



Scottish Information  
Commissioner

**Decision 180/2006 Mr Alfred Weir and Fife Council**

*Correspondence and replies concerning all parties involved in tendering  
and submitting quotations for an IT contract with Fife Council*

**Applicant: Mr Alfred Weir  
Authority: Fife Council  
Case No: 200501049  
Decision Date: 5 October 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 180/2006 Mr Alfred Weir and Fife Council

***Request for correspondence relating to the tendering process for an IT contract with Fife Council – whether information relating to pricing schedules constitutes a trade secret under section 33(1)(a) of the Freedom of Information (Scotland) Act 2002 – whether disclosure of the information would, or would be likely to, prejudice substantially the commercial interests of any person under section 33(1)(b) – whether disclosure of the information would constitute an actionable breach of confidence under section 36(2)***

### Facts

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Mr Weir, Managing Director of NVT Computing Limited, wrote to Fife Council requesting copies of correspondence concerning all of the parties involved in tendering and submitting quotations for three Information Technology (IT) contracts with Fife Council. NVT Computing Limited had been one of eleven companies who had submitted a tender.

Copies of the successful tenderers' original evaluation sheets for one tendering process (DD310) were provided to Mr Weir, but Fife Council stated that information relating to the second of the contracts (DD033) could not be provided at that time since the bids received were in the process of being evaluated when Mr Weir submitted his request. Fife Council argued that disclosure of such information would be likely to prejudice substantially the commercial interests of the tendering parties under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). However, Fife Council agreed to contact Mr Weir about his request once the second contract had been awarded.

In relation to the third contract (RM716), Fife Council informed Mr Weir that information relating to pricing schedules which had been submitted to Fife Council by the tenderers constituted a trade secret in terms of section 33(1)(a) of FOISA. Fife Council added that the information requested could not be disclosed on the grounds that to do so would prejudice substantially the commercial interests of the contractor and tenderers under section 33(1)(b) of FOISA and that the information requested was also exempt under section 36(2) of FOISA on the grounds that disclosure of the information would constitute a breach of confidence actionable by the tenderers against Fife Council.

Mr Weir was dissatisfied with Fife Council's response in relation to contract RM716 and, after requesting a review of Fife Council's original decision, applied to the Scottish Information Commissioner for a decision.



## Outcome

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The Commissioner did not accept that the tendering bids in contract RM716 constituted a trade secret or that disclosure of the information would, or would be likely to, prejudice substantially the commercial interests of any person. The Commissioner also found that disclosure of the information would not constitute an actionable breach of confidence. The Commissioner therefore found that Fife Council had failed to act in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by incorrectly relying upon the exemptions under sections 33(1)(a), 33(1)(b) and 36(2) of FOISA in relation to the information withheld.

The Commissioner required Fife Council to supply Mr Weir with the tendering correspondence in relation to contract RM716.

## Appeal

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Should Mr Weir or Fife Council wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

## Background

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1. On 27 January 2005, Mr Weir, Managing Director of NVT Computing Limited, wrote to Fife Council by e-mail. Mr Weir requested “all correspondence and replies from all parties tendering, submitting quotations giving prices and responses” for three specific IT contracts. NVT Computing Limited had been one of the parties who had submitted a tender.
2. Fife Council responded by letter on 27 January 2005. In its letter, Fife Council acknowledged Mr Weir’s request and provided contact details of the person who would deal with it.



