

Decision Notice

Decision 001/2016: Mr Alan Howard and Moray Council

Tender submissions

Reference No: 201501232

Decision Date: 6 January 2016



Scottish Information
Commissioner

Summary

On 15 May 2015, Mr Howard asked Moray Council (the Council) for information contained in an Invitation to Tender (ITT) Response questionnaire submitted by Quarriers. The Council provided some of the information, withholding other information under various exemptions in FOISA.

During the investigation, the Council provided further information to Mr Howard, and the Commissioner accepted the remaining information was correctly withheld under section 36(2) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); (36)(2) (Confidentiality)

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 15 May 2015, Mr Howard wrote to the Council. He requested information relating to the procurement of a service, as follows:
Section 1 (Qualification Envelope) and Section 2 (Technical Envelope) of the ITT Response Questionnaire submitted by Quarriers in respect of the procurement of 14/0056 Provision of Direct Access Drug and Alcohol Service including the attachments to questions 1.15.2, 1.15.3, 1.15.4, 1.15.5, 1.15.6, 1.16.2, 1.16.3, 1.16.4, 1.16.5 and 2.1.10
2. The Council responded on 11 June 2015. It informed Mr Howard that information had been published on the Council's website and provided a link. It made no reference to any information being withheld.
3. On 16 June 2015, Mr Howard wrote to the Council requiring a review of its decision. He did not consider the published information met his request.
4. The Council notified Mr Howard of the outcome of its review on 18 June 2015. It informed Mr Howard that it considered the information to be exempt under various exemptions in FOISA, including section 36(2).
5. On 30 June 2015, Mr Howard wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Howard submitted that the Council had not applied the exemptions claimed properly.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Howard 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 28 July 2015, the Council was notified in writing that Mr Howard 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. The Council was asked to justify its withholding of the information, with reference to relevant provisions of FOISA.
9. The Council responded with full submissions on these matters.
10. During the investigation, the Council provided Mr Howard with further information from Section 1 (Qualifications Envelope), subject to redactions in two documents and withholding one document in its entirety. It maintained that this information, and all information withheld from Section 2 (Technical Envelope), was exempt from disclosure in terms of sections 30(c), 33(1)(b) and 36(2) of FOISA.
11. Mr Howard acknowledged receipt of the information. He accepted the redaction of personal data from one of the documents provided and wished the Commissioner to come to a decision on the other withheld information.

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 Mr Howard and the Council. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner will first of all consider the application of section 36(2) of FOISA.

Section 36(2) - Confidentiality

14. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.

Obtained from another person

15. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
16. The Council explained that the information within the tender information had been supplied to the Council by another person, namely Quarriers. In the circumstances, the Commissioner is

satisfied that all of the withheld information was obtained by the Council from another person and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

17. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.
18. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

19. Having considered the information requested by Mr Howard and the arguments put forward by the Council, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence, in that the information is not common knowledge and could not readily be obtained by Mr Howard through any other means.

Obligation to maintain confidentiality

20. The Council contended that the information had been communicated under an implied obligation of confidence. The Council explained that the information was submitted by Quarriers onto the Public Contracts Scotland (PCS) e-tender portal. This is a secure software system used by most public sector bodies in Scotland seeking tenders for works, goods and services: the Council submitted that the system could only be accessed by authorised personnel (the tender administrator and the evaluation panel) and the instructions for access of this system stated quite clearly that all information supplied would be treated as confidential.
21. The Council submitted that the very nature of the tender process and the security measures involved in tender submissions and evaluation implied an obligation of confidentiality. It explained that only those persons authorised to access the information may have access to it. The Council drew attention the fact that those submitting tenders via the PCS e-tender portal were informed that:

Any information contained within your Profile or Extended Profile is visible to buyers within contracting authorities using PCS-Tender and administrators of the system. It is not visible to other suppliers registered on the system.
22. Mr Howard submitted that the expectation of confidentiality for successful bidders should not be as high as for an unsuccessful bidder. He further pointed out that the procurement had been concluded and the contract had been awarded. He suggested, therefore, that the obligation to maintain confidentiality during the procurement process is reduced.

