

Decision Notice



Decision 069/2009 Mr Conor McNally and City (Building Glasgow) LLP

Information relating to repair and maintenance contract

Reference No: 200800994
Decision Date: 16 June 2009

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Conor McNally requested from City Building (Glasgow) LLP (CBG) information relating to the winning tender for the Glasgow Housing Association (GHA) Home Improvement Contract. CBG responded by providing some information, however CBG advised Mr McNally that the remainder was either not held by it or was considered exempt in terms of section 33(1)(b) of FOISA. Following a review, Mr McNally remained dissatisfied and applied to the Commissioner for a decision

Following an investigation, the Commissioner found that CBG had partially failed to deal with Mr McNally's request for information in accordance with Part 1 of FOISA, by failing to advise him that certain information was not held by it. The Commissioner found that CBG had correctly applied the exemption in section 33(1)(b) of FOISA in relation to the pricing information. However, he found that CBG had failed to comply fully with Part 1 of FOISA because it had not clearly informed Mr McNally which of the information he had requested was not held. The Commissioner did not require CBG to take any action in relation to this breach in response to this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 17(1) (Notice that information is not held) 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

1. On 25 May 2008, Mr McNally emailed CBG requesting the following information:

Information concerning CBG's winning tender for the GHA Home Improvement Framework Agreement (roofing and external cladding). In particular:
 - a. All submitted tender documents (including returned PQQs [pre-qualification questionnaires], RFPs [requests for proposals], RFQs [requests for quotations], schedule of rates, build standards, supporting documents, presentation slides etc.)
 - b. Documents supplied by GHA



- c. Clarification questions submitted/answers
 - d. Schedule and minutes of meetings held between CBG/GHA up to award of contract
2. CBG responded on 2 June 2008. It noted that it had already provided some of the information to Mr McNally following previous correspondence on the matter, and that Mr McNally had made clear that further copies of documents previously supplied were not required. In relation to the information that had not previously been supplied, CBG advised Mr McNally that it considered the information to be exempt from disclosure in terms of section 33(1)(b) of FOISA (Commercial interests and the economy) on the basis that disclosure of the information would substantially prejudice its commercial interests. CBG also advised Mr McNally that it considered the cost of providing the information sought by this request would exceed £600. Consequently, it indicated in terms of section 12 of FOISA that it was not obliged to comply with the request.
 3. On 5 June 2008, Mr McNally emailed CBG requesting a review of its decision. In particular, Mr McNally did not consider that release of the information would substantially prejudice CBG's commercial interests and that the public interest favoured disclosing the information. Mr McNally also did not consider that the cost of providing the information would exceed £600.
 4. CBG notified Mr McNally of the outcome of its review on 26 June 2008. In its response, CBG confirmed that it considered its original response was correct and that it considered the remaining information was exempt from disclosure in terms of section 33(1)(b) of FOISA. CBG also upheld its original view that the cost of providing the information would exceed £600.
 5. On 2 July 2008, Mr McNally wrote to the Commissioner, stating that he was dissatisfied with the outcome of CBG's review and applying for a decision in terms of section 47(1) of FOISA.
 6. The application was validated by establishing that Mr McNally 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. The case was then allocated to an investigating officer.

Investigation

7. The withheld information in this case was provided to the Commissioner by CBG in response to previous correspondence on a related matter.
8. On 24 July 2008, the investigating officer notified CBG in writing that a valid application had been received from Mr McNally and 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, CBG was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



9. CBG responded on 18 August 2008 providing its submissions on its application of the exemption in section 33(1)(b) of FOISA to the withheld information.
10. In further correspondence, CBG withdrew its reliance on section 12 of FOISA in relation to Mr McNally's request, by no longer claiming that the costs of providing the information requested would exceed £600. Additionally, CBG confirmed that certain information sought under the request was not held, and so it applied the provisions of section 17 of FOISA to this information. CBG also sought to apply the exemption contained in section 36(2) of FOISA (Confidentiality) to the pricing information contained within the contract.
11. Some additional information was supplied by CBG to Mr McNally during the investigation. This information has been excluded from consideration in what follows.
12. Mr McNally was also invited to provide his comments on the public interest in disclosure of the information under consideration.
13. The submissions made by both Mr McNally and CBG are summarised (where relevant) in the analysis and findings section below.

