

Decision Notice



Decision 104/2008 Streetwork UK and Glasgow City Council

The successful bid for the Council's Street Outreach Service (Homelessness)

Reference No: 200701489

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Streetwork UK (Streetwork) requested a copy of the successful bid for the Street Outreach Service (Homelessness) from Glasgow City Council (the Council). The Council responded by withholding this information under section 33 of FOISA. Following a review, Streetwork remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Streetwork's request for information in accordance with Part 1 of FOISA. He concluded that the exemptions in sections 33(1)(a) and (b) of FOISA had been misapplied to the information withheld. The Commissioner also noted that, had he found the exemption in section 33(1)(b) to have been correctly applied, he would have concluded that the public interest in maintaining the exemption was outweighed by the public interest in disclosure. The Commissioner required the Council to provide Streetwork with the information withheld.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) (effect of exemptions); 10(1) (Time for compliance) and 33(1)(a) and (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.

Decision 175/2007 *Millar & Bryce and Perth & Kinross Council*

Scottish Information Commissioner's Guidance *Commercial interests and the economy*.
<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>

The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA ('the Section 60 Code') <http://www.scotland.gov.uk/Publications/2004/09/19894/42618>

Scottish Public Sector Procurement & Freedom of Information Guidance, Scottish Procurement Directorate: <http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>

Facenda Chicken Ltd v. Fowler & Others [1986] 1 All ER

Lansing Linde Ltd. v Kerr [1991] 1 WLR 251

Scottish Ministers v Scottish Information Commissioner [2007] CSIH 8



Background

1. On a form dated 13 December 2006, Streetwork made an information request to the Council for a copy of the successful bid from the Simon Community and Barnardo's for the Council's Street Outreach Service (Homelessness). Streetwork is a charity involved in the provision of services of this type.
2. On 20 August 2007, the Council wrote to Streetwork in response to its request for information. The Council said that it had received the request on 18 January 2007 and apologised for the delay in responding. The Council stated that the information requested was exempt in terms of section 33(1)(b) of FOISA since disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council, the Simon Community and Barnardo's. The Council concluded that the public interest in maintaining that exemption outweighed the public interest in disclosure in this case.
3. Streetwork wrote to the Council requesting a review of its decision in an undated letter, which was received by the Council on 30 August 2007.
4. On 25 September 2007, the Council notified Streetwork of the outcome of the review. The Council upheld its decision to withhold the material under section 33(1)(b) of FOISA.
5. On 2 November 2007, Streetwork wrote to the Commissioner, stating that it 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.
6. The application was validated by establishing that Streetwork 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

7. On 25 January 2008, the Council was notified in writing that an application had been received from Streetwork and asked to provide the Commissioner with any information withheld from the applicant. The Council responded with the information requested and the case was allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, providing it with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on the exemption in section 33(1)(b) of FOISA.



9. The Council confirmed that the information withheld in this case comprised three documents which were submitted by Barnardo's and the Simon Community (referred to in this decision as "the successful tenderer") which together formed their bid to provide the Council's Street Outreach Service.
10. The Council undertook a competitive tendering exercise in 2006 to identify the operator of services to prevent and alleviate certain extreme forms of homelessness. The successful tenderer was awarded the contract following a decision by the Council's Executive Committee on 8 December 2006 and continues to provide services to the Council in terms of that contract.
11. The successful tender documents (labelled GCC 8 -10 in the Council's schedule) will be referred to respectively in this decision as (a) the Proposal document, (b) the Integrated Care Proposal Budget and (c) tender pack certificates. All were initially withheld in their entirety.
12. During the investigation, the Council reconsidered its position and released to Streetwork the tender pack certificates (subject to minor redactions) and the introductory sections of the Proposal document. Following this disclosure, Streetwork confirmed that it no longer wanted the Commissioner to consider the tender pack certificates in his decision, but it still wished to access the full Proposal document, and the Integrated Care Proposal Budget. The remaining investigation and the Commissioner's decision have therefore focussed on these two documents.
13. The Council's submissions provided details of its reasoning when applying the exemption in section 33(1)(b) of FOISA to these items. The Council also submitted that, although this had not been cited in correspondence with Streetwork, the exemption in section 33(1)(a) of FOISA, which applies to information which constitutes a trade secret, applied to the parts of the Proposal document that had not been disclosed.
14. The Council's submissions on these exemptions and the public interest are described in the Commissioner's analysis and findings section below.
15. During the investigation, Streetwork was notified of the Council's reliance upon an additional exemption, and it was provided with the opportunity to comment upon this exemption. It was also invited to provide comments concerning the public interest in relation to the disclosure of the information under consideration.
16. Streetwork's application and additional submission provided detailed arguments as to why it believed the information withheld by the Council should be disclosed. These are also described within the Commissioner's analysis and findings section below. The Commissioner does not consider that there are any points in the submissions made by Streetwork which have not already been addressed in submissions by the Council.



Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all the information and submissions presented to him by Streetwork and the Council and is satisfied that no matter of relevance has been overlooked.

Section 33(1)(a) – trade secret

18. Section 33(1)(a) of FOISA provides that information is exempt from disclosure if it constitutes a trade secret. This is a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.
19. The Council submitted that this exemption applied to the parts of the Proposal document that were not supplied to Streetwork during the investigation.
20. There is no definition of a trade secret in FOISA, although this term was discussed when the Freedom of Information (Scotland) Bill was considered in the Scottish Parliament. The then Justice Minister said:
- "Although trade secrets are often considered to be commercial interests, I invite the Committee to accept that they are materially different from the normal interest that a business has in the confidentiality of its affairs. A trade secret can be regarded as an asset - perhaps the most valuable asset - of the business. The recipes for Drambuie and Irn Bru are examples of trade secrets that people would readily recognise as being of a different quality from commercial interests. Sometimes trade secrets attract legal protection, such as a patent or copyright, but often the only protection is in maintaining their secrecy."
21. The definition of "trade secret" has been considered by the courts. In *Facenda Chicken Ltd v Fowler* [1986], the court recognised that it was difficult to define this term:
- "It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality."
22. The court also 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".
23. In a later case, *Lansing Linde Ltd v Kerr* [1991], the court advanced the following definition:



"A trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication."

24. In his guidance *Commercial interests and the economy*,¹ the Commissioner advised public authorities to consider the following issues when determining whether something is a trade secret:
- **Is the information of commercial value?** If not, it is unlikely that it will be a trade secret.
 - **Is the information used for the purpose of trade?**
 - **Would the release of the information harm trade?**
 - **Is the information common knowledge?** The more people who know the information, the less likely it is to be a trade secret.
 - **How easy would it be for competitors to discover or reproduce the information for themselves?** The easier it would be for competitors to copy, the less likely it is that the information is a trade secret.
 - **Has the value of the information diminished over time?** Information which constitutes a trade secret at the time of its creation may lose its commercial value as time passes.
25. The Council submitted that, whilst it was difficult to identify any sentence or paragraph in the Proposal document that was a trade secret, taken in its entirety, the document had the characteristics of a trade secret for the purposes of section 33(1)(a), that is, having the following attributes:
- It was used in the business of providing purchased social care services to local authorities;
 - It was specific to, and was produced with the appliance of effort and relevant skill by, the successful tenderer;
 - it was not widely known outwith the two organisations who make up the successful tenderer;

¹ This guidance was published in April 2008, when it superseded the Commissioner's previous guidance on the exemptions in section 33 of FOISA. The Council's submissions to the Commissioner pre-dated this publication and referred to the guidance available at that time. The references above reflect the current guidance, and the Commissioner is satisfied that there are no differences between the two documents that would affect his consideration of this case.



- the successful tenderer objected to its release: the Council provided the Commissioner with a letter from the successful tenderer indicating objection to release of the withheld information;
 - it had an economic value from not being widely known (and the request for information itself as well as the request for internal review indicate the value this information has to a commercial competitor of the successful tenderer); and
 - the information consisted of the business process, applicable policies, staff engagement process, management strategy and operational descriptions all of which resulted in the successful tenderer being the successful tenderer.
26. Streetwork was invited to provide comments on the application of section 33(1)(a) – since this section had not been cited by the Council at initial or review stage – and it said that it had difficulty in conceiving of anything that is involved in street-based outreach work as involving a trade secret. Instead, it submitted that, almost without exception, accepted practice in the charity/social sector is to share good practice. Streetwork questioned whether it was being claimed that the winning tenderers had invented a way of helping homeless people that could not be disclosed or used elsewhere to better support other vulnerable people.