3. On 2 February 2005, Fife Council wrote to Mr Weir, dealing with each contract in turn. The first of the three contracts (DD310) concerned the supply of Unix-based and NT servers. This contract had expired on 31 July 2004 and was subsequently merged with the second contract (DD033) which concerned the supply of servers.
4. In relation to the first contract (DD310), Fife Council asked Mr Weir to clarify whether he required details of the original scoring for the tender offers. The second contract (DD033) was subject to a tendering process and the bids received were in the process of being evaluated when Fife Council received Mr Weir's request. Fife Council informed Mr Weir that disclosure of such information would be likely to prejudice substantially the commercial interests of the tenderers under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Fife Council added that it did not judge disclosure to be in the public interest.
5. The third contract (RM716) concerned computer hardware, firmware and operating system software maintenance. Fife Council informed Mr Weir that it was unable to provide him with any further information until the current contractor and the unsuccessful tenderers had been consulted. Fife Council stated that this would allow it to determine whether information contained within the tenderers' original bids had any confidential and commercial implications for their organisations. Fife Council added that it would keep Mr Weir informed of progress.
6. Fife Council wrote to all of the companies involved in the RM716 tendering process (with the exception of Mr Weir's Company) on 2 February 2005, asking them to confirm whether they considered the viewing of their tendering correspondence would prejudice substantially the commercial interests of any person within their respective organisations. It was stated that if no written response was received it would be deemed that all correspondence and replies from the tendering process would be disclosed under FOISA.
7. Fife Council received responses from five of the ten companies it had contacted. One company stated that it had no objection to the release of the information and four companies raised a number of objections in relation to disclosure. No responses were received from the other five companies concerned, from which it can be concluded that they did not object to the information being released.



8. On 7 February 2005, Mr Weir wrote to Fife Council confirming that he required details of the original scoring for the tender offers for contract DD310. He acknowledged that Fife Council could not supply information concerning contract DD033 but asked for the information originally requested to be provided following the successful contractor being awarded the contract. Mr Weir questioned Fife Council's decision to withhold the information he had requested concerning contract RM716 and repeated his request to be provided with all correspondence in relation to that tender.
9. Fife Council responded to Mr Weir's letter on 11 February 2005. In its letter, Fife Council stated that it had enclosed copies of the successful tenderers' original evaluation sheets for contract DD310. Fife Council added that, in line with the Scottish Public Sector Procurement and Freedom of Information Guidance produced by the Scottish Executive, it was unable to provide copies of the scoring sheets for unsuccessful tenderers. Fife Council also stated that following the award of the contract, under tender DD033, it would contact Mr Weir to discuss his request.
10. In relation to the RM716 tenders, Fife Council informed Mr Weir that it had consulted the current contractor and the unsuccessful tenderers and concluded that it could not provide him with the information he had requested on the grounds that it would prejudice substantially the commercial interests of the contractor and tenderers under section 33(1)(b) of FOISA. Fife Council also decided that disclosure would not be in the public interest. A copy of the Procurement and Supplies Contract Report was provided by Fife Council for Mr Weir's information. The report is an internal recommendation document submitted to the Head of Service Support at Fife Council for approval and award of a contract.
11. Mr Weir wrote to Fife Council on 16 February 2005, requesting a review of the decision to withhold the information in relation to contract RM716. Fife Council carried out a review and responded to Mr Weir on 15 March 2005. In its letter, Fife Council stated that it had reviewed the documentation submitted by the tenderers in connection with the RM716 tenders and had also considered the representations which had been made by three of the tenderers on being advised of the request which had been submitted by Mr Weir.



12. Fife Council upheld its previous decision that disclosure of the information would prejudice substantially the interests of the tenderers involved. It also added that the information relating to pricing schedules submitted to Fife Council by the tenderers had been considered and constituted a trade secret in terms of section 33(1)(a) of FOISA. This exemption is also subject to the public interest test and Fife Council stated that, in considering whether the public interest in disclosing the information outweighed the public interest in maintaining the exemption, it had taken account of the fact that the request for information had been submitted by a commercial competitor and that there was no suggestion that the contract award process had been conducted improperly.
13. Fife Council also contended that by disclosing the information it may find that companies will be reluctant to tender for Fife Council contracts in the future. It was argued that this would be to the detriment of Fife Council and the public interest, in that competition would be limited, leading to Fife Council having to pay more for the services than was necessary.
14. In its letter, Fife Council added that the information requested was also exempt under section 36(2) of FOISA on the grounds that disclosure of the information would constitute a breach of confidence actionable by the tenderers against Fife Council. In reaching its decision, Fife Council held that the information had been submitted to Fife Council by the tenderers on the basis that it was “commercial in confidence”. The fact that the tenders had been submitted to Fife Council over a year before FOISA came into effect was also taken into consideration, as was the fact that the request concerning contract RM716 related to a current rather than a completed contract.
15. Fife Council ended its letter by confirming the decision complained of, with modifications, as provided for under section 21(4)(a) of FOISA. It stated that it could not provide Mr Weir with the information he had requested in relation to contract RM716.
16. On 17 March 2005, Mr Weir wrote to my Office, requesting an investigation into the matter. He argued that FOISA was expressly designed to ensure that there was openness to prove that competing companies were treated equally in tendering for public sector contracts. He also complained that Fife Council had failed to show openness in relation to its decision making process when awarding contracts through the tendering process.
17. The case was then allocated to an investigating officer.