Commissioner's analysis and findings

14. 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 McNally and CBG and is satisfied that no matter of relevance has been overlooked.
15. CBG submitted that it had provided a considerable amount of information to Mr McNally which, it considered, substantially met the terms of his request. It maintained that the only information which it was withholding under Part 2 of FOISA was the pricing information contained within the Schedule of Rates and derived from the Schedule of Rates.
16. Mr McNally has indicated in his application to the Commissioner that he had expected to receive certain document types which he considered fell within the scope of his request for all tender documents. The Commissioner is satisfied that such documents did not form part of the relevant tender process and so CBG has considered all relevant tender documents.
17. The Commissioner is also satisfied that, during previous correspondence with Mr McNally, CBG has released all relevant information held by it which falls within the scope of request c) above.
18. During the investigation, however, the investigating officer identified that CBG had failed to respond to certain parts of Mr McNally's information request. Following correspondence with the investigating officer, CBG, indicated that it did not hold any schedules or minutes of meetings between CBG and GHA.



19. This decision will first address the question of whether CBG acted in accordance with FOISA by withholding information from Mr McNally, before going on to consider the handling of Mr McNally's request in relation to the information claimed not to be held.

Consideration of section 33(1)(b) (Commercial interests and the economy)

20. CBG applied the exemption in section 33(1)(b) of FOISA to the pricing information contained in its Schedule of Rates and pricing information derived from this.
21. 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.
22. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might 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. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
23. In setting out the background to this case and its application of this exemption, CBG explained the process by which it became the main contractor to GHA for maintenance and repair work.
24. Consequent to the 2003 housing stock transfer, Glasgow City Council (the Council) through its Building Services Department was appointed to be the main contractor to GHA for maintenance and repair work. The Building Services Department had previously carried out this work on behalf of the Council's Housing Services Department, having won the contract in 1996 following a tendering exercise carried out under compulsory competitive tendering (CCT) rules which applied to such contracts at that time. In 2006, the Council's Building Services Department was transferred into CBG, which was created as a new external body. CBG then succeeded the Building Services Department as the contractor to GHA.
25. CBG explained that the prices for various works of maintenance and repairs are contained in the Schedule of Rates in the contract between the Council and GHA. It noted that the Schedule of Rates is made up of a number of elements, including an allowance for direct labour costs, materials, direct supervision, property costs, transport, storage site and office overheads.
26. CBG stated that the Schedule of Rates had been drawn up in 1996. and, since then, both the Council's Building Services Department and (as successor to that department) CBG itself, simply continued to use the 1996 Schedule of Rates with inflationary uplifts applying to its various components. CBG stated that, while the original source document was 2 years old, it remains the mainstay of how it calculates its prices for tenders and will continue to do so for the foreseeable future. CBG stressed that its Schedule of Rates is used as the basis for pricing numerous other tenders.