Conclusions on section 33(1)(a)

27. The Commissioner has considered the Council's arguments carefully, but he is unable to accept that any of the withheld part of the Proposal document constitutes a trade secret.
28. In reaching this view, the Commissioner recognises that the Proposal document was created by the application of skill and effort by the successful tenderer; and that it was created for the purposes of trade (in respect of its efforts to secure the contract to operate the Council's street outreach services).
29. He also acknowledges that (at least until the Council awarded the contract) the Proposal document was of economic value to the successful tenderer; that the contents were not common knowledge and could not be easily discovered or reproduced; and that it would be harmful to the successful tenderer's trade (i.e. their ability to secure the contract) if the contents of the Proposal document were to be publicly known.
30. The Commissioner does not dismiss the possibility that tender documents will on occasion include information that would fall within the definition of a trade secret, or that the way in which a proposal is presented as a whole might constitute a trade secret. For instance the trade secret might exist by virtue of a unique and secret technique to preparing or presenting a successful bid or in a unique and closely guarded approach to delivering the service .
31. However the Commissioner has not found that either of those features are present in this case. There is nothing novel or secret about the manner or form in which the proposal and budget have been drawn up and presented.



32. The Commissioner has noted that the Council has not drawn his attention to any specific information contained within the withheld parts of this document, but instead applied the exemption in section 33(1)(a) to approximately 45 pages of the Proposal document.
33. These pages include information about the nature of the service that was to be offered to individuals who were either homeless or at risk of becoming homeless in Glasgow. Whilst the construction and delivery of the proposed service relies upon the professional knowledge and experience of the service provider, there is nothing observably secret or unique about the methods to be employed in providing the service. The nature and design of this service would, once the contract was implemented, be clear to service users through its delivery. It is difficult to see how its description could be seen as a trade secret once it had been determined that this bid would be accepted and the proposed service would be implemented. Similarly, information about staffing, or the previous activities of the winning bidders, would be routinely known by staff of these organisations (rather than restricted to only a few), and the organisations and individuals who came into contact with them.
34. Looking at the contents of the Proposal document, therefore, and having had no specific parts drawn to his attention, the Commissioner is unable to accept that it contains information that is generally secret.
35. The Commissioner is aware that the successful tenderer has objected to the disclosure of the information, but he does not accept such an objection is sufficient to demonstrate that the contents of this document include any trade secret. He has noted the terms of that successful tenderer's communication with the Council on this information request. This makes no reference to trade secrets in relation to the Proposal document or any of the other bid documents. This communication reveals no specific reasons for the objection, nor does it highlight any parts of this or the other bid documents that were considered to be of particular sensitivity. This communication simply indicates that the successful tenderer was unwilling to agree to disclosure.
36. The Commissioner's view is that, even if it could be maintained that the form of this Proposal was a trade secret (regardless of whether the contents themselves would otherwise be secret), the argument that harm would follow from disclosure would be significantly reduced once the relevant contract had been awarded.
37. In this case, Streetwork's request form was dated 13 December 2006, five days after the decision was taken to award the contract to the winning bidders. The Council has stated that it was not received until a month later on 18 January 2007. The Council's response was then issued seven months later, on 20 August 2007. When considering whether a public authority has complied with Part 1 of FOISA, the Commissioner must address the case at the point where that authority notified the applicant of the outcome of its review. This was confirmed by the Court of Session in *Scottish Ministers v Scottish Information Commissioner* [2007]:

"It is correct that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of [FOISA]."



Given the Council's delay in responding to Streetwork's initial request, the relevant point in this case is 25 September 2007, around nine months after the decision to award the contract was taken.

38. The Commissioner takes the view that any sensitivity in the information under consideration would have diminished in the period between the decision to award the contract and the time of the Council's responses to Streetwork's request for information and request for review.
39. In the absence of the Council making the case as to why any specific part(s) of the document constituted trade secret(s) at that point, the Commissioner has concluded that it has not been demonstrated the withheld parts of the Proposal document constituted a trade secret at the relevant time.
40. The Commissioner therefore finds that the exemption in section 33(1)(a) was wrongly applied by the Council in this case.

