

# Decision Notice



Decision 057/2009 Mrs S Mulholland and City Building (Glasgow) LLP

Works carried out for Glasgow Housing Association

Reference No: 200900813  
Decision Date: 22 April 2010

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

Mrs Mulholland requested information from City Building (Glasgow) LLP (CBG) relating to work carried out by CBG for Glasgow Housing Association (GHA). CBG responded to the effect that it did not hold certain of the information, withholding the remainder under the exemptions in sections 25(1), 33(1)(b) and 38(1)(b) of FOISA. Following a review, Mrs Mulholland remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that CBG had partially failed to deal with Mrs Mulholland's request for information in accordance with Part 1 of FOISA. While satisfied that CBG was correct in its arguments that certain information was not held and that the remainder was properly withheld under the exemptions in sections 25(1) and 33(1)(b) of FOISA, he also found that CBG had not fulfilled its duty to provide advice and assistance under section 15(1) of FOISA by explaining certain matters to Mrs Mulholland. He required CBG to provide these explanations.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible) and 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

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1. On 7 February 2009, Mrs Mulholland wrote to CBG requesting information relating to work it had carried out on a specified property for GHA, as follows:



Request A

*I request that you provide me with copies of:*

*Owner Occupier Inspection Reports Cost – usually sent to owners or the Final Cost/Invoices presented to the GHA in respect of*

<i>Job Nos -</i>	<i>12095469</i>	<i>Received 6.4.06</i>	<i>Completed 16.10.06</i>
	<i>12095500</i>	<i>6.4.06</i>	<i>18.7.06</i>
	<i>12277549</i>	<i>28.7.06</i>	<i>28.7.06</i>
	<i>12402509</i>	<i>12.10.06</i>	<i>12.10.06</i>

Request B

*I would also like to request a copy of the specifications for the individual address at [ ]. These specifications are referred to in the Specification Report (for the whole of Glasgow) which you kindly provided with your letter of 16.09.08. I have attached a copy of the points which refer to CBG and GHA being involved in planning and drawing up individual specifications.*

Request C

*I wish to request copies of the Owner Occupier Inspection Repair Cost and Owner Occupier Inspected Repair Cost Works Description Sheet for Job No 13366372 received the 12.5.08, completed 12.5.08.*

*I also request computer print out of the phone call logged on 12.5.08 in respect of reported loose slates at the front of the property at [ ].*

In this request, Mrs Mulholland advised that she was willing to accept a print detailing the reported repair on the 12.5.08 with the caller's name, flat number and telephone number redacted.

Request D

*Additionally I request all letters, emails, computer conversations since 3/10/08 relevant to me and my property.*



