendering of the Council's contract or indeed any other future commercial tenders.



29. In conclusion, I am not satisfied that release of this information would or would be likely to, prejudice substantially the commercial interests of any person as required by section 33(1)(b) of FOISA. As such, I find that the Council misapplied the exemption in section 33(1)(b) of FOISA to the information withheld.
30. As I have found that the exemption in section 33(1)(b) has been incorrectly applied, it is not necessary for me to consider the public interest as it relates to this exemption.

Section 36(2) actionable breach of confidence

31. 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 by any other person.
32. 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.
33. Section 36(2) outlines a two stage test which must be fulfilled before the exemption can be relied upon. Firstly, 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.
34. The second part of the test is that the disclosure of the information by the public authority would constitute an actionable breach of confidence either by the person who gave the information to the public authority or by any other person. I take the view that actionable means that the basic requirements for a successful action must appear to be fulfilled.
35. As the monetary values for the various elements of the photographic service were supplied to the Council from another party, the incumbent contractor in the context of the tendering process, I am satisfied that the first part of this test has been fulfilled.
36. There are three main requirements which must be met before a claim for breach of confidentiality 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 the authority to maintain confidentiality; and
 - c) there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
37. Having considered the information requested by Mr McNie, I am satisfied that it has the necessary quality of confidence, in that the information is not publicly available and could not be readily obtained through any other means.
38. In its submissions to my Office the Council supplied a number of documents relating to the tendering process. Document 1 provides instructions and information on the tendering process. Paragraph 28 of this document states that:
- “All information supplied by the Authority [i.e. the Council] to you must be treated in confidence and not disclosed to third parties except insofar as this is necessary to obtain sureties or quotations for the purpose of submitting the tender. All information supplied by you to the Authority will similarly be treated in confidence except:*
- i. that references may be sought from banks, existing or past clients, or other referees submitted by the tenderers;*
 - ii. for the disclosure of such information with regard to the outcome of the procurement process as may be required to be published in the Supplement to the Official Journal of the European Communities in accordance with EC directives or elsewhere in accordance with the requirements of UK government policy on the disclosure of information relating to government contracts.”*
39. In addition, the Council supplied the Conditions of Contract, within which Condition 25 (Confidentiality) states that:
- “25.1 Each Party :-*
- a) shall treat as confidential all information obtained from the other Party under or in connection with the Contract;*
 - b) Shall not disclose any of that information to any third party without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Contract;*
 - c) Shall not use any of that information otherwise than for the purposes of the Contract.”*
40. The Conditions of Contract also provide, at Condition 25.8, that:



“The obligations imposed by this Condition shall continue to apply after expiry or termination of the Contract.”

41. It is clear from the information supplied by the Council that an appropriate obligation of confidentiality was in place when the information was initially supplied.
42. This contract commenced on 1 January 2003 and was due to expire at the end of March 2006 but was extended to the end of December 2006.
43. I am therefore satisfied that the Council is still subject to the obligations under these Conditions of Contract, including the obligations as to confidentiality.
44. As indicated above in paragraph 36, the third requirement of an actionable breach of confidence is that there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
45. The Council received comment from the incumbent contractor who expressed the view that if their detailed costs were released, albeit they are now three years old, a direct competitor would have a competitive advantage not only in tenders for the Council but in all other commercially tendered work.
46. The Council submits that while it would not treat, and has not treated, all the information provided under the contract as confidential under FOISA, the disclosure of the information withheld from Mr McNie would substantially prejudice the current contractor's commercial interests and therefore would constitute an actionable breach of confidence which the current contractor would have good prospects of winning if pursued in court.
47. For the reasons I have set out in paragraphs 26-30 above, I am not satisfied that the release of the information withheld from Mr McNie would substantially prejudice the commercial interests of the incumbent contractor. However, the test as to whether disclosure would cause damage to the party who provided the information for the purposes of an actionable breach of confidence is essentially a lower one.
48. In the circumstances, I accept that disclosure which has not been authorised by the incumbent contractor who communicated the information, where that contractor is clearly unhappy with the possibility of disclosure and apprehends damage as a consequence, would cause the requisite degree of damage to the incumbent contractor in this instance.
49. As stated above, if the conditions of section 36(2) are fulfilled an absolute exemption is created. However, 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.



50. In this case the public interest considerations which have to be taken into account are different from the public interest test contained in section 2(1) of FOISA. The exemption in section 36(2) is not subject to the public interest test in section 2(1) of FOISA. The law of confidence recognises that there is a strong public interest in ensuring that people respect confidences, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances the 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 (Decision 056/2006 MacRoberts and the City of Edinburgh Council).
51. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern. In this instance I have considered whether disclosure of the information in question would be necessary to secure effective scrutiny of decision-making processes or oversight of the expenditure of public funds. Taking into account the information already released by the Council, I see no reasonable basis for concluding that the Council would have a defence to an action of breach of confidence on public interest grounds should it disclose this information.
52. In conclusion, I am satisfied that the requirements of section 36(2) of FOISA have been fulfilled in this instance. As a result, I find that the exemption under section 36(2) (b) of FOISA was correctly applied by the Council to the information withheld from Mr McNie.

Technical Breaches of FOISA

53. Section 21(1) of FOISA sets out the requisite timescales in which a Scottish public authority must respond to a request for review.
54. In this instance, the Council took longer than the 20 working day period allowed in responding to Mr McNie's request for review and therefore, failed to comply with the timescales set out in FOISA.



Decision

I find that the West Lothian Council acted in accordance with Part 1 of FOISA in its application of the exemption under section 36 (2) in withholding the information, in that the information was obtained by the Council from another person and its disclosure by the Council would constitute a breach of confidence actionable by that person.

However, I find that West Lothian Council was incorrect in its application of the exemption under section 33(1) (b) of FOISA, I am not satisfied that the release of the requested information would substantially prejudice the commercial interests of the incumbent contractor.

West Lothian Council breached Part 1 of FOISA in its failure to respond to Mr McNie's request for review within the requisite timescales set out in section 21 (1) of FOISA.

Appeal

Should either Mr McNie or the West Lothian Council wish to appeal against the Commissioner's 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner

30 November 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

21 Review by Scottish public authority

- (1) ... a Scottish public authority receiving a requirement for review must ... comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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.