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

41. The Council has applied the exemption in section 33(1)(b) to the withheld parts of the Proposal document and the Integrated Care Proposal Budget in its entirety.
42. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (the definition of "person" includes a public authority). This is also a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.
43. In its correspondence with Streetwork, the Council claimed that disclosure would be likely to prejudice substantially both its own commercial interests and those of the successful tenderer. During the investigation, however, the Council chose to no longer argue that this exemption applied on the basis that its own commercial interests would be harmed. The Commissioner has therefore considered only the case maintained during the investigation; that disclosure would, or would be likely to, prejudice substantially the commercial interests of the successful tenderer (i.e. of Barnardo's and Glasgow Simon Community).
44. The Council submitted that, for largely the same reasons described in respect of section 33(1)(a) (and particularly the reasons set out in paragraph 25 above), release of the Proposal document to commercial rivals of the successful tenderer would make it more difficult for the successful tenderer to bid successfully in future against a rival who was able to replicate a proven successful technique without having had to go to the trouble and effort of developing and documenting that technique itself. The Council submitted that this would clearly be to the commercial prejudice of the successful tenderer.
45. With respect to the Integrated Care Proposal Budget, the Council noted that this consists of the detailed cost breakdowns and other components which made up the final project costs. The Council submitted that, having considered the contents and the available guidance, it considered that this level of financial detail supplied by a provider in a competitive marketplace clearly engages the exemption under section 33(1)(b).



46. The Council said that it had considered whether this document could be supplied in a redacted form, but concluded that it would not be practical or helpful to Streetwork to do so, since all that would remain would be the blank document template which Streetwork had already seen in connection with its own tender submission.
47. The Commissioner has first considered whether Barnardo's and Glasgow Simon Community, acting together as the winning bidder in this case have commercial interests and he is satisfied that they do. Commercial interests will specifically relate to any commercial trading activity an organisation undertakes, such as the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.
48. Although both Barnardo's and Glasgow Simon Community are voluntary organisations with charitable status, the Commissioner finds that they have commercial interests in respect of their bids to win contracts for the provision of services of this type, and thereby to raise revenue, in a competitive environment.
49. The Commissioner's conclusions on the application of this exemption to each document are set out in turn below. When considering this exemption, the Commissioner has had regard to the views expressed in numerous decisions and reiterated in his briefing *Commercial interests and the economy*. This says:

"The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.

FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied."

The Proposal document

50. When arguing that the withheld parts of this document were exempt under section 33(1)(b), the Council has drawn upon the arguments discussed above (and particularly as set out in paragraph 25 above) in relation to section 33(1)(a).
51. As noted above, the Commissioner accepts that disclosure of the Proposal document *prior* to the Council's decision to award the contract would have been likely to harm the successful tenderer's chances of success in that process, and so harm their commercial interests. However, the Commissioner must consider whether the Council was correct to withhold this information at a point nine months after the Council had taken its decision to award the contract. At this point, it is clear that the successful tenderer's prospects for winning that specific contract could no longer be harmed.



52. The Commissioner has therefore focussed on the question of whether disclosure of this information would be likely to harm the successful tenderer's chances in future bidding processes of this type.
53. The Commissioner has not been advised by the Council whether Barnardo's and Glasgow Simon Community operate (or intend to operate) in partnership elsewhere in Scotland or the UK. However, in coming to his conclusions, he has taken into account the possibility that they might bid for future contracts of this type, either in Glasgow (on completion of the current contract) or in other areas.
54. The Council submitted that disclosure would make it more difficult for the successful tenderer to bid successfully in future against a rival who was able to replicate a proven successful technique without having had to go to the trouble and effort of developing and documenting that technique itself.
55. The Council's submissions do not make clear whether the "technique" referred to here is the technique for making a successful bid or the techniques identified therein for successfully providing outreach services to individuals who are homeless or at risk of homelessness. He has therefore considered both possible readings of this argument. The Council did not draw the Commissioner's attention to any particular parts of the document as being of particular concern to the winning tenderers. Therefore, the Commissioner has considered the content as a whole in what follows.
56. Firstly, the Commissioner would expect that those involved in securing services via tender – including public authorities such as the Council – from organisations involved in the protection of vulnerable persons would have sufficient expertise to differentiate between an organisation that is merely replicating content or style, and a tenderer that is evidencing the skills it has to offer. He has noted that a significant aspect of the Proposal under consideration is its demonstration of the history, experience and expertise of Barnardo's and Glasgow Simon Community. He does not accept that such information could simply be replicated to the advantage of a competitor, whose unique set of experience and expertise would differ from those of Barnardo's and Glasgow Simon Community.
57. He would also point out that the winning tenderer owns the intellectual property contained in each of the documents under consideration in this case. While FOISA may provide a right of access to information, it does not provide the recipient with a licence to copy it or use it without restriction. As was clear in *Decision 175/2007 Millar & Bryce and Perth & Kinross Council*, non-disclosure under FOISA should not be used as a method of seeking to enforce other legal obligations (e.g. with respect to copyright law) on those receiving information.
58. In line with his comments on section 33(1)(a) above, the Commissioner has recognised that the Proposal document describes a front line service, the organisation, methods and structure of which would be visible to individuals using it and otherwise coming into contact with it. He is also aware that a range of research has been undertaken and publicly reported into the provision of outreach services of this type both in Glasgow and elsewhere.



