

Decision Notice

Decision 210/2014: Mr Conor McNally and Renfrewshire Council

Review of waste and recycling services

Reference No: 201401299

Decision Date: 30 September 2014



Scottish Information
Commissioner

Summary

On 14 April 2014, Mr McNally asked Renfrewshire Council (the Council) for a report it had commissioned on household waste and recycling services in Erskine, Renfrewshire.

The Council disclosed the report to Mr McNally, but redacted some information on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA (commercial interests).

The Commissioner found that the Council was entitled to withhold some, but not all, of the information under this exemption. She required the Council to disclose the information which was not exempt to Mr McNally.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 14 April 2014, Mr McNally made a request for information to the Council. The information requested was a report commissioned by the Council into the collection of household waste and recycling from homes where it is difficult to use wheeled bins. Mr McNally also asked for other information that is not the subject of this decision.
2. The Council responded on 7 May 2014. The Council disclosed a copy of the report requested by Mr McNally. The Council withheld some of the information contained within the report on the basis that it was exempt from disclosure in terms of section 33 of FOISA.
3. On 7 May 2014, Mr McNally emailed the Council requesting a review of its decision. Mr McNally did not agree that the Council could justify the redactions in the information that it had disclosed to him.
4. The Council notified Mr McNally of the outcome of its review on 3 June 2014. The Council informed Mr McNally that it was withholding information in terms of section 33(1)(b) of FOISA. This was on the basis that its disclosure would, or would be likely to, prejudice substantially the Council's commercial interests in a competitive tender process. The Council disclosed other information which is not the subject of this decision.
5. On 12 June 2014, Mr McNally wrote to the Commissioner. Mr McNally applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr McNally stated he was dissatisfied with the outcome of the Council's review because he did not agree that the disclosure of the estimated costs would influence any tendering process. Additionally, he considered that some information within the report which did not comprise financial information could be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr McNally made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 20 June 2014, the Council was notified in writing that Mr McNally had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr McNally and the Council. She is satisfied that no matter of relevance has been overlooked.

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

10. The Council submitted that the information sought by Mr McNally was exempt from disclosure in terms of section 33(1)(b) of FOISA. This 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). In this case, the Council submitted that disclosure would damage the commercial interests of the Council and tenderers for the contract to provide infrastructure for the chosen option.
11. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
12. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial; in other words, of real and demonstrable significance.
13. Having considered the Council's submissions, the Commissioner is satisfied that the interests that have been identified are commercial interests for the purposes of this exemption. The withheld information comprises the anticipated costs (and differences in costs) to the Council for various options for waste and recycling services considered within the report. The information relates to the likely costs for the purchase and provision of services in a competitive and commercial environment.
14. Having reached this conclusion, the Commissioner must now go on to consider whether the commercial interests identified would, or would be likely to, be prejudiced substantially by the disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
15. In its submissions, the Council stated that the withheld information contained detailed financial information and cost analysis of the options set out in the report. The Council

explained that it was due to launch a competitive tender process to provide infrastructure to support the option finally chosen. The Council explained there was significant concern that if the financial information was made publicly available, it would be likely to substantially prejudice the tender process.

16. The Council submitted that, as there was ongoing activity within a competitive environment, it considered disclosure of the information would be harmful to the extent that it would cause substantial prejudice to the commercial interests of both the Council and the tenderers. The Council did not provide any reasons to the Commissioner as to why disclosure would, or would be likely to, prejudice substantially the commercial interests of the tenderers. The Commissioner will therefore concentrate on possible harm to the commercial interests of the Council.
17. The Council submitted that disclosing the financial information would be likely to result in it paying more for infrastructure and materials than would otherwise be the case. This was because potential bidders would be aware of the cost estimates for each option. In the Council's view, as the tender process was still outstanding, there was a genuine link between the disclosure of the information and the possible harm to its commercial interests.
18. The Council explained that a combination of options for waste collection might be required. At the time it responded to Mr McNally's requirement for review, no options had been discounted and the final option would not be decided until further analysis and investigation was undertaken. The Council stated that, due to the likely scale of procurement exercises, mini competition would be required and disclosure of the costs information would impact on that competition.
19. In his application to the Commissioner, Mr McNally argued that it was quite common for authorities to provide guidance costs to suppliers within their tender notices. He also submitted that the estimated costs used by the Council appeared to come from standard sources. He further submitted that the tender process would take place only on one chosen option, not all of them.
20. Mr McNally argued that, even if the actual costs were not disclosed, the rankings for each scenario could be disclosed, as could the percentage savings against baseline. Mr McNally also suggested that the Council could disclose relative costs between each option (e.g. option B costs twice as much as option A).
21. The Commissioner has considered all of the arguments put forward by the Council and Mr McNally. As in any case, the Commissioner must consider the position as it stood at the point when the Council notified Mr McNally of the outcome of its review on 3 June 2014.