2. CBG responded to Mrs Mulholland's request on 6 March 2009, explaining that it held some of the information she had requested, but not that identified in her requests B and D. In relation to Mrs Mulholland's request A, it was of the opinion that she had previously been provided with the relevant information, without the costs, and therefore the exemption in section 25(1) of FOISA applied. In relation to the cost information sought in request A, CBG advised that this was being withheld under the exemption in section 33(1)(b) of FOISA. Finally, it advised that it was relying on the exemption in section 38(1)(b) of FOISA (which relates to personal data) for withholding the information relating to the phone call identified in Mr Mulholland's request C.
3. On 30 March 2009, Mrs Mulholland wrote to CBG requesting a review of its decision. In relation to request A, she advised CBG that she did not believe either it or GHA had provided her with copies of the Final Invoices/Bills/Accounts for the job numbers she had specified, with or without costs, and therefore she did not accept that section 25(1) of FOISA applied to this information. Mrs Mulholland also questioned CBG's reliance on the exemptions in section 33(1)(b) (not accepting that the information in question was commercially sensitive) and 38(1)(b) of FOISA. In relation to the latter exemption, she noted that she had been quite clear in her request for information in asking for the caller's name, telephone number and flat number to be redacted. In relation to the information CBG claimed not to hold, Mrs Mulholland accepted this assertion in relation to her request D, while expressing disbelief that there were no specifications for work on the property in question.
4. CBG notified Mrs Mulholland of the outcome of its review on 30 April 2009, upholding its earlier application of sections 25(1) and 33(1)(b) of FOISA. By way of clarification, it noted that she had been provided with a Common Repair Account in respect of the four jobs listed in request A: Owner Occupier Inspection Reports, as requested in requests A and C, were not prepared for this type of work and therefore were not held. With regard to Request B, CBG adhered to the position that it did not hold specifications for the property in question, specifications being completed by property type and not by individual address: it understood that Mrs Mulholland had already been given copies of the specifications for the relevant property type. In relation to the computer print out of the phone call (request C), CBG confirmed that it was still relying on section 38(1)(b) of FOISA in respect of certain of the information, while providing a copy of the print out with that information redacted.
5. On 6 June 2009, Mrs Mulholland wrote to the Commissioner, stating that she was dissatisfied with the outcome of CBG's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. In her application for a decision, Mrs Mulholland was specific about the matters she wanted the Commissioner to investigate:
  - a. whether CBG had been correct to rely on section 25(1) of FOISA in relation to the Common Repair Accounts for the four jobs listed in request A (which she advised she did not hold)
  - b. whether CBG had been correct to withhold the cost information sought in request A under section 33(1)(b) of FOISA
  - c. whether CBG had been correct to claim that it did not hold the specifications she had requested (request B)



- d. CBG's failure to provide her with the correct redacted print out, as identified in request C.
6. The application was validated by establishing that Mrs Mulholland had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 24 June 2009, CBG was notified in writing that an application had been received from Mrs Mulholland and was asked to provide the Commissioner with any information withheld from her. Glasgow City Council provided a response on behalf of CBG with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted CBG, 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. In particular, CBG was asked to justify its reliance on the exemptions in sections 25(1) and 33(1)(b) of FOISA, and to provide further information on the specifications it claimed not to hold.
9. A response was received from Glasgow City Council on behalf of CBG. In the remainder of this decision, these and other submissions provided by the Council on CBG's behalf will be referred to as CBG's submissions.
10. Further correspondence was entered into with both Mrs Mulholland and CBG during the course of the investigation. Their respective submissions, insofar as relevant, will be fully considered in the Commissioner's analysis and findings below.
11. During the investigation, CBG provided Mrs Mulholland with a copy of the telephone log referred to in her request C, with the caller's details redacted as specified in that request. Consequently, the Commissioner does not consider it necessary to give further attention to CBG's application of section 38(1)(b) in this case.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mrs Mulholland and CBG and is satisfied that no matter of relevance has been overlooked.
13. The information Mrs Mulholland has requested relates to repairs which were carried out to her home and those of others in her street in 2006, commissioned by GHA. The work was carried out by CBG, which was one of GHA's appointed contractors for work of this kind.



### **Section 25 – Information otherwise accessible**

14. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
15. It should be noted that section 25(1) is not restricted to information which is publicly accessible. It recognises that where information is already available to the applicant (even if it is not available to the general public) there is no need to provide an alternative right of access to it through FOISA.
16. The issue to be considered in this case, therefore, is whether the information requested by Mrs Mulholland could be reasonably obtained by her through means other than FOISA.
17. CBG relied on section 25(1) of FOISA in relation to the information specified in Mrs Mulholland's request A, with the exception of information relating to costs, arguing that this information had already been supplied to her.
18. CBG explained to the Commissioner that it considered that the relevant information to be exempt under section 25(1) of FOISA, on the basis that Mrs Mulholland had already been provided with a note of all repairs reported since 2003 as communal property at the address specified, including references to the four jobs specified in Mrs Mulholland's request A. It provided the investigating officer with a copy of this note. The Commissioner is aware from the extensive documentation provided by Mrs Mulholland in support of her application that she does indeed hold a copy of the information in question. He is therefore satisfied that CBG was correct to rely on section 25(1) of FOISA in respect of this information.
19. After considering CBG's reliance on section 33(1)(b) in relation to the withheld cost information, the Commissioner will consider further its arguments that it holds no additional information falling within the scope of Mrs Mulholland's request A.