59. Given these observations, it is unclear to the Commissioner why or how the winning tenderers would expect information about the nature of the service they proposed to remain confidential once it was agreed that the proposal would be implemented.
60. The Commissioner is therefore unable to accept that the disclosure of this document would, or would be likely to, prejudice substantially the commercial interests of the successful tenderer by revealing details of their “techniques” in terms of the detail of the service it proposed to provide. He is unable to accept that the exemption applies on this basis.
61. The Commissioner has also considered the application of section 33(1)(b) to the Proposal document insofar as it reveals the “technique” adopted by the winning tenderers in presenting their bid to the Council. The Commissioner accepts that a competing bidder could gain insights into the type of structure, content and language of a document that succeeded in securing the contract. A competitor might frame a future bid for a contract of this type in a manner that replicates that of the successful tenderer (without necessarily duplicating the content), thereby increasing their chances of success.
62. However, the Commissioner does not accept such an effect would, or would be likely to, amount to substantial prejudice to the commercial interests of the successful tenderer. The information contained in the Proposal document may assist a competitor in becoming more adept in presenting a proposal in a way that is capable of being successful, but success in any case will depend upon the extent to which any bidder demonstrates that it is capable of meeting the specification set by the contracting organisation, and that it can do so in a cost effective manner. The Proposal document does not include any detailed breakdown of the proposed costs of the service, but instead describes it in general terms.
63. The Commissioner is of the view that, while the successful tenderers may in future bid for contracts to offer similar services in Glasgow or other locations, any such tender will be based on a different specification, and the specific particular challenges of the place concerned at the time of the tendering process. He considers that access to the remaining parts of the Proposal document would not be likely to assist a competitor in future tendering processes to the extent that the commercial interests of the successful tenderer would be substantially prejudiced.
64. The Commissioner has therefore concluded that the Council was wrong to withhold the remaining parts of the Proposal document [GCC8] under the terms of section 33(1)(b) of FOISA.

Integrated Care Proposal Budget

65. The Integrated Care Proposal Budget document has been withheld in its entirety under the terms of section 33(1)(b). It includes a breakdown of the costs of the successful tenderer’s bid, and also includes details of the staffing rota for the outreach service and salary scales.



66. The Commissioner first considered the salary scales and rotas contained within these documents. The Commissioner has noted that these items do not reveal any details of the costs of the bid, and they contain information which would be easily observable to users of the service or in information about recruitment by these two organisations. The Commissioner can see no reason for accepting that the disclosure of this information would, or would be likely to, prejudice substantially the commercial interests of the successful tenderer at the time of the Council's review of Streetwork's information request.
67. The remaining parts of this document contain detailed information about the costs of the service. The Commissioner has noted that this information provides considerably more detail about the costs of the service and how these were calculated than is already publicly available.
68. However, for the reasons set out in paragraph 63 above, the Commissioner has also concluded that the Council has not demonstrated that disclosure of this document would, or be likely to, prejudice substantially the commercial interests of the successful tenderer. He has again noted that a period of nine months had passed between the award of the contract and the Council's notification to Streetwork of the outcome of its review of its information request. He has also noted that the costs submitted in this would be specific to the particular service required by the Council and the specific circumstances in which the successful tenderers made their bid.
69. While the Commissioner again accepts that a competitor could learn from this process about the structure and content of a successful bid, he does not accept that disclosure of this information would, or would be likely to, prejudice substantially the commercial interests of the successful tenderers.
70. The Commissioner has therefore concluded that the exemption in section 33(1)(b) was misapplied to the *Integrated Care Proposal Budget* [GCC9].

