

Decision Notice

Decision 024/2015 Ms Marianne Rugard Jarvstrat and Argyll and Bute Council

Assessment of offer for a property

Reference No: 201402551

Decision Date: 18 February 2015



Scottish Information
Commissioner

Summary

On 25 July 2014, Ms Jarvstrat asked Argyll and Bute Council (the Council) for details of considerations and assessments carried out by the Council in relation to an offer to purchase a specified property. The Council provided some information, explaining that it was withholding other information as disclosure would substantially prejudice its commercial interests.

The Commissioner accepted this argument from the Council.

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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. Ms Jarvstrat had been in correspondence with the Council regarding a complaint she had raised regarding the Council's handling of a bid she submitted to purchase a particular property. The Council responded to Ms Jarvstrat's complaint on 23 July 2014.
2. On 25 July 2014, Ms Jarvstrat wrote to the Council requesting the following information in relation to the bid:
 - a) the assessment by the Council's Economic Development Team;
 - b) the full consideration of the terms and conditions of her offer, undertaken by the Estates Team within Facility Services, and
 - c) the recommendations to the Area Committee on 11 June.
3. The Council responded on 22 August 2014, providing Ms Jarvstrat with information responding to part c) of her request. It stated that it was withholding the information it held which was covered by parts a) and b), applying the exemptions in sections 30(c) and 33(1)(b) of FOISA.
4. On 22 August 2014, Ms Jarvstrat wrote to the Council and requested a review of its decision. Whilst acknowledging the property was still for sale, she disagreed with the Council's application of exemptions and submitted that disclosure was in the public interest.
5. The Council notified Ms Jarvstrat of the outcome of its review on 22 September 2014. It upheld the original decision without modification.
6. On 2 November 2014, Ms Jarvstrat wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.

7. The application was validated by establishing that Ms Jarvstrat made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 11 November 2014, the Council was notified in writing that an application had been received from Ms Jarvstrat and was asked to provide the Commissioner with the information withheld from her. The Council provided the information and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, in particular its reliance upon sections 30(c) and 33(1)(b) of FOISA.
10. The Council responded with submissions in support of its position that the information was properly withheld from Ms Jarvstrat under sections 30(c) and 33(1)(b) of FOISA.

Commissioner's analysis and findings

11. 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 Jarvstrat and the Council. She is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first of all consider the application of section 33(1)(b) of FOISA.

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

13. The Council 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.
14. 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.
15. 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.

16. In this case, Ms Jarvstrat has indicated that she has no objection to the information being disclosed, and that she is only interested in information relating to her own offer for the property. Here, however, the commercial interests identified by the Council extend to itself and others who might be interested in the property. Also, given the nature of the information, it will not always be possible to separate that relating to consideration of Ms Jarvstrat's offer from that relating to wider aspects of the sale of the property.
17. In the circumstances, the Commissioner accepts that the both the Council and others who might be interested in the property had a commercial interest in the information withheld by the Council. At the time Ms Jarvstrat asked for the information, and indeed at the time of the Council's review, the property was still being marketed on behalf of the Council, with a view to sale at the best price which could reasonably be obtained.
18. Having reached this conclusion, the Commissioner must go on to consider whether the Council was correct to conclude that these commercial interests would, or would be likely to, be prejudiced substantially by the disclosure of the information. Substantial prejudice is described in paragraph 15 above: such prejudice must be at least likely before the exemption can apply.
19. The Council explained that, in its opinion, disclosure of the information would prejudice its commercial interests substantially, in regard to the proposed sale of the property. As indicated above, it was still "for sale" and being actively marketed when the Council responded to Ms Jarvstrat's request and her requirement for review. It believed that if the information requested was disclosed, then this could prejudice the Council's ability to obtain the best possible price for the property, as it would put into the public domain details of a previous offer received (along with the considerations which led to the recommendation to the Area Committee that the offer was not acceptable).
20. The Council went on to submit that disclosure would deter potential purchasers from making offers for its properties, if they knew that such information could be made public. Offers were made in the expectation that their details, and those of consideration of the offer by the Council, would be kept confidential and not made public. Deterring offers in this way would have a real, significant and immediate impact on the Council's commercial interests, and those of its potential partners.
21. Having considered the withheld information and the Council's submissions, the Commissioner acknowledges that disclosure of information relating to Ms Jarvstat's offer for the property might not, by itself, have the prejudicial effects claimed by the Council. Having considered the information, however, the Commissioner is not satisfied that information relating to Ms Jarvstrat's offer alone can readily be separated from the withheld information, which relates to wider considerations. She must also consider carefully the Council's arguments relating to the likely deterrent effect of disclosure on other bids for the property.
22. The property was still subject to active marketing at the relevant time, with a view to a sale at something approximating to its market value. Deterring potential purchasers from making offers would clearly have a prejudicial effect on the Council attaining that objective, and therefore on its commercial interests. In relation to disclosure in the context of Ms Jarvstrat's request, the Commissioner accepts as reasonable the expectations of those making offers, as described by the Council. She accepts that the deterrent effect of failing to meet those expectations would be substantial, as would the consequent impact on the Council's commercial interests.