23. In this regard, the Council submitted that whilst the tender process had been completed, at the time of Mr Howard's request (and requirement for review) and indeed during the investigation, the contract had not yet been concluded and awarded to Quarriers.
24. Having considered the circumstances of its provision to the Council, the Commissioner is satisfied that the information remaining withheld from Mr Howard was received in circumstances which imposed upon the Council (at least implicitly) an obligation to maintain confidentiality. That obligation might not remain in place for all time, but the Commissioner is satisfied that it did remain in place at the time the Council received Mr Howard's request and when it carried out its review in relation to that request.

Unauthorised disclosure which would cause detriment

25. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In that respect, the test of detriment is different from establishing whether, for example, disclosure would *prejudice substantially* the commercial interests of any person when considering the exemption in section 33(1)(b) of FOISA.
26. The Council submitted that disclosure would be detrimental to the interests of Quarriers, the tenderer which provided the information, in relation the future of the project in question and the company's competitive and trading position. Quarriers' consent to disclosure was sought and declined.
27. The Council confirmed that in declining to share the information, Quarriers had submitted that it would provide competitors with an unfair competitive advantage when tendering against them for future services of a similar nature. The Council concurred with this view, submitting that the information (derived from Quarriers' research and development) would confer a significant advantage on others seeking to develop submissions for similar work. Quarriers had agreed that elements of the information could be disclosed without harm, as evidenced by disclosure during the investigation.
28. The Commissioner acknowledges that the information that remains withheld is intrinsically linked to the Quarriers' business case for the contract in question. It may be of significance in future tendering exercises, although it is difficult to comment on that in the abstract. That said, she accepts that disclosure in response to Mr Howard's request or his requirement for review, while the procurement process remained incomplete, would have been harmful to Quarriers' interests, and indeed to those of the Council in threatening the integrity of the tendering process.
29. The Commissioner, having considered the submissions put forward by both the Council and Mr Howard, is satisfied that disclosure of the information remaining withheld would be unauthorised by Quarriers and sufficiently detrimental to meet the requirements for an actionable breach of confidence. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are met in this case.

Public interest

30. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that in certain circumstances the strong public

interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.

31. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
32. In coming to a decision on this matter, the Commissioner has taken account of the submissions made by Mr Howard on the public interest in his application and in correspondence with the Commissioner. These focused on the effectiveness of the procurement process and the need for fairness, openness and transparency in its conduct.
33. There is clearly a general public interest in economy, efficiency and effectiveness in the expenditure of public funds, and more particularly in transparency and effective scrutiny in relation to the awarding of public contracts. There is, on the other hand, a strong public interest in the maintenance of confidences. On balance, having considered all relevant submissions, the Commissioner is not persuaded that there is a public interest in disclosure sufficiently strong to outweigh that public interest in confidentiality.
34. Having considered all the arguments, therefore, the Commissioner does not consider there to be a reasonable argument in this case for the disclosure of confidential information on public interest grounds and consequently is satisfied that the Council was entitled to withhold the information remaining withheld from Mr Howard under section 36(2) of FOISA.
35. Given that the Commissioner is satisfied that the Council was entitled to withhold the information under section 36(2) of FOISA, she is not required to (and will not) go on to consider the application of sections 30(c) or 33(1)(b) of FOISA in this case.

Decision

The Commissioner finds that, in respect of the information remaining withheld at the close of the investigation, Moray Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Howard. She is satisfied that the Council was entitled to withhold this information in terms of section 36(2) of FOISA.

Appeal

Should either Mr Howard or Moray 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.

Margaret Keyse
Head of Enforcement

6 January 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

(a) the provision does not confer absolute exemption; and

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

(2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

(c) section 36(2);

...

36 Confidentiality

...

(2) 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.

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