

Decision Notice



Decision 149/2011 Mr Thomas Reilly and North Lanarkshire Leisure Ltd.

Cost of gym equipment at Ravenscraig Regional Sports Facility

Reference No: 201100735
Decision Date: 8 August 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Thomas Reilly requested from North Lanarkshire Leisure Ltd. (NLL) the cost of fitting out the Ravenscraig Regional Sports Facility with training equipment. NLL withheld the information in terms of section 33(1)(b) of FOISA. Following a review, Mr Reilly remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which NLL additionally submitted that the request was vexatious in terms of section 14(1) of FOISA, the Commissioner found that NLL had failed to deal with Mr Reilly's request for information in accordance with Part 1 of FOISA, by wrongly applying the exemption in section 33(1)(b) of FOISA to the withheld information. He also did not accept that the request was vexatious in terms of section 14(1) of FOISA. He required NLL to provide the requested information to Mr Reilly.

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); 14(1) (Vexatious or repeated requests) 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 7 April 2011, Mr Reilly wrote to NLL requesting the cost of fitting out Ravenscraig Regional Sports Facility with training equipment.
2. NLL responded on 8 April 2011. In its response, NLL advised Mr Reilly that the information was considered exempt from disclosure in terms of section 33(1)(b) of FOISA on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of both NLL and the supplier of the equipment.
3. On 8 April 2011, Mr Reilly wrote to NLL requesting a review of its decision. Mr Reilly did not agree that there would be detrimental effect on NLL and the supplier of the equipment if the information were to be disclosed.



4. NLL notified Mr Reilly of the outcome of its review on 18 April 2011, upholding its previous decision in full.
5. Also on 18 April 2011, Mr Reilly wrote to the Commissioner, stating that he was dissatisfied with the outcome of NLL's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Reilly had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 21 April 2011, NLL was notified in writing that an application had been received from Mr Reilly and was asked to provide the Commissioner with the information withheld from him. NLL responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted NLL, 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. NLL was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the exemption in section 33(1)(b) of FOISA.
9. NLL responded on 20 May 2011, providing submissions on its application of the exemption in section 33(1)(b) of FOISA. NLL also explained that it now considered that Mr Reilly's request may be vexatious and, consequently, it would not have been obliged to comply with the request in terms of section 14(1) of FOISA.
10. The investigating officer also contacted Mr Reilly during the investigation seeking his submissions on the matters to be considered in the case. Mr Reilly's submissions, along with those of NLL, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

11. 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 Reilly and NLL and is satisfied that no matter of relevance has been overlooked.



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

12. NLL submitted that the information sought by Mr Reilly was exempt from disclosure in terms of section 33(1)(b) of FOISA, which provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
13. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to 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. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
14. In its submissions, NLL argued that the disclosure of the information sought by Mr Reilly would harm both its own commercial interests and those of the supplier of the gym equipment. It considered the harm was real and significant and not hypothetical and marginal. It also considered the risk of damage to both parties' commercial interests was imminent and likely to occur in the near future. In relation to timescales, NLL submitted that substantial prejudice would have an immediate effect on NLL given that it is considering a new tender process for the supply of gym equipment to its existing facilities in North Lanarkshire and there would be an immediate effect on the supplier as regards the supplier's ability to tender for supplies to other public authorities and its commercial negotiations with other customers.

Submissions regarding NLL's commercial interests

15. NLL stated that it was a Scottish charity and that its charitable objectives were to provide services in the areas of sport, recreation, advancement of health and social welfare. It submitted that, although it is a not for profit organisation (providing management services to North Lanarkshire Council in relation to various sports and recreation facilities within North Lanarkshire), it clearly carries out commercial activities as it levies charges for use of its facilities by the public through entrance charges, activity charges or subscriptions for membership.
16. NLL stated that there are a number of other providers of leisure services within the same geographical area. Accordingly, it considered that it is an important element of NLL's function to negotiate contracts at best value in order that it can compete in a commercial environment. NLL considered that if its ability to achieve best value was compromised, it could undermine the financial viability of NLL.