23. In all the circumstances, therefore, the Commissioner is satisfied that disclosure of the withheld information in response to Ms Jarvstrat's request would have prejudiced substantially, or would have been likely to prejudice substantially, the commercial interests of the Council, in its ability to obtain the best price it could reasonably obtain for the property in question. She is therefore satisfied that the information withheld is exempt under section 33(1)(b) of FOISA.

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

24. 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.
25. The Council accepted that there was a public interest in knowing the basis on which decisions were made by the Council. On the other hand, the Council stated that it was obliged to make decisions on the sale of an asset which considered fully whether the offer represented value for money. It also believed it to be in the public interest that it could conduct its consideration of proposed disposals within a confidential process.
26. The Council went on to highlight that it was not in the public interest to sell properties for less than the best consideration reasonably attainable: there was a statutory obligation which regulated its ability to sell an asset in such circumstances.
27. The Council acknowledged that the withheld information might be of interest to Ms Jarvstrat, but did not consider its disclosure to be in the wider public interest. Having considered all the factors, it concluded that the public interest in disclosure of the information was outweighed by the public interest in maintaining the exemption.
28. Ms Jarvstrat submitted that she firmly believed that to clearly and openly inform the public about the criteria used in evaluating offers could only lead to offers being presented that were more aligned with those criteria. She believed this would be in the interests of the Council and the taxpaying public of the locality.
29. Ms Jarvstrat submitted that she had requested details on the criteria employed to evaluate her offer to purchase council property. She believed such criteria should be public information, and failed to understand how there could be any legal or ethical interest in keeping these hidden and undisclosed.
30. The Commissioner acknowledges the general public interest in transparency and accountability, particularly where this involves exercises intended to secure best value for the public purse. She also acknowledges Ms Jarvstrat's argument, to the extent that there may be an associated public interest in understanding (in general terms) the criteria adopted by a Scottish public authority in evaluating offer with a view to securing best value. Here, however, she must consider the public interest in disclosing the information requested by – and withheld from – Ms Jarvstrat, which relates to the particular circumstances of a particular property sale, sought at a time when that sale was still "live".

31. The Commissioner has accepted the prejudicial effect of disclosure, as argued by the Council. Given the Council's obligations to secure best value in its property disposals, and the wider impact of diminished interest on the public purse, it is clear that such prejudice would not be in the public interest. On the contrary, it is in the public interest for the Council (in common with other Scottish public authorities) to be able to dispose of its surplus property effectively in a competitive market, with a view to obtaining the best possible financial outcome for the Council and thus securing value for the public purse. As the Council has indicated, this requires that reasonable expectations of confidentiality are maintained.
32. The Commissioner must acknowledge that there might be circumstances in which there would still be a strong public interest in disclosure of this kind of information, in a context similar to that applying in this case. Otherwise reasonable expectations of confidentiality might, for example, be overridden where maintaining confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit scrutiny of matters of genuine public concern. There is nothing of that kind in the information withheld here.
33. On balance, taking account of all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure in this particular case. Consequently, she finds that the Council was entitled to withhold the information under section 33(1)(b) of FOISA. As a result, she is not required to (and will not) go on to consider whether the exemption in section 30(c) also applied to the information.

Decision

The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Jarvstrat.

Appeal

Should either Ms Jarvstrat or Argyll and Bute 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
18 February 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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