

Decision Notice

Decision 138/2015: Begbies Traynor Group PLC and Transport Scotland

Payment information – bridge works

Reference No: 201500405

Decision Date: 27 August 2015



Scottish Information
Commissioner

Summary

On 18 August 2014, Begbies Traynor Group PLC (BTG) asked Transport Scotland for the final account agreed with Bam Nuttall Limited (BNL) for a specific project, with particular reference to the blast cleaning and painting works. Transport Scotland withheld the information on the basis that disclosure would substantially prejudice the commercial interests of BNL and Transport Scotland. The Commissioner accepted this argument from Transport Scotland.

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 Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation – definition of “environmental information”)

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 18 August 2014, BTG emailed Transport Scotland. It explained that it had been appointed Administrators of MacLean and Spiers Blasting Limited (MSBL) and that MSBL had carried out blast cleaning and painting works on the M8 White Cart Viaduct as a sub-contractor to Bam Nuttall Limited (BNL). BTG further explained that a dispute existed between MSBL and BNL in respect of the scope of the work carried out for BNL and the evaluation of such works.
2. Within this email, BTG requested a copy of the final account agreed between BNL and Transport Scotland, detailing the sums paid to BNL with particular reference to the blast cleaning and painting works carried out by MSBL.
3. Transport Scotland responded on 1 September 2014. It stated that the information was exempt in terms of section 33(1)(b) of FOISA, as disclosure would be likely to give BNL’s competitors an advantage in future similar tendering exercises and so would substantially prejudice BNL’s ability to submit competitive tenders and significantly harm its commercial business.
4. Transport Scotland also explained that the contract in question was still a live contract and, while there was a public interest in transparency, there was a greater public interest in protecting the commercial interests of companies entering into contracts with Transport Scotland and ensuring it could always obtain best value for public money.
5. On 15 September 2014, BTG wrote to Transport Scotland requiring a review of its decision. It pointed out that it did not ask for the entire financial accounts (in relation to which it could understand and accept the reasons for refusal), but had limited its request to the payments made to BNL for each item of work carried out by MSBL. BTG submitted that disclosure of

this information would not cause harm to the future commercial interests of BNL, and that disclosure of this information would be in the public interest.

6. Transport Scotland notified BTG of the outcome of its review on 24 September 2014. Transport Scotland upheld its original decision. Noting that BNL and MSBL were in dispute, it considered disclosure would prejudice BNL's negotiating position and thus its commercial interests.
7. On 27 February 2015, BTG wrote to the Commissioner. It applied to the Commissioner for a decision in terms of section 47(1) of FOISA. BTG submitted that Transport Scotland had failed to explain how disclosure would, or would be likely to, cause substantial prejudice. BTG also believed the request should have been dealt with under the EIRs.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that BTG 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.
9. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 12 March 2015, in line with agreed procedures, the Ministers were notified in writing that an application had been received from BTG and were asked to provide the Commissioner with the information withheld from BTG. The Ministers provided the information and the case was then allocated to an investigating officer.
10. Subsequent references to contact with or submissions from Transport Scotland are references to contact with or submissions made by the Ministers on behalf of Transport Scotland.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and answer specific questions. Transport Scotland was asked to justify its withholding of the information and its decision to handle the request under FOISA rather than the EIRs.
12. Transport Scotland responded with full submissions on these matters.

Commissioner's analysis and findings

13. 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 BTG and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs.

14. Transport Scotland submitted that it did not agree with BTG's submission that the request fell to be dealt with under the EIRs. It explained that while the works themselves related to the environment, this request related only to an amount paid for some of these works. Therefore, while Transport Scotland acknowledged that the request would be likely to be considered under the EIRs if it were broader and covered details of the works themselves, it

did not consider this approach appropriate in this case. In particular Transport Scotland referred to *Decision 125/2014 Clow Group Ltd*¹, which related to works carried out on the Erskine Bridge and where the Commissioner accepted that the request should be considered under FOISA.