27. Turning to the GHA contract for roofing and external wall cladding (the contract to which Mr McNally's request relates), CBG noted that was awarded to the Council's Building Services Department in 2005 following a competitive tendering process, in which all tenderers submitted "blind" tenders.
28. CBG indicated that the pricing information withheld from Mr McNally in this case is based on the Schedule of Rates described above. It noted that the prices therein were CBG's current prices and particularly relevant for any future tenders that CBG may seek. CBG maintained that disclosure of the pricing information withheld would substantially prejudice its own commercial interests. Additionally, CBG noted that GHA has also indicated that it too considered disclosure would prejudice GHA's own commercial interests by prejudicing its ability to conduct a confidential tendering process.
29. Given that the GHA repairs and maintenance contract represents a significant element of the work it carries out, and that the same methodology for calculating costs and prices is routinely used by CBG in its tender submissions for a variety of work, CBG maintained that release of the information withheld from Mr McNally could have a significant impact on the operations of the entire company.
30. CBG commented that it has been set up in part to be able to compete in the general market place and to submit tenders for contracts of this nature, and that the tender bids which it submits are made on the basis that no tenderer is aware of the prices etc. which any other tenderer will submit, so that all tenderers will submit their best bid rather than one which has been adjusted away from the best bid as a result of knowledge of the competition.
31. CBG contended that the actual level of any bid submitted for repair and maintenance work would consist purely of the specified rates for the jobs concerned plus any applicable percentage variations. CBG argued that if the withheld pricing information were made available under FOISA, then its competitors would be able to calculate its pricing strategy and profit margin and consequently the likely tender price which CBG would submit, to the detriment of CBG's ability to compete in the market place in future. CBG submitted that this would clearly be to the substantial prejudice of its commercial interests and could indeed jeopardise the financial viability of the entire company.
32. In his submissions, Mr McNally contended that the exemption should not apply. He argued that the contract was open for four years which would allow CBG to revise its process before the next tender was due. Mr McNally also argued that CBG had undergone substantial organisational change since the tender award and that the Council's Building Services Department no longer existed as an entity.



Conclusions on section 33(1)(b)

33. The Commissioner firstly considered whether CBG has relevant commercial interests. 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. The Commissioner is satisfied that CBG's activities are commercial in nature, and that it does have commercial interests.
34. 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) exemption¹. 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."*
35. The Commissioner accepts that the information withheld is based upon the Schedule of Rates that was originally calculated some years ago and that, notwithstanding its age, that this remains the basis upon which CBG prices tenders for work of this nature. The Commissioner considers that this information - which would allow insights into CBG's overall pricing strategy, and not just that for one tender - would be of significant interest to CBG's competitors and could place it at a serious commercial disadvantage.
36. In this case, the Commissioner is persuaded by CBG's arguments that the release of the information withheld would, or would be likely to, prejudice substantially its commercial interests by revealing underlying assumptions, pricing structures and margins employed by it and so that this exemption is engaged.
37. As noted above, the exemption under section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

The public interest test

38. In his submissions, Mr McNally provided a number of arguments with respect to the public interest in favour of disclosing the information withheld.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>



39. He indicated that disclosure would open the tender process to scrutiny. He noted that thousands of GHA-factored homeowners pay for work without knowing details of the contracts or bidding process. He noted that these homeowners have no choice about the contractor they get, but they have a very keen interest in the work that they are paying for.
40. He argued also that even for non-homeowners, a lot of public money is involved in the work, and so disclosure would allow the general public taxpayers to see how their money is being spent, ensuring effective oversight of expenditure of public funds and that the public obtain value for money.
41. He also considered that disclosure of the information would enable correction of misleading claims, or reveal malpractice, particularly in the light of concerns regarding the way in which GHA invoices for work. He suggested that disclosure of full pricing information would allow clarification of its charges.
42. Further, Mr McNally indicated that disclosure would allow better participation in quality control and contribute to the considerable public debate and interest in the topic. He also submitted that it would be in the public interest to know if CBG was making a substantial profit on the contract which was funded through public money and the contributions of home owners.
43. In its submissions regarding the public interest test, CBG recognised there were a number of factors favouring disclosure of the information requested. It identified the following:
 - a. the general public interest in information being accessible;
 - b. that disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
 - c. that disclosure would ensure fairness in relation to applications, in this case to other tenderers who were or may be interested in tendering for these services ; and
 - d. the general public interests surrounding the issue of owner-occupier repair bills issued by GHA.
44. CBG identified that following public interest factors in favour of withholding the information:
 - a. the public interest in securing value for money in relation to public expenditure by CGB;
 - b. avoidance of a course of action which would frustrate the legislative intentions behind section 8 of the Local Government in Scotland Act 2003 (which contains provisions for the supply of goods and services etc. by local authorities);
 - c. avoidance of a course of action which could undermine the competitive tendering exercises conducted by CBG by providing competitors with an unfair advantage;
 - d. maintaining consistency with the approach adopted by Directive 2004/18/EC (which concerns the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) and



