

Decision Notice

Decision 042/2017: Mr Gary Barwood and the Scottish Futures Trust

Lender return rates for Scottish Futures Trust projects

Reference No: 201601898

Decision Date: 22 March 2017



Scottish Information
Commissioner

Summary

SFT was asked for the rate of return for the lenders under contracts for infrastructure projects. SFT refused the request on the basis that disclosure would cause substantial prejudice to the commercial interests of various bodies, including the lenders.

The Commissioner agreed that the information was properly withheld on this basis.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 25 August 2016, Mr Barwood made a request for information to Scottish Futures Trust (SFT). The information requested concerned projects undertaken by SFT since its inception in 2008. That information included (in relation to the Hub initiative):

The expected rate of return for the lenders.

Mr Barwood also requested other information which is not the subject of this Decision Notice.

2. SFT responded on 22 September 2016. SFT withheld the expected rate of return for the lenders under the exemption in section 33(1)(b) of FOISA (Commercial interests and the economy).
3. On 25 September 2016, Mr Barwood wrote to SFT requesting a review of its decision. He queried SFT's application of the exemption in section 33(1)(b) of FOISA and the associated public interest test.
4. SFT notified Mr Barwood of the outcome of its review on 24 October 2016. SFT upheld its original decision without modification.
5. On 24 November 2016, Mr Barwood wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Barwood stated he was dissatisfied with the outcome of SFT's review as he did not consider the public interest in withholding the information had been justified by SFT. Furthermore, he did not consider the legal test undertaken by SFT for the section 33(1)(b) exemption had been properly explained.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Barwood 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 25 November 2016, SFT was notified in writing that Mr Barwood had made a valid application. SFT was asked to send the Commissioner the information withheld from him. SFT 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. SFT was invited to comment on this application and answer specific questions, focusing on its application of section 33(1)(b) of FOISA.
9. During the investigation, SFT disclosed some information to Mr Barwood which fell within the scope of his request. Mr Barwood agreed that this information could be discounted from consideration in the Commissioner's decision.

Commissioner's analysis and findings

10. 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 Barwood and SFT. She is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) of FOISA – Commercial interests and the economy

11. The exemption in section 33(1)(b) of FOISA applies to information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. "Person" must be interpreted widely, to include a legal person (such as a company) as well as an individual: specifically, in this context, it includes a Scottish public authority. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
12. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial: in other words, of real and demonstrable significance.
13. The information withheld under this exemption comprises the rates of return for lenders payable under the finance agreements for individual Design, Build, Finance and Maintain (DBFM) projects under the Hub initiative. SFT provided some background to this initiative, under which public infrastructure projects are delivered across Scotland, centred on five regional "hubs". It explained its role in securing value for money across all of these projects.
14. SFT submitted that the parties whose commercial interests would be affected would be public bodies (such as health boards and local authorities), contractors, funders and others active in Hub projects. SFT also considered the Scottish Government would be affected, as it too had a substantial commercial interest in the projects.
15. SFT noted that the Scottish Government pays an annual revenue charge to a project at a sufficient level to meet the debt terms, including interest. Given the constraints on the amount that can be paid for infrastructure projects (including Hub), the issue of value for money is of crucial importance. SFT argued that, the more competitive the interest rate obtained, the greater number of projects that can be delivered. SFT submitted that this was in the commercial interests of all affected parties.

16. SFT submitted that information about interest rates was clearly information that was relevant to the commercial interests of the funders in question and central to the business of those funders.
17. Having considered SFT's submissions, the Commissioner is satisfied that the interests that have been identified are commercial interests for the purposes of this exemption. The information concerns contractual agreements between public authorities and lenders and the commercial terms offered by competing lenders. Clearly, it relates directly to the commercial interests of those lenders.
18. The Commissioner must now go on to consider whether the commercial interests identified would, or would be likely to, be prejudiced substantially by the disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
19. SFT argued that disclosing this commercially sensitive information could have a serious adverse impact not only on the affordability of future projects, but also on the number of projects to be delivered. SFT submitted that this would have a consequential adverse impact on contract and employment opportunities.
20. In relation to the funders, SFT argued that the relevant commercial interests lay in their ability to successfully compete in competitions in the wider infrastructure project market, both in the UK and in Europe, for contracts and funding opportunities. SFT stated this would be prejudiced in the event that the commercially sensitive information was to become available to their competitors. SFT explained that competition law recognises that the sharing of pricing information on a voluntary basis may be illegitimate because of its potential effect on the market (by driving up prices at the expense of consumers).
21. As in any case, the Commissioner must consider the position as it stood at the point when SFT notified Mr Barwood of the outcome of its review, on 24 October 2016.
22. The Commissioner recognises that disclosure of the information for the various projects would provide significant insight into the rates applied by successful lenders. This would allow future tenders to be tailored to undercut previous, successful bids for similar sized existing projects, thereby providing other bidders with a competitive advantage. In the Commissioner's view, this would place the existing lenders at a disadvantage in future competitions, thereby causing substantial prejudice to the commercial interests of existing lenders.
23. The Commissioner is satisfied, therefore, that disclosure of this information would impact sufficiently on the commercial interests of the lenders to engage the exemption in section 33(1)(b) of FOISA.

The public interest test

24. As the Commissioner has found the exemption in section 33(1)(b) was correctly applied to the information, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.

25. SFT submitted that the following factors favoured maintaining the exemption:
- the potential impact on the ability of the Scottish Government to fund, and the public sector organisations to deliver, value for money infrastructure projects through the Hub initiative;
 - the adverse effect of the disclosure of commercially sensitive information on the projected Hub project pipeline, and consequent reduced contract and employment opportunities;
 - the potential impact on the ability of funders to successfully compete in competitions in the wider infrastructure project market for funding opportunities;
 - the importance of ensuring that meaningful competition among contractors tendering for work, and funders competing to provide finance for Hub and similar projects, was not diminished due to a loss of confidence among stakeholders.
26. Mr Barwood submitted that SFT had not explained properly how it had determined where the public interest lay in relation to the disclosure of the information. He highlighted the importance of transparency in relation to the use of public funds.
27. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to scrutiny of public finances. In this case, the Commissioner accepts that disclosure would allow some insight into whether (and to what extent) the various projects were delivering value for money.
28. On the other hand, the Commissioner accepts there is a public interest in ensuring that there is fair competition in the commercial environment in which lenders operate. She has already acknowledged the submissions made by SFT in support of the exemption itself and has acknowledged the likelihood of substantial prejudice to lenders in this case, in relation to the withheld information.
29. The Commissioner accepts that it is in the public interest for commercial lenders to be able to trade fairly and to provide a viable service in a competitive market. The Commissioner also considers it is in the public interest that the relevant lenders in this case are not treated unfairly as a result of having entered contractual arrangements with public bodies, with a consequential adverse impact on their ability to participate effectively in a competitive market.
30. Having concluded that disclosure in this case would, or would be likely to cause substantial harm to these lenders' commercial interests, the Commissioner considers it would be contrary to the public interest to place them in a disadvantageous position with respect to their competitors.
31. The Commissioner has considered all of the factors set out above. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice might result, the Commissioner does not believe it would be justified in this case.
32. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration. The Commissioner therefore finds that SFT was entitled to withhold the information requested by Mr Barwood under section 33(1)(b) of FOISA.

Decision

The Commissioner finds that the Scottish Futures Trust complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Barwood.

Appeal

Should either Mr Barwood or the Scottish Futures Trust 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

22 March 2017

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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