15. Apart from referring to the definition in regulation 2(1) of the EIRs (see Appendix 1), BTG did not explain why it considered the information to be environmental.
16. Having considered all relevant submissions and the withheld information, the Commissioner is satisfied that the information withheld, i.e. the amount paid for specific work, does not fall within the definition of “environmental information” set out in regulation 2 of the EIRs. As such, she is satisfied that Transport Scotland was correct to deal with the request in terms of FOISA.

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

17. Transport Scotland submitted that it was withholding information under 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). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
18. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - a) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - b) the nature of those commercial interests and
 - c) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
19. 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.
20. Transport Scotland submitted that the commercial interests of both BNL and Transport Scotland would be harmed by disclosure.
21. BTG drew attention to *Decision 096/2008 Mr B and the Scottish Further Education Uni*², (the SFEU) where the Commissioner found a distinction had to be drawn between “commercial interests” and “financial interests”, and in that case found that the SFEU did not have a commercial interest for the purposes of section 33(1)(b) of FOISA.
22. In that decision, the Commissioner commented that “*an organisation's financial interests will relate to the management of its financial resources and assets, while its commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. 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. While the purchase of*

¹ <http://www.itspublicknowledge.info/uploadedFiles/Decision125-2014.pdf>

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200700062.aspx>

resources or services may entail activity which engages with commercial operators, it will not necessarily follow that the authority has commercial interests in relation to that activity”.

23. Whilst the Commissioner did not accept that the SFEU had a commercial interest for the purposes of section 33(1)(b) of FOISA, that case was in relation to SFEU's grant funding and whether the generation of income was the object of the project in question. Neither question has any direct bearing on this case and, as the Commissioner has pointed out on numerous occasions, each case has to be considered on its own merits.
24. In this case, having considered all of the circumstances, the Commissioner is satisfied that both Transport Scotland (in procuring the type of service to which the request relates, in a competitive market) and those providing the service (in this case BNL, operating for profit in a commercial market) would have relevant commercial interests in the information requested.
25. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests she has identified would, or would be likely to, be prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 19 above: such prejudice must be at least likely before the exemption can apply.
26. In its application to the Commissioner, BTG submitted that Transport Scotland had misdirected itself as to the scope and application of the section 33(1)(b) exemption. It argued that the exemption's purpose was to prevent the release to the requesting party of information which was not in the public domain and which would give that party an unfair ongoing commercial advantage, for example in future public procurement or tendering processes. It stated that the exemption tried to avoid the requesting party becoming privy to confidential information which enables it to acquire, and thereby eliminate or neutralise, an advantage its competitors may have acquired only through years of experience.
27. BTG further submitted that Transport Scotland failed to explain how disclosing information to MSBL, in administration and no longer trading, could present an ongoing threat to the commercial interests of BNL. It also submitted that the work carried out by MSBL was unique, so the payments made for the work would be a one-off set of data. Therefore, in any event, disclosure of the payments would be of no avail to MSBL in pricing future bids.
28. BTG made a number of further arguments, to the effect that the limited information sought was unlikely to be of any use to competitors of BNL, and that the information requested was not the tender price but the price actually agreed by Transport Scotland.
29. BTG also submitted that Transport Scotland did not appear to take account of the passage of time, which would have had the effect of diminishing any value the information might have had. It also submitted that it could be equally argued that disclosure of the information requested might simply lead to greater competition. It did not believe the information had ever been considered confidential.
30. Transport Scotland did not accept BTG's contention that section 33(1)(b) could only apply if disclosing the information to the requester would give the requester themselves an unfair commercial advantage. It highlighted that disclosure would make the information available to anyone else who requested it, including BNL's competitors, to identify BNL's costs.
31. Transport Scotland submitted that BNL's interests would be significantly harmed, firstly because disclosure could enable its competitors to know the amount it was charging

Transport Scotland for that type of work and therefore seek to undercut them in future tendering exercises for similar work.