The Public interest test

71. Having concluded that the exemptions cited in this case were both misapplied, the Commissioner is not required to go on to consider the public interest test required by section 2(1)(b) of FOISA in this case.
72. However, the Commissioner considers in this case that it would be helpful for him to set out his views on this test as if, contrary to his views, he had found that the exemption in section 33(1)(b) did apply.
73. The Council's submissions identified public interest factors both for and against the disclosure of the information withheld in this case:

For disclosure

- the general public interest in information being accessible;



- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure would ensure fairness in relation to demonstrating that the Council's procurement activities in this area are based on proper objective assessment of the relative merits of the competing bids received.

Against disclosure

- the public interest in securing value for money in relation to public expenditure by the Council on externally-provided care services (by safeguarding the integrity of the tendering process as a whole);
- the Council's interests in having a competitive tendering process;
- avoidance of a course of action which could undermine competitive tendering exercises conducted by the Council by providing some tenderers with an unfair advantage at the expense of others;
- maintaining consistency with the approach adopted by Directive 2004/18/EC [brought into effect in Scotland via the Public Contracts (Scotland) Regulations 2006] and ensuring the integrity of any future tendering exercises which the Council undertakes;
- protecting the successful tenderer's contracting position for future tendering purposes;
- protecting the trade secrets developed through the application of skill and effort by the successful tenderer for their own benefit (and that of those bodies they contract with using these techniques) from being unfairly released to those who have not had to expend this effort.

74. The Commissioner has disregarded the last of these, having concluded that the information contained in the Proposal document does not constitute a trade secret.

75. Streetwork argued that it is inappropriate to cite commercial interests in relation to the voluntary sector because the overriding public interest is always in improving the health and welfare of vulnerable people and specifically not any particular charity. It submitted that the public interest is much better served by disclosure and openness with regard to:

- sharing good practice;
- encouraging other service providers to bid for such contracts;
- encouraging other service providers to learn from successful bids so that their skills and services are improved;
- better value for councils and the people they serve;



- better outcomes for our most vulnerable people which Streetwork commented were paramount before any “commercial interest” of any charity.
76. The Council has argued that Streetwork’s interest in this information (to enable it to improve its own performance in tendering processes of this type) is a private interest rather than a public interest. Additionally, the Council commented that its officers have offered to meet with representatives of Streetwork to assess its own tender by reference to its tender rather than by reference to the tender of another party.
77. The Council also noted that the Public Contracts (Scotland) Regulations 2006 require procuring bodies to respect tenderer’s reasonable requirements as to confidentiality. The Commissioner notes that these Regulations do not apply to a tender such as the one to which this information relates, and the Council acknowledges this. However, whilst this tendering exercise did not fall within the terms of these Regulations, the Council suggested that the rationale justifying this requirement is applicable more widely and should be respected where there is no compelling reason to do so. The Commissioner notes, however, that the Council did not rely on the exemptions in section 26 (Prohibitions on disclosure) or 36(2) (Confidentiality) of FOISA to withhold the information.
78. The Council said that the Section 60 Code lists, at paragraph 43, certain elements of contracts which should not be the subject of agreed non-disclosure items and that the information does not fall into any of the categories listed.
79. The Council also referred to the Scottish Procurement Directorate’s *Scottish Public Sector Procurement & Freedom of Information Guidance*. It noted that Annex A of this guidance provides a number of possible information requests and the suggested approach to these. “Price breakdown” is listed with the suggested approach of “generally withhold” on the basis that this could reveal the contractor’s costing information which, in turn, should be withheld because of the advantage this could give a competitor.

Conclusions on the public interest

80. The Commissioner has considered all the arguments put forward by the parties to this case, and had regard to all of the guidance referred to therein.
81. The Commissioner has first noted that paragraph 43 of the Section 60 Code refers to contracts rather than tendering documents. While similar considerations may apply to both document types, he is not persuaded that the absence of reference to the type of information under consideration here should be taken as evidence that the public interest would be served by its non-disclosure.