- e. ensuring the integrity of any future tendering exercises which CBG participates in and protecting GHA's contracting position for future tendering purposes.
45. CBG also submitted that, since the process was governed by European procurement rules, all unsuccessful tenderers were entitled to be debriefed by GHA as to why they were unsuccessful and as to the characteristics and relevant advantages of the successful tender. CBG submitted that this debriefing requirement satisfied the public interest in ensuring that the applicable rules were followed and that the public money was spent wisely.
46. CBG considered that the balance of the public interest favoured withholding the information for the following reasons:
- a. Safeguarding the integrity of future tendering exercises. CBG argued that GHA is essentially a public funded body and is subject to European procurement rules. Those rules, as implemented in Scots Law by the Public Contracts (Scotland) regulations 2006 require procuring bodies to respect tenderers' reasonable requirements as to confidentiality, so as to prevent the integrity of tendering exercises being compromised. CBG suggested that this was a not-unlikely prospect if it was required to release detailed breakdowns under FOISA.
 - b. Trading activities by wholly owned subsidiaries of the Council help to generate funds to support front line service delivery without impacting on the public purse. CBG considered that the public interest was served by protecting its ability to do so in a competitive market place.
 - c. CBG referred to the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code) which can be viewed at: <http://www.scotland.gov.uk/Publications/2004/09/19894/42618>. CBG noted that the Section 60 Code lists, at paragraph 43, certain elements of contracts which should not be the subject of agreed non-disclosure items. CBG argued that the information withheld from Mr McNally and withheld by it does not fall into any of the categories listed.
 - d. CBG also referred to the Scottish Public Sector Procurement and Freedom of Information Guidance, published by the Scottish Procurement Directorate which can be viewed at: <http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>. In relation to section 33(1)(b) of FOISA, this guidance states:



“Substantial prejudice to commercial interests is required before the information can be considered to be exempt under section 33(1)(b). This will generally mean real or actual harm around the ability to do business. This could involve giving advantage to the competition, and/or loss of shareholder/customer/supplier confidence. The commercial interest of a public body are also covered by this exemption, e.g. whether public bodies have a revenue earning commercial arm and are therefore subject to prejudices similar to those that could apply to private sector companies; [or] the role of the public body as a purchaser could be compromised, e.g. suppliers could withhold sensitive information in the future (to the detriment of the procurement process), or a reduction in the body’s ability to negotiate effectively to secure best value for money.”

CBG also noted that Annex A of this Guidance provides a number of possible information requests and the suggested approach to these. “Price breakdown” is listed with the suggested approach of “generally withhold” on the basis that this could reveal a contractor’s costing information which, in turn, should be withheld because of the advantage this could give a competitor.

47. CBG submitted that all of these factors were present in respect of the information requested by Mr McNally.
48. The Commissioner has considered the arguments submitted by both parties and notes that there are valid public interest arguments in favour of disclosure. The Commissioner considers that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In particular, he believes that organisations which engage in commercial activities within the public sector must expect some information about these activities to be disclosed and that there will be a significant public interest in scrutinising details of such activities in the interest of public accountability, particularly where expenditure has come under question and has aroused public discussion.
49. The Commissioner is also mindful of the fact that the GHA-factored homeowners have had no say in the choice of contractor to carry out this work but are still obliged to pay for work carried out to their properties.
50. While the Commissioner has noted the guidance referred to by CBG, he would also point out that each case must be considered on its merits. When considering any information request, the decision must be made in all the circumstances of the particular case, and so it cannot be assumed that any particular type of information should routinely be withheld. With respect to CBG’s comments regarding paragraph 43 of the section 60 Code, the Commissioner is not persuaded that the absence of reference to the type of information under consideration here should be taken as evidence that the public interest would be served by its non-disclosure.
51. However, in the Commissioner’s view, the withheld information, being drawn or derived from the Schedule of Rates would constitute a core part of any tendering bid made by CBG in relation to its trading activities. In the Commissioner’s opinion, if this information were to be made available to CBG’s competitors, this would be highly likely to put CBG at a competitive disadvantage in any competitive tendering exercise it subsequently enters into.