32. It submitted that, at the time of the request, the contract in question was still live. Whilst the item referred to was fairly specific to one part of a contract, it continued, this information could still be used by others to ascertain information about their pricing in that area, which would be likely to make it harder for BNL to secure similar contracts in future. In Transport Scotland's opinion, that constituted substantial prejudice to BNL's commercial interests.
33. In addition, Transport Scotland submitted that disclosure would be likely to significantly prejudice BNL's commercial interests in securing any final agreement with the Administrators in this case. It considered it clear from BTG's application that it wanted to obtain the information as Administrators of MSBL, to help ease MSBL's debts. It acknowledged this was understandable, but still believed it would significantly harm BNL's commercial interests by making their negotiating position more difficult.
34. Transport Scotland drew the Commissioner's attention to the arguments set out in *Decision 125/2014*, as mentioned above, stating that it believed there were strong similarities in this case and the arguments set out in that decision also applied here. It also identified as relevant *Decision 233/2006 Mr Mike Portlock and Glasgow City Council*³, where the Commissioner found that the release of the unit price the Council had paid for a particular foodstuff would prejudice substantially the commercial interests of the Council's catering company: it would be likely to harm the Council's ability to secure an advantageous price for the product, which would in turn affect the competitiveness of the catering company's future tender bids.
35. In Transport Scotland's opinion, that decision was directly comparable to the request for information in this case, as disclosing this information would be likely to give BNL's competitors an advantage in future similar tendering exercises, which would substantially prejudice BNL's ability to submit competitive tenders and so could significantly harm their commercial business. Transport Scotland submitted that there was a relatively small selection of contactors experienced in bridge steelwork strengthening and repairs, so the impact on BNL of disclosure would be substantial given the same, small number of firms would often bid for the same tenders in future.
36. Transport Scotland submitted that BNL had expressed significant concerns at the prospect of information relating to their tender strategy being disclosed. It had sought the views of BNL in this regard and produced relevant correspondence. In particular, BNL noted that the information being requested in this case remained relevant in relation to future tenders they might submit for similar contracts.
37. In addition, Transport Scotland submitted that it was obliged to secure best value for money in its contractual negotiations. This required that reasonable expectations of confidentiality were maintained, which it believed to be relevant to the application of section 33(1)(b) in this case. Disclosure, it argued, would substantially prejudice its ability to achieve best value when contracting for this type of work in the future, by making other contractors aware of the amount it would be likely to be willing to pay in respect of these costs. Disclosure, it claimed, was also likely to lead to a reduction in the number of contractors willing to bid for future

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200501687.aspx>

contracts, due to their concerns about future disclosure of their own commercially sensitive information: they noted that this was apparent from the correspondence received from BNL.

38. Transport Scotland further added that, given that this was already a specialist area with only a small number of contractors with the necessary skills and experience to carry out such work, a reduction in the number of firms tendering would be likely to significantly harm its commercial interests by making it much harder to secure sufficient good quality tenders and ensure those tenders represented best value.
39. The Commissioner has considered the information withheld under this exemption, along with all submissions received. She must bear in mind, contrary to the argument advanced by BTG, that disclosure under FOISA (and, for that matter, the EIRs) is effectively disclosure to the world at large and not simply to the requester. In other words, the information would be available to anyone else if disclosed, including (in this case) actual and potential competitors of BNL. In addition, she cannot accept BTG's contention that disclosure must confer a competitive advantage on the requester before the exemption can be upheld.
40. BTG has made a number of other points which might, depending on the circumstances, have a considerable bearing on determining whether substantial prejudice to commercial interests would, or would be likely to, follow the disclosure of information. The Commissioner must, however, consider the particular information withheld in this case and all other relevant circumstances, taking account of all relevant submissions received from both parties. Having done this carefully, and leaving aside (for the purposes of assessing such prejudice) the potential effects of disclosure on any dispute between MSBL and BNL, the Commissioner accepts that disclosure of the information requested would be likely to have a substantially prejudicial effect on BNL and Transport Scotland, given the potential benefits of this information to competitors as argued by Transport Scotland. She is therefore satisfied that this information is exempt under section 33(1)(b): its disclosure would, or would be likely to, prejudice substantially the commercial interests of both Transport Scotland and BNL.