## The Investigation

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18. Mr Weir's appeal was validated by establishing that he had made a request for information to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
19. The investigating officer wrote to Fife Council on 21 April 2005. Fife Council was asked to provide comments on the case and to supply documentation which would enable the investigation to proceed. It was also asked to provide a detailed analysis of its application of the exemptions it had cited in relation to contract RM716. In particular, Fife Council was asked to provide details of its consideration of the "harm test" in relation to the section 33(1)(b) exemption (i.e. how release of the information would, or would be likely to, prejudice substantially the commercial interests of any person) and to provide details of the factors that were taken into consideration when applying the public interest test to the use of the section 33(1)(a) and (b) exemptions.
20. Fife Council was asked if any consideration had been given to providing the information to the applicant with specific pricing details redacted (i.e. edited out) where it considered the information to be commercially sensitive. Fife Council was also asked whether it had taken into account the terms of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code), such as the section which refers specifically to public sector contracts.
21. Fife Council responded to my investigating officer on 12 May 2005. It provided a schedule of documents for the purposes of the investigation and commented on the points that had been raised. In its letter, Fife Council outlined the procedures it had followed to carry out the review. It confirmed that a senior member of staff who had not been involved in the original decision to withhold the information had carried out the review. The original tender documents had been examined as had the letters which had been submitted to Fife Council by the other tenderers.
22. In its letter of 12 May 2005, Fife Council stated that it had contacted the other parties that had been involved in the RM716 tendering process. Fife Council had invited them to make representations in the light of Mr Weir's information request. Four tenderers had opposed the release of the information requested. In considering what weight to give these representations, Fife Council had regard to the Scottish Public Sector Procurement and Freedom of Information Guidance which was issued by the Scottish Executive as Local Authority Procurement Circular – LAPC(13)04 on 21 December 2004.





23. Fife Council concluded that the information requested was sensitive and that the views of those providing it required to be taken into account. In considering the section 33(1)(a) exemption under FOISA, the Council attached weight to the submissions of the four tenderers, including the statement of one of them that it was of the view that its pricing structure should be regarded as a trade secret on the grounds that it was not generally known and was, in its opinion, a principal source of its competitive edge.
24. In considering the terms of section 33(1)(b) of FOISA, Fife Council had regard to the statements made by the four tenderers who claimed that the effect of releasing the information would be to substantially prejudice their commercial interests.
25. In respect of section 36(2) of FOISA, Fife Council stated that it had taken into consideration the briefing on the exemption that had been produced by my Office and which is available on my website. Fife Council had particular regard to section 6 of the briefing note and, having regard to the letters from the four tenderers, concluded that the requirements necessary to constitute an actionable breach of confidence would be met if Fife Council released the information requested.
26. Fife Council maintained that the information which had been requested by Mr Weir had been submitted to it on a “commercial in confidence” basis. It also considered it significant that the tenders in question had been submitted to Fife Council over a year prior to FOISA coming into force and that the request related to a current rather than a completed contract.
27. In relation to the “harm test” under section 33(1)(b) of FOISA, Fife Council considered that the commercial interests of the tenderers would be substantially prejudiced for a number of reasons that had been specified in the tenderers’ letters. This included representations that the disclosure of any details relating to methodology, design, specification, pricing and service delivery would put the tenderers at a competitive disadvantage. It was also argued that information relating to response times, pricing structure and referees was commercially sensitive.
28. One of the tenderers informed Fife Council that the impact of sharing such information might influence its decisions to bid for future contracts with Fife Council. This, it was argued, constituted evidence that Fife Council could find companies reluctant to tender for contracts in the future if information which contractors had considered to be confidential had been released. It was maintained that this would be to the detriment of Fife Council and the public interest in that competition would be limited and this would in turn lead to Fife Council and therefore the public having to pay more for services or receive a poorer service than was necessary.