Financial information

22. In this case, the Commissioner accepts that the disclosure of the financial information would allow significant insight into the likely costs estimated by the Council in relation to each option identified within the report. The Commissioner accepts the Council's submission that this would be likely to prejudice its commercial interests substantially in any tendering process, for the reasons put forward by the Council and described above. In the Commissioner's view, disclosure of the financial information would have a prejudicial effect on the Council's ability to obtain best value in the tendering process.
23. The Commissioner is satisfied that, at the time the Council dealt with Mr McNally's requirement for review, the withheld financial information was of sufficient commercial

relevance to engage the exemption in section 33(1)(b) of FOISA and the exemption was correctly applied on that basis.

Ranking of options

24. The Commissioner has reached a different conclusion in relation to the withheld information in tables A.2 and 4.3 showing the respective rankings of each option considered within the report.
25. In the Commissioner's view, the Council has failed to demonstrate how disclosure of this particular information would cause the level of harm envisaged in relation to its commercial interests, given that the information provides no insight into the likely costs estimated by the Council for each option. Additionally, the Commissioner notes that, within the information previously provided to Mr McNally by the Council, some of the rankings have already been disclosed.
26. In the circumstances, the Commissioner is not satisfied that the Council has demonstrated how the disclosure of the ranking information would, or would be likely to, prejudice substantially the commercial interests of any person. She cannot therefore accept that the Council was correct in withholding this information as exempt under section 33(1)(b) of FOISA.
27. As this information cannot be considered to have been exempt under this section, the Council was not entitled to withhold the information under section 33(1)(b). Therefore, the Commissioner is not required to go on to consider the application of the public interest test in relation to this information.
28. The Commissioner therefore requires the Council to disclose to Mr McNally the ranking information contained in tables A.2 and 4.3 within the report.

The public interest test

29. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the financial information contained in the report, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
30. The Council submitted that, given the stage of the tender process and the potential adverse consequences of disclosing the information, there was no benefit to the public in the information being disclosed. The Council contended that the tender process must be undertaken within a genuinely competitive environment which would be substantially impacted if the financial information within the report were to be made publicly available.
31. In the Council's view, it was in the public interest that the information should not be disclosed in order to allow it to obtain best value from the contractor appointed.
32. Mr McNally argued that there was a public interest in receiving a satisfactory waste collection service that accounted for the unique built environment (in Erskine) and was not unduly influenced by cost. In his view, this outweighed the public interest in the small risk that publishing the estimated costs would have on any tendering process. Mr McNally submitted that the public needed to see the estimated costs in order to fully appreciate the motivation behind any decision made.

33. The Commissioner acknowledges the general public interest in transparency and accountability, particularly where this involves a significant area of potential expenditure from the public purse.
34. The Commissioner has already taken account of the submissions made by the Council in support of maintaining the exemption insofar as it relates to the financial information contained within the report. She has already acknowledged the risk of substantial commercial prejudice to the Council in this case. In the Commissioner's view, it is in the public interest for the Council, in common with other Scottish public authorities, to be able to obtain best value and to tender in a genuinely competitive fashion in order to do so.
35. In all the circumstances of the case, the Commissioner finds there to be a strong public interest in maintaining the exemption in section 33(1)(b) in order to ensure the effectiveness and competitiveness of the tendering process. To counteract this, there would need to be a compelling specific public interest in disclosure; the Commissioner does not consider such a compelling specific public interest to exist on this occasion.
36. Taking account of all the circumstances of the case, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. Consequently, she finds that the Council was entitled to withhold the financial information within the report under section 33(1)(b) of FOISA.

Decision

The Commissioner finds that Renfrewshire Council (the Council) 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 the Council was entitled to withhold financial information on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA.

However, the Council was not entitled to withhold ranking information in terms of section 33(1)(b) of FOISA. In withholding this information, the Council failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Mr McNally with the information identified in paragraph 28 by 14 November 2014.

Appeal

Should either Mr McNally or Renfrewshire Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If Renfrewshire Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Renfrewshire Council has failed to comply. The Court has the right to inquire into the matter and may deal with Renfrewshire Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

30 September 2014

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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