52. The Commissioner believes that there is a public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for major tenders of this nature. The Commissioner also accepts that, where a public authority is engaging in competitive tendering, if it is able to do so without loss of competitive advantage caused by its status as a public body, that would be in the public interest.
53. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice may result, the Commissioner does not believe that this is justified in this case. After weighing up the competing interests in this case, the Commissioner has concluded that, on balance, the public interest in disclosing the information, is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA.
54. As the Commissioner has concluded that the information in question is exempt from disclosure on the basis of substantial prejudice to the commercial interests of CBG, he has not gone on to consider the application of this exemption in relation to the commercial interests of GHA.
55. Given that the Commissioner has concluded that the withheld information is exempt from disclosure, he has not gone on to consider the application of section 36(2) of FOISA to this information.

Consideration of section 17 (Notice that information is not held)

56. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that the information is not held.
57. In its initial response to Mr McNally's request, CBG did not specifically state that certain information falling within the scope of Mr McNally's requests was not held by it. It did advise him that "some of the information requested may be held by GHA." CBG did not however advise Mr McNally what specific information it considered may be held by GHA.
58. During the course of the investigation and following correspondence with the investigating officer, CBG confirmed to the Commissioner that certain information contained in Mr McNally's request was not held by it. Specifically, CBG stated that it did not hold schedules and minutes of meetings held between it and GHA up to the award of the contract.
59. The investigating officer subsequently asked CBG to clarify what steps it had taken to establish that this information was not held. CBG stated that it had carried out a number of searches of files and information held by it.
60. CBG stated that it was aware from the tender process that no schedules of meetings were held and no minutes from those meetings were taken. CBG also stated that, in relation to contracts of this nature, it follows the guidance contained in the Council's Procurement Manual on Records Management (the Manual) and provided the Commissioner with a copy of the relevant section from the Manual. CBG states that, in accordance with the Manual, all records in relation to procurement contracts are maintained in an identifiable filing system and documentation is retained for a period of 5 years after the contract end.



61. CBG advised that it had carried out a search of all manual files held in relation to the contract covered by Mr McNally's requests and found no schedules or minutes of meetings as requested by Mr McNally.
62. CBG also explained that it does not scan any minutes that are taken at meetings. Additionally, it stated that, in line with the records management procedure, any critical electronic records would in any case have been printed and filed in the manual files.
63. CBG considered that there were no further searches that it could undertake in order to establish if any relevant information was held.
64. Having considered CBG's submissions on this point and its explanation of the steps taken in order to ascertain that it does not hold the information in question, the Commissioner is satisfied that the information is not held by CBG. The Commissioner is satisfied that CBG has taken all reasonable steps to establish whether any appropriate information is available.
65. However, by failing to advise Mr McNally that it did not hold any minutes or schedules of meetings, the Commissioner has concluded that CBG failed to comply with the technical requirements of section 17(1) of FOISA in relation to this aspect of his request.
66. The Commissioner does not require CBG to take any action in relation to this failure at the present time. The Commissioner would however urge CBG to ensure that adequate and appropriate responses are provided to information requests in future.

DECISION

The Commissioner finds that City Building (Glasgow) LLP (CBG) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McNally.

The Commissioner finds that CBG acted in accordance with Part 1 of FOISA by correctly withholding information contained within the Schedule of Rates under section 33(1)(b) of FOISA.

However, the Commissioner finds that CBG failed to comply with the requirements of section 17(1) of FOISA by failing to inform Mr McNally that it did not hold some of the information requested by him. In failing to do so, CBG breached Part 1 of FOISA.

The Commissioner does not require CBG to take any action in respect of this breach in response to this particular application.



Appeal

Should either Mr McNally or CBG 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
16 June 2009



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.

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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).