29. In considering the public interest in relation to sections 33(1)(a) and (b) of FOISA, Fife Council had regard to the fact that the request for information had been submitted by a company for commercial purposes rather than a member of the public (in its original request NVT Computing Ltd had informed Fife Council that it was conducting a review of lost public sector business). Significance was also attached to the following: (i) there was no suggestion that the contract award process had been conducted improperly and (ii) release of the information requested would be unlikely to benefit the public at large. Fife Council maintained that the only persons to benefit from the release of the information would be Mr Weir and NVT Computing Ltd. Fife Council argued that the potential benefit was more than offset by the detriment which would be suffered by the other tenderers and the Council if the information was released.
30. Finally, Fife Council stated that it had considered providing the information to Mr Weir with specific pricing details redacted, but since Mr Weir was particularly interested in the pricing details this was not considered to be a productive course of action. It was also mentioned that the contract was awarded in October 2003 and that it would have been unlikely that the terms of the Section 60 Code had been considered since the Section 60 Code had not been approved until September 2004. In relation to the RM716 contract, which was due to expire in September 2005, the investigating officer was later informed by Fife Council that the contract had been extended by another year and was therefore still extant.
31. I will now go on to consider the exemptions that have been cited by Fife Council in relation to the information requested by Mr Weir.

## **The Commissioner's Analysis and Findings**

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### **Section 33(1)(a) – trade secret**

32. Section 33(1) of FOISA relates to trade secrets and commercial interests. It states:

“Information is exempt information if –

- (a) it constitutes a trade secret; or
- (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).”



33. Section 33(1)(a) of FOISA allows a public authority to withhold information which constitutes a trade secret. However, even if information does constitute a trade secret, the information should still be disclosed if, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption. There is no definition of a trade secret in FOISA, but I have published guidance on section 33 which includes some issues to consider when deciding whether information constitutes a trade secret. The guidance can be found on my website at <http://www.itspublicknowledge.info/legislation/briefings/section33.htm>.
34. In my guidance I have advised public authorities that these are the types of questions they should consider in determining whether something is a trade secret:
- Is the information used for the purpose of trade?
  - Would the release of the information cause harm?
  - Is the information common knowledge?
  - How easy would it be for competitors to discover or reproduce the information for themselves?
35. In coming to a view on this aspect of the case I have considered Fife Council's submission and the arguments forwarded by the four tenderers who objected to the information being disclosed. I have also referred to the Irish Information Commissioner's decision on Case 98049, 90056, 98057 – Henry Ford & Sons, Nissan Ireland and Motor Distributors Ltd and the Office of Public Works, which looks at the case law on trade secrets and confidentiality from a number of jurisdictions.
36. Fife Council argued that the information relating to pricing schedules which had been submitted to it by each tenderer constituted a trade secret. In its letter of 12 May 2005, Fife Council referred to a statement in a letter it had received from one of the tenderers which stated: "In respect of section 33(1)(a) of the FOISA, we are of the view that our pricing structure should properly be regarded as a trade secret as it is not generally known and is, in our opinion, a principal source of our 'competitive edge'."
37. The Irish Information Commissioner was asked to consider whether a price quoted in a tender was a trade secret. The applicant referred to the English case of *Faccenda Chicken Ltd v. Fowler & Others* [1986] 1 All ER, to support this view and drew attention to the comment of Neill, L.J. that "We can well appreciate that in certain circumstances information about prices can be invested with a sufficient degree of confidentiality to render that information a trade secret or its equivalent."