### **Section 33(1)(b) – Commercial interests and the economy**

20. CBG relied on the exemption in section 33(1)(b) of FOISA for withholding cost information in respect of the four jobs specified in Mrs Mulholland's request A, and also certain information redacted from the telephone log referred to in request C. CBG explained that it did not hold specific invoices for the jobs in question, an assertion which will be considered further below. It confirmed that it did, however, hold information as to the prices charged to GHA for the work done, which was what it was seeking to withhold under section 33(1)(b).
21. Section 33(1)(b) of FOISA 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.



22. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to 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. It would have to be at least likely, so there would require to be a significant probability of it occurring, in the near (and certainly the foreseeable) future.
23. CBG submitted that its own commercial interests would be substantially prejudiced if the withheld cost information were to be disclosed. It explained that the relevant contracts with GHA represented a significant element of its work and emphasised the importance and sensitivity of its methodology for calculating costs and prices, arguing that disclosure of the withheld information could have a significant impact on its operations.
24. CBG advised that its prices (including those applicable to the work in question) were based on a Schedule of Rates. This had been drawn up many years before but remained in use, not only for GHA contracts but also for pricing numerous other tenders. It argued that should any element of its pricing strategy be released this would have a substantial effect on its ability to prepare and submit tenders for work of this nature, placing it at a serious commercial disadvantage compared to competitors who were not covered by FOISA: in this connection, it pointed out that it had been set up to compete in the market place. CBG also advised that it was in the process of bidding for contracts starting in the coming year, based on the same Schedule of Rates.
25. CBG also referred to the terms of The European Procurement Framework (Directive 2004/18/AC), incorporated into Scots Law by The Public Contracts (Scotland) Regulations 2006. Noting that these Regulations (regulation 43) specifically permitted tenderers to designate materials submitted as part of a tender as being confidential, it submitted that where information could thus be treated as confidential in the hands of the party advertising the tender it would be perverted to interpret FOISA as permitting access to that same information in the hands of the party responding to such a tender.
26. The Commissioner has first considered whether CBG has relevant commercial interests, and he is satisfied that it does. Commercial interests will generally relate to any commercial trading activity a company undertakes, such as the sale and purchase of products or services, commonly for the purpose of generating revenue. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that the activities described by CBG meet these requirements.



27. Having taken into account the submissions received from CBG together with the information which has been withheld, the Commissioner does not consider that each individual element of that information, taken by itself, would necessarily provide sufficient information about CBG's pricing strategy to cause the substantial prejudice claimed. However, the Commissioner does accept that its disclosure would be likely to have that effect taken as a whole, together with the information already made available to Mrs Mulholland by both CBG and GHA. The Commissioner also accepts the submission of CBG that although these rates were established some years ago, they were at the time CBG dealt with Mrs Mulholland's request (and indeed remain) current and relevant to tenders submitted by CBG.
28. The Commissioner therefore accepts that if the information withheld under section 33(1)(b) were disclosed then this would be likely to prejudice substantially the commercial interests of CBG by allowing access to its pricing strategy, thereby placing it at a serious commercial disadvantage.

*Public interest test*

29. As mentioned above, the exemption under 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.
30. CBG suggested that the following public interest factors favoured disclosure:
- the general public interest in information being accessible
  - whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and obtaining value for money
  - whether disclosure would ensure fairness in relation to applications, in this case to the other tenderers who were or might be interested in tendering for these products
  - the general public interest surrounding the issue of owner/occupier repair bills issued by GHA.
31. It also suggested that the following public interest factors favoured withholding the information:
- the public interest in securing value for money in relation to public expenditure by CBG as a wholly-owned subsidiary of Glasgow City Council
  - the avoidance of a course of action which would frustrate the legislative intentions behind section 8 of the Local Government (Scotland) Act 2003
  - the avoidance of a course of action which could undermine competitive tendering exercises conducted by the Council and now by CBG, by providing competitors with an unfair advantage
  - maintaining consistency with the approach adopted by the Directive 2004/18/AC and ensuring the integrity of any future tendering exercises participated in by CBG
  - protecting GHA's contracting position for future tendering purposes