17. NLL stated that the gym equipment across all its sites was provided under a contract awarded following a tendering process. The contract started in October 2008, and covered a period of three years with an option to extend for a further two years. It indicated that it may enter a further tender process in 2011 and argued that disclosure of the information under consideration in this case would have serious adverse commercial implications for NLL in the context of the tender process.
18. NLL argued that, if the information in this case were to be disclosed, tenderers would be able to frame their tender in the light of their knowledge of the price quoted for the previous tender for the supply of equipment in 2008 and the cost of supplying equipment for the Ravenscraig facility which was delivered under that contract. NLL argued that it was likely that tenderers may then submit less competitive pricing than would otherwise have been submitted. It argued that this would impact on the financial performance of NLL.
19. NLL also submitted that allowing such information to be released into the public domain would put it at a disadvantage with respect to its competitors. It argued that if the information was available to other leisure service providers, they could seek to misuse the information to draw conclusions about NLL's approach to pricing in order to undercut it.
20. NLL also submitted that disclosure of the information may lead to suppliers not tendering because of fears that confidential information on pricing would enter the public domain. It argued that this may result in a reduced number of tenders during future tendering exercises which may in turn affect overall quality. It argued that those suppliers may come under pressure from other customers to offer similar prices and this could lead to those suppliers offering less attractive prices to NLL.

Submissions regarding the supplier's commercial interests

21. NLL also submitted that disclosure of the information would harm the commercial interests of the incumbent supplier. It argued that disclosure of the information would adversely affect that supplier's ability to compete with other suppliers of equipment on price as competitors would have the benefit of the knowledge of the prices which the supplier had agreed with NLL and would therefore be in a stronger position to negotiate on price. NLL submitted that the market for gym equipment is highly competitive and there are a small number of providers. It argued that should those competitors be made aware of the price offered by the supplier, it was likely that those competitors would use that information to undercut the supplier in future tenders to local authorities.
22. NLL also submitted that the disclosure of the information would hamper the current supplier's ability to negotiate with its current and future customers and that there was a risk that the current supplier would come under pressure from future customers to match the terms offered to NLL. Additionally, NLL argued that release of the information may result in the current supplier refusing to retender or to tender on less advantageous terms in order to meet the expectations of other customers.



23. NLL argued that disclosure of the information would result in real and substantial harm to the supplier's ability to conduct business which would substantially prejudice the supplier's commercial interests.
24. In support of its position regarding the supplier, NLL provided the Commissioner with a copy of a letter from the supplier to NLL setting out the supplier's view that the information should be considered exempt from disclosure in terms of section 33 of FOISA.

Submissions from Mr Reilly

25. In his submissions, Mr Reilly has argued that he is simply asking for the total cost of the supply of equipment to one facility rather than the schedule of prices of individual items or equipment. As such, he did not agree that potential tenderers could frame tenders in light of their knowledge of the total price quoted for the supply of equipment to Ravenscraig.
26. Mr Reilly also argued that the cost of purchasing sports equipment was only a small part of NLL's overall costs compared to costs such as labour and management costs, vehicles, electricity and fuel. He submitted that other providers of leisure services will know the approximate costs of equipment as it is their business and will know the approximate discounts available. He also submitted that the disclosure of the information could allow NLL to obtain a cheaper tender in future as competitors could try to undercut the current supplier's prices.
27. In relation to the supplier's commercial interests, Mr Reilly did not agree that making the total cost of supplying sports equipment to the facility at Ravenscraig would adversely affect the supplier's ability to compete with other suppliers. He stressed that he was only asking for the total cost, not the detailed prices and that the supplier's competitors would already know that they did not win the contract and would therefore have to lower their prices in order to win the next contract.

Commissioner's findings on section 33(1)(b)

28. The Commissioner has firstly considered whether NLL and the supplier have 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 the activities under consideration here, involving the sale and purchase of sports equipment in an environment open to competition, are commercial in nature. In this connection, he would note his conclusion in *Decision 074/2011 Ms Caroline Gerard and City of Edinburgh Council*¹ that:
"the commercial procurement of resources (including services) required for the purposes of undertaking [the Council's] core (non-commercial) activities can be considered to be a commercial activity, and that [the Council] has commercial interests in this respect."