38. It was accepted by the Irish Information Commissioner that *during* the tendering process the price offered by each company was confidential, and that a strong case could be made that, at that time, the price was a trade secret. This view was informed by discussions of the meaning of “trade secret” in the case of *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967 v.r.373]. In that case Gowans J. stated:
- ”An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one’s trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his contemporaries; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others”.
39. However, the Irish Information Commissioner noted that Neill, L.J. in the *Faccenda Chicken* case had made it clear that the secret nature of information need not last indefinitely, observing that “innumerable...pieces of information are capable of being trade secrets, though the secrecy of some information may only be short lived”. The Commissioner concluded that only in exceptional circumstances would historic price information qualify as a trade secret, noting also a key requirement that the information in question must be in current use in the trade. Finally, the Commissioner placed considerable importance on the value of the information to competitors.
40. The information provided by tenderers concerning contract RM716 formed the basis of a contract agreed in October 2003. The contract expired on 30 September 2005, but was subsequently extended to expire on 30 September 2006. The commercial sensitivity of any information included in the tenders and its interest to a potential competitor is likely to have decreased significantly since the tender bids were originally submitted. In my opinion the pricing schedules submitted by the tendering companies in 2003 would not be any guide to their submissions for any similar tender, or for any unrelated tendering business, in future.
41. In this case, I think it is important to consider the nature of the information withheld in reaching a conclusion whether or not it possesses the quality of being secret. It seems to me that any element of secrecy associated with the information in the tender documents would relate to the way in which the prices for each of the elements were calculated, rather than the prices themselves.



42. After studying the documents that have been withheld I have come to the conclusion that it would not be possible to work out any company's profit margins from the information provided without first obtaining further information about the purchase costs of materials or services from suppliers. I do not accept that the method of computing any of the tendering companies' prices could be worked out from the information available in the documents in question. Nor do I accept that the pricing information would now be of use or value to any company's competitors and consequently I do not hold that the disclosure of such information would compromise any company's "competitive edge".

### *Conclusion*

43. I do not accept that any of the information withheld from Mr Weir could be held to constitute a trade secret, and therefore I do not accept that it should be withheld under section 33(1)(a) of FOISA. As the exemption cited is not upheld there is no requirement for me to consider the public interest in relation to section 33(1)(a) of FOISA.

### **Section 33(1)(b) – commercial interests**

44. Section 33(1)(b) of FOISA states that information is exempt information if 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).
45. 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 these interests will be substantially prejudiced. 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 will be substantially prejudiced.
46. Even where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still 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.



47. Fife Council stated in its letter to me, dated 12 May 2005, that it had taken account of the statements made by four of the eleven tenderers to the effect that releasing the information requested would prejudice substantially the tenderers' commercial interests. In considering what weight to give to these representations, Fife Council also had regard to the Scottish Public Sector Procurement and Freedom of Information Guidance issued as Local Authority Procurement Circular LAPC(13)04, issued by the Scottish Executive on 21 December 2004.
48. The company which submitted the winning tender for contract RM716 (the contractor) argued that the disclosure of its tendering documents would prejudice substantially its commercial interests. It stated that it operated in a highly competitive environment and its ability to compete successfully for contracts depended heavily on the way in which it distinguished itself from its competitors. The contractor claimed that it achieved this distinction through unique service delivery initiatives, processes and procedures together with flexible and effective costing mechanisms, all of which were detailed in the documentation it submitted to Fife Council in support of its bid.
49. The contractor added that it regarded the Council as an important customer and that disclosure of the tendering information would adversely affect its ability to compete effectively in relation to the renewal of the contract in September 2005. The RM716 contract was in fact extended in September 2005 until September 2006 without recourse to competition, although I accept that this would not necessarily have been apparent to Fife Council at the time it dealt with Mr Weir's request.
50. The unsuccessful tenderers who submitted objections to the release of the tendering information argued that the information requested by Mr Weir contained current information and the disclosure of any details relating to methodology, design, specification, pricing and service delivery would put them at a competitive disadvantage. It was argued that the impact of sharing this type of information could potentially erode the companies' existing client bases and affect their ability to win new business in the future. In particular, they argued that the disclosure of elements such as response times, references, costs, hardware and software support, and pricing structure, would operate to the advantage of their competitors, causing real or actual harm concerning their ability to do business.
51. Fife Council also stated that it had regard to the fact that by disclosing this information it might find that companies would be reluctant to tender for its contracts in the future. It added that this would be to the detriment of Fife Council and the public interest, in that competition would be limited, leading to Fife Council having to pay more for the services or receive a poorer service than was necessary.