Public interest test - section 33(1)(b)

41. As mentioned above, the exemption in section 33(1)(b) is subject to the public interest test in 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.
42. Transport Scotland recognised that there was some public interest in disclosure of this information, in order to provide transparency on how public money had been spent in relation to this particular element of the contract. However, it also considered there to be a strong public interest in avoiding significant harm to the commercial interests of BNL (both in its negotiations with sub-contractors, particularly MSBL and their Administrators, and in prejudicing its competitiveness in future procurements).
43. Transport Scotland also submitted that there was also a strong public interest in avoiding prejudicing its own commercial interests, as disclosure would be likely to lead to (a) higher costs in securing contractors (which would need to be paid using public funds), and (b) greater difficulty in securing appropriate contractors (which might also lead to higher costs as well as delays in taking projects forward). Therefore, Transport Scotland concluded that the public interest in withholding this information outweighed the public interest in disclosing it.

44. BTG identified a strong public interest in facilitating the work of Administrators. There was also, it believed, a public interest in providing information empowering Scottish commercial entities to resolve disputes.
45. BTG went on to argue that the onus of proof lay on the public authority to show that the public interest test was engaged and why it favoured withholding the information, not upon a requester to explain the contrary. BTG submitted that Transport Scotland's arguments were purely speculative, supported by no facts or reasoning.
46. BTG submitted that the issue was whether or not BNL had retained monies properly due to MSBL, paid out of public funds, the retention of which might have led to the insolvency of MSBL.
47. BTG emphasised there was a public interest in ensuring that public authorities disbursing public funds did so in a way that precluded sub-contractors from withholding sums due, ultimately putting the intended payee out of business (if that was the result here) and thereby imposing a burden on the state. There was a public interest, it submitted, in knowing that public authorities agreeing final accounts obtained the most economically advantageous outcome for the public. There was, in particular, a very strong public interest in facilitating the work of those who administered the UK's insolvency regime, since their activity was ultimately intended to benefit society by establishing and explaining to the public the reasons for business failures and maximising recovery of funds for creditors.
48. BTG pointed out that Transport Scotland had been informed that the information requested was needed to enable the Administrators of MSBL to establish the scope of works carried out by that company and the sums Transport Scotland agreed to pay BNL for those works. It submitted that these public interests outweighed any alleged public interest inherent in withholding the information requested.

Commissioner's conclusions

49. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves spending from the public purse. She acknowledges that the withheld information might cast some light on these matters and has borne in mind that those entering into contracts with Scottish public authorities should be aware that, at times, information relating to these contracts will require to be released as a result of a request under FOISA.
50. The Commissioner has also considered fully all of the submissions received from BTG, particularly those regarding the effective functioning of Administrators. Clearly, these identify issues of public interest. On the other hand, as indicated above, the Commissioner must be aware that disclosure under FOISA is disclosure to the public and not merely to the applicant.
51. The Commissioner has also taken account of the submissions made by Transport Scotland in favour of maintaining the exemption. She has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that this would not be in the public interest. It is in the public interest for Transport Scotland, in common with other Scottish public authorities, to be able to procure services in a competitive market, thus securing best value for the public purse. It is also in the public interest for any supplier of a public service to remain commercially viable and capable of offering best value, along with its potential competitors on a fair and equal footing. The Commissioner has borne in mind the

relatively specialised nature of the work under consideration here, with all the implications of that for future procurement exercises.

52. On balance, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in disclosing the requested information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA. Consequently, she is satisfied that Transport Scotland correctly withheld the information in terms of section 33(1)(b) of FOISA.

Decision

The Commissioner finds that Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Begbies Traynor Group Limited.

Appeal

Should either Begbies Traynor Group Limited or Transport Scotland 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.

Margaret Keyse
Head of Enforcement

27 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).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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