

Decision Notice

Decision 127/2015: Ms S and Aberdeenshire Council

Termination payment

Reference No: 201500780

Decision Date: 11 August 2015



Scottish Information
Commissioner

Summary

On 13 March 2015, Ms S asked Aberdeenshire Council (the Council) for information about the payment agreed with Tesco following the termination of a contract for the sale of land. The Council withheld the information. Following a review, Ms S remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had properly responded to Ms S' request for information in accordance with Part 1 of FOISA. The Commissioner found that at the time of its response the Council was entitled to withhold the information under the exemption in section 33(1)(b) of FOISA.

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. In 2014, the Council completed negotiations with Tesco over the sale of land at Canal Park, Banff and over the replacement of recreational facilities which would be lost if a superstore was built there. In 2015, Tesco announced it would halt all new store builds. In March 2015, the Council issued a press release stating that it had agreed a termination payment from Tesco, along with other works, in excess of £12.7 million.
2. On 13 March 2015, Ms S made a request for information to the Council. Among other requests, which are not the subject of this decision, she asked:

"In relation to the £12.7m sports and community facilities approved for Banff and Macduff ...what is the size of the "termination payment"?"
3. The Council responded on 23 March 2015 withholding the termination payment details information under section 33(1)(b) of FOISA. The Council explained that the information was held for the purposes of facilitating its ongoing discussions with Tesco.
4. On 24 March 2015, Ms S wrote to the Council to query why the information about the size of the termination payment had been withheld, when a press release had indicated that the amount was £12.7 million.
5. The Council replied on 24 March 2015. It stated: "While it is the case that a given termination sum has been approved by Councillor [sic], the terms and conditions on which that payment will be made are still the subject of ongoing discussion between the Council and Tesco's solicitors. Hence, it remains the case that no agreement between the Aberdeenshire Council and Tesco as at time of this reply has been reached."
6. On 26 March 2015, Ms S wrote to the Council requesting a review of its decision on the basis that she wanted to know how much Tesco had paid under "the Section 75" (i.e. the

termination payment) and she wanted clarity and accuracy around the reported payment of £12.7 million.

7. The Council treated Ms S's email of 26 March 2015 as a requirement for review and notified Ms S of the outcome of its review on 27 April 2015. The Council upheld its decision that the information was exempt from disclosure under section 33(1)(b) of FOISA. The Council also addressed other issues raised by Ms S, which are not the subject of this decision.
8. On 30 April 2015, Ms S applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms S was dissatisfied that the Council had withheld information about the termination payment under section 33(1)(b) of FOISA. She believed this raised issues of openness, transparency, and the basic principle of knowing how public money is spent.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Ms S 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.
10. On 22 May 2015, the Council was notified in writing that Ms S had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information and the case was allocated to an investigating officer.
11. 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

12. 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 Ms S and the Council. She is satisfied that no matter of relevance has been overlooked.

The information

13. The Council was asked what recorded information it held about the termination payment on the date of Ms S' request (13 March 2015).
14. The Council explained that a report had been submitted to the Council meeting on 12 March 2015 setting out the negotiations which had taken place with Tesco in relation to its contract with the Council for the sale of the land at Canal Park. This report was considered with the press and public excluded in terms of section 50A(4) and (5) of the Local Government (Scotland) Act 1973 to avoid disclosure of exempt information of the classes described in paragraphs 9 and 12 of Part 1 of Schedule 7A of the 1973 Act, so the detail of the negotiations did not enter the public domain.
15. At that meeting, the Council agreed it would conclude an agreement with Tesco to terminate the existing contract of sale on the terms indicated in the report to Councillors. This included a compensatory payment.
16. The Council was of the view that the compensatory payment offered by Tesco fitted the description of a "termination payment", but, at the time of Ms S' request on 13 March 2015, the figure was still provisional. Agreement with Tesco was finalised on 29 April 2015, when

the payment was made. The Council stated that, on 13 March 2015, it had agreed to accept an offer from Tesco, but detailed negotiations were still to be concluded.

17. The Commissioner accepts that the Council held information about the amount of the termination payment from Tesco when Ms S made her request, even though final agreement was not concluded with Tesco until 29 April 2015.