52. Reference was made by Fife Council to the Scottish Public Sector Procurement and Freedom of Information Guidance (the Procurement Guidance). This document provides guidance on how requests for procurement-related information under FOISA should be handled by public bodies. It was produced by the Scottish Executive and was issued in December 2004.
53. In relation to tender evaluation information on unsuccessful bidders, the Procurement Guidance states, in Annex A, that although commercially non-sensitive information could be disclosed, the public interest in favour of disclosure of sensitive information is generally weaker than that for winning bidders. The Guidance states that such information should generally be withheld under section 33 of FOISA, with the exception of non-sensitive information.
54. In my opinion the disclosure of the correspondence relating to the 2003 tender submissions would not cause (or be likely to cause) any significant harm to those parties involved if they were to submit tenders for a future contract. The specification and terms of any future contract will be dictated by Fife Council's requirements in respect of that particular contract, at the material time. Any prices submitted by tendering parties in relation to a future contract will be based on Fife Council's requirements as specified in the relevant tender documents and market conditions as they stand at the time the bids are submitted. I consider it unlikely, therefore, that pricing information relating to contracts let in 2003 will be a reliable guide to appropriate pricing for future contracts, or that the information would have had such value to potential competitors at the time the Council dealt with Mr Weir's request.
55. While I note the comments of certain tenderers in relation to information that they would regard as being of advantage to competitors, the elements they have described, such as response times, references, costs, and hardware and software support, all appear to relate to the supply of standard products and it is my view that the disclosure of such information in this instance would not cause real or actual harm to any company's ability to do business. In relation to pricing structure, it is the methodologies and computational processes involved in working out the pricing structures which are of value rather than the pricing structures themselves. As I stated above in relation to trade secrets, I do not accept that the disclosure of the pricing structures in this instance would result in the kind of harm anticipated or would now be of use or value to any company's competitors.





56. In my briefing on the exemption in section 33(1)(b) of FOISA, which is available on my website, I said:

”in order to claim these exemptions, the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time. Authorities should therefore consider disclosing the information asked for unless it would cause real, actual and significant harm”.

57. It is my opinion that the passage of time has reduced the potential value of the information to any competitors for future tenders, as prices and market conditions will undoubtedly have changed. As I have indicated above, I have not accepted that all of the information withheld had such value in any event. Therefore, I do not accept that the release of the information requested by Mr Weir would, or would be likely to, cause real, actual and significant harm to any of the parties involved in the 2003 bidding process, and therefore it would not prejudice substantially their commercial interests.

### *Conclusion*

58. I do not uphold Fife Council’s decision to withhold information relating to the tendering submissions under section 33(1)(b) of FOISA, for the reasons given above. As the exemption cited is not upheld there is no requirement for me to consider the public interest in relation to section 33(1)(b) of FOISA.