- the fact that European Procurement Rules state that unsuccessful tenderers are entitled to be debriefed by GHA as to why they were unsuccessful and that such debriefings did occur, which satisfied the public interest in ensuring that the applicable rules were followed and public money was spent wisely.
32. While acknowledging the importance of “information for information’s sake”, CBG submitted that there were practical limitations to this concept and that some flexibility had to be recognised where the public sector itself was the party doing the business. In particular, it believed that the legitimate public interest points favouring disclosure had all been addressed without the information requested having to be disclosed. For the following reasons, it considered the balance of the public interest to favour withholding the information:
- i) safeguarding the integrity of future tendering exercises, as regulated by the European Procurement Rules;
  - ii) trading activities by the Council and its wholly owned subsidiaries help to generate funds to support front line service delivery without impacting adversely on the public purse: the public interest was served by protecting their ability to do so;
  - iii) the fact that the withheld information did not appear to fall within any of the categories listed in paragraph 43 of the Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under FOISA,
  - iv) the relevant provisions of the Scottish Public Procurement Directorate Guidance, which suggested that information on “price breakdown” should generally be withheld because of its value to competitors.
33. Mrs Mulholland has provided extensive arguments as to why she considers the public interest to favour disclosure of this information. Her main cause for concern relates to discrepancies she believes to exist in the accounts she has received from GHA for the work done on her property. Mrs Mulholland is concerned that if individuals like herself do not have access to the final cost/invoices billed by CBG then GHA can charge what it wants and those individuals will be unable to check what has been charged to GHA.
34. Mrs Mulholland is also concerned that individuals are being billed for work that has never been done. In support of her concerns, she has provided a considerable amount of information.
35. Having considered the submissions made by both Mrs Mulholland and CBG, the Commissioner recognises that there is a clear public interest in those who have had work done on their homes under GHA improvement schemes being aware of the charges levied by CBG. The Commissioner accepts that this is a matter of direct concern to a number of people and that release of the withheld information (which he accepts in this case falls within the scope of Mrs Mulholland’s request A) would go a long way to fulfilling this public interest and assisting these individuals to understand whether they are being charged appropriately for work which has been carried out.



36. Against this acknowledged public interest, however, the Commissioner must weigh the arguments advanced by CBG, at least those he considers to be of relevance in this case. In doing so, he accepts that there is a public interest in ensuring that where CBG is tendering for work in future it should be able to do so in a fair and equitable competitive environment without prejudice to its commercial position. He has accepted this in similar circumstances in *Decision 110/2009 Mr Conor McNally and CBG (Glasgow) LLP* and recognises in particular that the rates and charges applied by CBG in this case are those it would be highly likely to apply in future tendering exercises.
37. While there will be circumstances in which the public interest will require the disclosure of information even where substantial prejudice to a person's commercial interests would (or would be likely to) result from that disclosure, the Commissioner does not believe that to be the case here. After weighing up the competing interests in this case, he has concluded that, on balance, the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA.

#### **Section 17 – Notice that information is not held**

38. Section 17(1) of FOISA requires that where a Scottish public authority receives a request for recorded information it does not hold, then it must give the applicant a notice in writing to that effect.
39. In order to determine whether CBG dealt with Mrs Mulholland's request correctly, the Commissioner must be satisfied whether, at the time it received Mrs Mulholland's requests, CBG held any information which would fall within the scope of the relevant request.
40. With this in mind, the investigating officer asked CBG what searches it had carried out to determine whether any relevant information was held.
41. CBG advised that it did not hold two of the sets of information Mrs Mulholland had requested:
- The specifications for the work carried out on a particular property (request B)
  - The final cost invoices presented by CBG to GHA for 4 specified jobs (the cost information she had specifically requested in request A)

Each of these sets of information will be considered separately.