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

18. The Council relied on section 33(1)(b) of FOISA to withhold the information. Section 33(1)(b) 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 subject to the public interest test in section 2(1)(b) of FOISA.
19. An authority relying on this exemption must be able to show 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 by disclosure of the information. 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 be (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.
20. The Council explained that the commercial interests in question were those of Tesco and the Council itself. At the time of the request, the Council was in a live commercial negotiation with Tesco to secure a multi-million pound package of new leisure, sports and community facilities in Banff and Macduff. The Council commented that it was vital to secure a deal with Tesco after the expectations of the local community had been raised and the Council's ability to provide sports and leisure facilities would have been substantially prejudiced if negotiations had fallen through.
21. The Council stated that it is required to achieve best value in all commercial matters. The information about the termination payment was held for the purposes of facilitating ongoing discussions between the Council and Tesco. The Council said that it could be argued that the termination payment figure that was being discussed was confidential up to the point of signature of the contract as it formed part of a live commercial negotiation.
22. In relation to Tesco's commercial interests, the Council said that information was withheld so as not to prejudice their ongoing negotiations in terms of other settlements which were yet to be agreed.
23. The Commissioner accepts that both the Council and Tesco have commercial interests relating to the withheld information.
24. In relation to how those commercial interests would, or were likely to be prejudiced by disclosure of the information, the Council explained that Tesco had been asked for its view and had expressly stated that the information should not be disclosed. Disclosure by the Council, therefore, could have resulted in a failure to achieve a deal which would deliver indoor and outdoor sports and community facilities and associated car parking and landscaping at Banff Academy.
25. In relation to Tesco's commercial interests, the Council explained that Tesco would be involved in other negotiations arising from their UK-wide decision to halt new store builds,

and there was a risk that parties would be less willing to negotiate if they knew that details of live negotiations could be made public.

26. The time-sensitivity of certain commercial information is recognised in the Scottish Ministers' *Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the Environmental information (Scotland) Regulations 2004*¹ (at 8.3.1. and 8.6). The Commissioner accepts that there was a time-sensitivity to the information about the termination payment, given that negotiations were not concluded at the time of the request.
27. The Commissioner accepts the Council's submission that, at the time of this particular request, disclosure of the information before the agreement was signed and legally concluded could have affected the terms and conditions of the concluded agreement. She also accepts that disclosure of the information would have been likely to prejudice substantially Tesco's commercial interests in relation to its negotiations with other parties.
28. The Commissioner therefore accepts that disclosure of the withheld information would have been likely to prejudice substantially the commercial interests of both the Council and Tesco and that the exemption in section 33(1)(b) was correctly applied on that basis.

Public interest test

29. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied, 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 acknowledged that it is in the public interest to have openness and transparency in local government and in showing how public money is spent. However, the Council stated that the withheld information is not public money, and the local public were well aware of the proposed facilities through a number of public meetings.
31. The Council submitted that it was in the public interest to allow the Council to conclude its negotiations with Tesco and achieve the best possible deal for Council taxpayers. There is a strong public interest in local authorities achieving best value in all commercial matters and in ensuring that local authorities utilise all forms of funding as effectively as possible. The Council argued that this interest is particularly strong in light of ongoing budget pressures across all areas of government.
32. The Council commented that the applicant's reasons for requiring the information were "openness, transparency, basic principle of knowing where/how our money is spent and the need to know what Tesco should have paid so that public pressure can be put upon Tesco if required from the information." The Council reiterated that the termination payment was not public money, and the deal was concluded with Tesco on 29 April, and "so the Council does not require the applicant's assistance in putting any pressure on Tesco". The Council took the view that, in this case, the issues of openness and transparency were outweighed by the arguments in favour of withholding the information.
33. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She also accepts that disclosure in this case would contribute to the public's understanding of the

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

agreement with Tesco, and the compensation achieved by the Council. Disclosure would provide transparency in relation to the Council's negotiations with Tesco.

34. The Commissioner agrees with Ms S that it is in the public interest to ensure effective oversight of public funds, and that disclosure of the information might enable such oversight. She does not accept the Council's point that the termination payment was not public money: although the payment was to be made by Tesco, the money was to be received by the Council and the Council would be responsible for how it is used.
35. The Commissioner also recognises a public interest in ensuring that value for money is achieved and seen to be achieved by Scottish public authorities. She accepts that where a public authority is engaged in negotiating or concluding an agreement, it is in the public interest that it is able to do so without its status as a public body impacting significantly on its ability to participate effectively; in particular, by securing best value.
36. The Commissioner has also taken account of the submissions made by the Council in favour of maintaining the exemption. She has already acknowledged the risk of substantial prejudice to commercial interests in this case, and accepts that there is a public interest in avoiding such prejudice.
37. The Commissioner has considered all the factors set out above. 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 would be justified on public interest grounds in this case. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration.
38. The Commissioner therefore finds that the information was correctly withheld by the Council under section 33(1)(b) of FOISA. This decision is based on the circumstances existing at the time the Council responded to Ms S' requirement for review, at which time negotiations with Tesco had not been concluded.

Decision

The Commissioner finds that, in respect of the matters specified in Ms S' application for a decision, the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to her information request.

Appeal

Should either Ms S or the 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.

Rosemary Agnew
Scottish Information Commissioner

11 August 2015

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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