### **Section 36(2) – actionable breach of confidence**

59. I will now examine whether the information requested by Mr Weir can be withheld under section 36(2) of FOISA.

60. Section 36(2) of FOISA relates to confidentiality and is an absolute exemption. This means that this exemption is not subject to the public interest test, although it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is justified in the public interest. Section 36(2) of FOISA states:

“Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.”





61. For an action of breach of confidence to be successful, there are three main requirements:
- (i) The information must have the necessary quality of confidence;
  - (ii) The information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
  - (iii) There must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. It is established that the detriment may be potential rather than actual and need not be financial.
62. The winning tenderer maintained that its desire to protect both its trade secrets and, more generally, its commercial interests was evidenced by the fact that the contract under which the services were provided included obligations of confidentiality. It also maintained that the documents it supplied to Fife Council in connection with its tender were supplied under conditions of confidentiality. The unsuccessful tenderers who objected to the release of the information to Mr Weir also maintained that all correspondence was supplied to Fife Council on a “commercial in confidence basis.”
63. Fife Council, in its e-mail to my office dated 17 August 2005, stated that the Council’s terms and conditions of contract do not contain any reference to the fact that tenders will be treated in confidence. However, it argued that this is the basis on which tenders have been received and processed in the past through long-established custom and practice. Fife Council stated that tenders are submitted and processed on the basis that they have been submitted on a “commercial in confidence” basis.
64. It should be noted that whilst this may have been the case prior to FOISA coming into force, such “long-established custom and practice” must now be considered in the light of the requirements of FOISA and the Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code). Public authorities now have a responsibility to develop ways of working with external suppliers and companies which take into account the new information culture that FOISA has introduced. This should include ensuring that existing contractors have a clear understanding of which information, if any, is or will be deemed to be confidential, and that existing obligations of confidentiality should not be expected automatically to exempt information from disclosure under FOISA for ever.



65. In my opinion, whereas an obligation of confidentiality could be inferred from the circumstances under which information was initially provided by the tendering companies and the information might have been judged to have been confidential at the time the bids were being assessed, it cannot necessarily be regarded in this way once the tendering process has been concluded and the contract has been awarded. The tendering exercise for contract RM716 was concluded in October 2003 and I am of the view that the passage of time had decreased the commercial sensitivity of the information by the time Mr Weir had made his request. Having examined the content of the documents withheld, I am of the opinion that the information itself reveals nothing that would have given a competitor any advantage in a similar tendering process in future, either at the time of the request or subsequently..
66. After considering the declining sensitivity of the information, together with Fife Council's legal responsibilities under FOISA, I do not accept that release of the information would deter or otherwise limit competition to such an extent that it would result in Fife Council and therefore the public having to pay more for services or receive a poorer service than was necessary.
67. Given the diminished commercial sensitivity of the information, I believe it is clear that the information supplied the tendering process no longer possesses the required quality of confidence for the exemption under section 36(2) of FOISA to apply. I would also emphasise that a decision to order the release of such information would not imply that all information relating to tenders would automatically require to be made available on request: that would depend on all the relevant circumstances at the time.

### *Conclusion*

68. In relation to contract RM716, whereas an obligation of confidentiality could be inferred from the circumstances under which information was initially provided by the tendering companies and the information might have been judged to be confidential at the time the bids were being assessed, I cannot in the circumstances accept that the information still possesses the requisite quality of confidence, or that it did at the time Fife Council dealt with Mr Weir's request for information. I therefore do not uphold Fife Council's decision to withhold information relating to the RM716 tendering submissions under section 36(2) of FOISA.



## Decision

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I find that Fife Council failed to act in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by relying incorrectly upon the exemptions under sections 33(1)(a), 33(1)(b) and 36(2) of FOISA in relation to contract RM716.

Accordingly, Fife Council failed to deal with Mr Weir's request for information in respect of contract RM716 in accordance with section 1(1) of FOISA. I now require Fife Council to release to Mr Weir the information requested by him in respect of contract RM716.

I cannot require Fife Council to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require Fife Council to release the tendering correspondence in relation to contract RM716 to Mr Weir within 45 days of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**5 October 2006**