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201001883.asp>



29. Having considered NLL's submissions, the Commissioner is satisfied that NLL and the supplier have a commercial interest in the sale and purchase of sports equipment.
30. Having reached this conclusion, the Commissioner must now go on to consider whether the commercial interests he has identified would, or would likely to, be prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 13 above: such prejudice must be at least likely before the exemption can apply.
31. The Commissioner has considered the arguments put forward by NLL (as summarised above), but he is not persuaded that the effect of disclosure would be likely to have any of the consequences suggested or that it would, or would be likely to, prejudice substantially the commercial interests of NLL or the supplier. It is the Commissioner's view that NLL has not demonstrated that the disclosure of the information requested by Mr Reilly would, or would be likely to, have the detrimental effects it suggests.
32. In reaching this view, the Commissioner notes that the information requested in this case is simply for the cost of supplying equipment for one sports facility. It does not reveal any details of the cost of any individual items of equipment, nor does it reveal any information concerning the supplier's pricing methods or structures. Even if NLL were to tender for similar services to those delivered by the supplier in future, disclosure of the information under consideration in this case would not necessarily have any relevance to a future tendering process. The Commissioner considers that each tendering process will proceed in the context defined by the needs specified by the contracting organisation, the ability of a tendering organisation to meet those needs, and the prevailing economic environment at that time. Without knowing the details of the tender submitted by the supplier in this case, including the specific service it offered, and details of its pricing structure, the value of the withheld information to a competitor seeking a similar contract in future would be limited.
33. Notwithstanding the above, the Commissioner also notes that the cost of supplying and installing gym equipment at other sports facilities run by NLL is already in the public domain².
34. The Commissioner has also noted the requirement within EU procurement rules that the overall value of a contract awarded (following a tendering process conducted in their terms) be published within a contract award notice in the Official Journal of the EU. He considers the routine publication of the value of contracts awarded via these rules undermines NLL's claims.
35. Additionally, the Commissioner has seen no evidence to persuade him that NLL should expect to receive fewer bids, that bidders would submit altered bids based on the information under consideration in this case, or that NLL would be placed at a disadvantage to its competitors as a result of disclosure in this case. It is not clear to the Commissioner how or why this disclosure of the particular information in this case could lead to such a negative impact on the NLL's ability to obtain the best price in any tender exercise.

² <http://mars.northlan.gov.uk/xpedio/groups/public/documents/report/060498.pdf>
<http://www.leisureopportunities.co.uk/detail1.cfm?pagetype=detail&subject=news&codeID=95883>



36. Similarly, the Commissioner has seen no evidence to suggest that such disclosures lead to future clients of winning tenderers seeking to negotiate contracts based on the value of that awarded to another customer. NLL has provided the Commissioner with no evidence or reason to persuade him that such a risk would be likely in the light of disclosure of the information under consideration in this case.
37. In the absence of any submissions or evidence from NLL that have persuaded him of how or why disclosure of the information under consideration would or would be likely to harm NLL's or the supplier's commercial interests, the Commissioner is not persuaded that disclosure would do so.
38. Consequently, the Commissioner does not accept that disclosure of the information withheld from Mr Reilly would, or would be likely to, prejudice substantially NLL's commercial interests or those of the supplier. He therefore concludes that NLL incorrectly applied the exemption in section 33(1)(b) of FOISA in this case.
39. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, he is not required to go on to consider the public interest contained in section 2(1)(b) of FOISA in relation to this exemption.