*Specifications for the work carried out on a particular property*

42. In its response to Mrs Mulholland's request and request for review, CBG explained that it did not hold any information which would address her request for the specifications for the individual address she had provided, advising that specifications were completed by property type and not by individual address. CBG understood that Mrs Mulholland had already been provided with copies of the specifications for the relevant property type.
43. CBG confirmed to the investigating officer that it did not hold specifications specific to the address specified by Mrs Mulholland. It explained that the specification document it held related to all properties covered by the relevant Works Improvement Project, referring to property types on a generic basis. It advised that it had provided Mrs Mulholland with a copy of this specification document, by way of advice and assistance, with a letter of 16 September 2008. It also confirmed that this was the specification used as the basis for the works carried out the address in question.
44. CBG explained that it carried out searches of all files held relating to this matter, including individual computer files. It confirmed that it had located no further relevant information.
45. Having considered the submissions received from CBG, the Commissioner is satisfied in the circumstances that it held no other specifications which would address Mrs Mulholland's request. The Commissioner therefore accepts that CBG was correct to respond to request B in terms of section 17 of FOISA.
46. During the course of the investigation, CBG provided a full explanation to the investigating officer as to how the specification provided to Mrs Mulholland was used and applicable to the work carried out on the specified property. The Commissioner considers that, had CBG provided this explanation to Mrs Mulholland, in line with its duty to provide advice and assistance under section 15(1) of FOISA, then this might have gone some way towards addressing her request. The Commissioner therefore requires CBG to provide this explanation to Mrs Mulholland.

*Final cost invoices presented by CBG to GHA for 4 specified jobs*

47. CBG explained that the work done under the four job numbers specified by Mrs Mulholland was carried out as part of its contract with GHA and invoices for this work would have been issued to GHA in terms of that contract. CBG submitted that it would have invoiced GHA on a block basis for all work done pertaining to a particular project (which, of course, extended to a number of jobs over a number of properties). Individual job numbers were allocated for its own internal management purposes only and GHA would not be invoiced on the basis of these individual jobs. Consequently, no final cost invoices existed in respect of the job numbers specified.
48. Having considered the explanations received from CBG, the Commissioner accepts that no final cost invoices were held for the jobs specified by Mrs Mulholland. Consequently, he accepts that CBG was correct to respond to this part of request A in terms of section 17 of FOISA.



49. Again, however, the Commissioner considers that had the explanations he has received as to how the work was invoiced been given to Mrs Mulholland by CBG, in line with its duty under section 15(1) of FOISA, then this might have gone some way towards explaining to Mrs Mulholland why this information was not held. The Commissioner therefore requires CBG to provide this explanation to Mrs Mulholland.

## DECISION

The Commissioner finds that City Building (Glasgow) LLP (CBG) mostly complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs Mulholland.

The Commissioner finds that the CBG was correct to give Mrs Mulholland notice (in terms of section 17 of FOISA) that it did not hold certain information and to withhold the remainder of the requested information under the exemptions in sections 25(1) and 33(1)(b) of FOISA.

However, the Commissioner also finds that CBG failed to comply with Part 1 in failing to fulfil its duty to provide advice and assistance under section 15(1) of FOISA. In particular, it failed to provide Mrs Mulholland with certain explanations which might have assisted her to understand why it did not hold certain of the information she had requested.

The Commissioner therefore requires CBG to provide Mrs Mulholland with the explanations it gave to him in relation to (i) the relevance to the work carried out on the specified property of the specification document provided to Mrs Mulholland, and (ii) why it would not hold final cost invoices for the four jobs specified. These explanations should be given to Mrs Mulholland by Monday 7 June 2010.

## Appeal

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Should either Mrs Mulholland or City Building (Glasgow) LLP wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**22 April 2010**



## Appendix

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### Relevant statutory provisions

#### 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.

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- (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 –

- (a) section 25;

...

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...



**17 Notice that information is not held**

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

**25 Information otherwise accessible**

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

**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).