Section 14 – vexatious or repeated requests

40. During the investigation, NLL commented that it had a concern that Mr Reilly's information request was vexatious.
41. NLL has referred to a previous information request on a related subject made by Mr Reilly and correspondence between it and Mr Reilly concerning that request. NLL has stated that it is assuming the purpose of Mr Reilly's current request is to exact some kind of retribution resulting from his dissatisfaction with the outcome of his previous request and it therefore considers this to be vexatious.
42. NLL submitted that the current request is imposing a significant burden on it. It states that it has had to expend a considerable amount of time replying to various emails from Mr Reilly which eventually resulted in the settlement of a previous request. NLL submitted that Mr Reilly's current request has necessitated detailed correspondence with the Commissioner and with Mr Reilly which has detracted several people away from their core activities within NLL.
43. NLL submitted that the current request had been designed to cause disruption or annoyance to NLL and had been made because of Mr Reilly's dissatisfaction with the outcome of his previous request.
44. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14 does not provide an exemption as such: instead, its effect is to render inapplicable the general right of access to information contained in section 1(1) of FOISA.



45. FOISA does not define the word “vexatious”. The Commissioner’s general approach (set out in his briefing on section 14³) is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
- (a) it does not have a serious purpose or value; and/or
 - (b) it is designed to cause disruption or annoyance to the public authority; and/or
 - (c) it has the effect of harassing the public authority; and/or
 - (d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

Significant burden

46. In his briefing, the Commissioner has indicated that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources away from its core operations. However, if the expense involved in dealing with a request is the only consideration involved, the authority should consider the application of section 12 of FOISA (excessive cost of compliance).
47. As noted above, NLL has submitted that a considerable amount of time has been spent responding to emails from Mr Reilly in relation to this, and a previous request. Additionally, it states that the processing of the requests has necessitated correspondence and discussions with staff in the Commissioner’s office.
48. In this case, the Commissioner notes that the request is simply for the cost of the supply of gym equipment for one sports facility (as indeed was the previous information request). He has also considered the nature and volume of correspondence, which has passed between NLL and Mr Reilly and the Commissioner’s Office, but is unable to accept that this has been either voluminous or onerous. The requests in each case were clearly and narrowly focussed, and the communications about these routine. In the current case, the extent of correspondence has been entirely in line with that which would be expected as Mr Reilly has followed the process allowed in FOISA for him to challenge (in this case successfully) NLL’s judgement that the information he requested was exempt from disclosure.
49. The Commissioner is therefore unable to conclude that there is any burden (significant or otherwise) which would be imposed on NLL in order to respond to Mr Reilly’s request.
50. Even though the Commissioner does not consider that the request would impose a significant burden on NLL, he has gone on to consider whether the request has been designed to cause disruption or annoyance as suggested by NLL.

³ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



51. The Commissioner has considered NLL's submissions on this point, but is unable to concur with NLL's conclusion that Mr Reilly's request was designed to cause disruption or annoyance to NLL. NLL has stated that it is assuming the request was submitted because of Mr Reilly's dissatisfaction with the outcome of a previous request, but has been unable to substantiate this assumption in any way. Having considered the terms of the request and the circumstances surrounding it, the Commissioner can find no evidence that the purpose of the request was to cause disruption or annoyance. He concludes therefore that the request for information cannot be deemed vexatious in terms of section 14(1) of FOISA.
52. As the Commissioner has not upheld NLL's application of section 33(1)(b) of FOISA to the withheld information or section 14(1) of FOISA to Mr Reilly's information request, he now requires NLL to disclose the requested information to Mr Reilly.

DECISION

The Commissioner finds that North Lanarkshire Leisure Ltd (NLL) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Reilly. The Commissioner finds that by incorrectly applying the exemption in section 33(1)(b) to Mr Reilly's information request, NLL breached the requirements of Part 1 and in particular section 1(1) of FOISA.

The Commissioner also finds that NLL was not entitled to treat Mr Reilly's information request as vexatious in terms of section 14(1) of FOISA.

The Commissioner therefore requires NLL to provide Mr Reilly with the total cost to fit out the Ravenscraig Regional Sports Facility by 22 September 2011.

Appeal

Should either Mr Reilly or NLL 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.

Margaret Keyse
Head of Enforcement
8 August 2011



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.

...

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

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).

...

Decision 149/2011
Mr Thomas Reilly
and North Lanarkshire Leisure Ltd.