- 82.** The guidance referred to at paragraph 79 provides a helpful overview of the procurement process and issues that will be raised by requests for information at various stages in that process. However, it is not legally binding, and it provides only general guidance on the handling of certain types of requests. Such guidance should not be followed without also considering the specific information requested in all the circumstances of the case. While price breakdowns may be properly withheld on some occasions, it should not be assumed that disclosure would always engage the exemption in section 33(1)(b), or that the public interest in maintaining this (or any other exemption) would always outweigh the disclosure of the information.
- 83.** The Commissioner accepts that in a case such as this, if it is accepted that disclosure would, or would be likely to, prejudice substantially the commercial interests of a bidder in a tendering process, then this will be a factor weighing in favour of non-disclosure. It is in the public interest that authorities should conduct the tendering process in such a way that it attracts a wide range of suitable bidders. It is in the public interest that organisations can enter into competitive tendering processes without their participation proving damaging to their own interests, and that individual bidders are not disadvantaged through premature disclosure.
- 84.** However, the Commissioner does not accept that disclosure in this case would undermine the tendering process or provide one party to future tendering with an unfair advantage. Indeed, an alternative view is that by making information of this general type available, the advantage held by an incumbent contractor is reduced in relation to other bidders, and potential for a range of high quality bids being received in a future tendering process is increased.
- 85.** The Commissioner takes that view that, although there is a significant public interest in avoiding harm to particular contractors, there is a competing public interest in enabling effective competition amongst the widest range of providers. Disclosure in this or similar cases has the potential to encourage competitors to develop services that encompass good practice at competitive cost, and to provide public authorities with increased value for money. Whilst taking into account any harm to an individual bidder, this more general contribution to competition is arguably a factor weighing in favour of disclosure in this case.
- 86.** Turning to the specific tendering process under consideration, the Commissioner has had regard to the nature of the street outreach service. The service works with some of the most vulnerable members of society and has significant effects on their lives. The Commissioner believes there is a substantial public interest in knowing the commitments that were made by the successful tenderer, including the costs and the mode of delivery of such a service.
- 87.** Such disclosure would provide transparency with respect to the Council's decision to award the contract to the successful tenderer, and enable users and other stakeholders to understand whether the service provided under contract provides value for money and is in line with the commitments made within the tender documents.



88. Having weighed the considerations both for and against disclosure in this case (as if, contrary to his view, the exemption in section 33(1)(b) had been correctly applied), the Commissioner has concluded that if he had found that the exemption in section 33(1)(b) was correctly applied in this case, he would have concluded that the public interest in maintaining this exemption was outweighed by the public interest in the disclosure of the information.

Conclusion on the information withheld

89. Having concluded that the information withheld by the Council in this case was not exempt under either section 33(1)(a) or section 33(1)(b), the Commissioner now requires the Council to supply to Streetwork complete copies of both the Proposal document [GCC8] and the Integrated Care Proposal Budget [GCC9].
90. The Commissioner has noted that he would also have required disclosure of this information had he concluded that the exemption in section 33(1)(b) had been correctly applied. This is because he is satisfied that, in all the circumstances of the case, the public interest in maintaining this exemption is outweighed by the public interest in disclosure of the information.

Technical breach - timescale for response

91. Streetwork's application to the Commissioner in this case expressed dissatisfaction with the Council's decision to withhold information in response to its information request. It did not mention the timescale within which the Council responded to its information request.
92. However, the Commissioner was concerned to note in this case that the Council took more than six months to respond to Streetwork's initial request for information. This is far in excess of the 20 working day period required by section 10(1) of FOISA. Given the severity of this delay, the Commissioner has found that the Council breached the requirements of Part 1 and section 10(1) of FOISA in the manner of its handling of Streetwork's information request.
93. Given that Streetwork did not raise this matter with the Commissioner, the Commissioner does not require any further action in response to this particular application in relation to this failure. However, he would advise the Council to take steps to ensure that its staff is aware of the statutory timescales for response set out in FOISA, and to avoid delays of this kind arising in future.

DECISION

The Commissioner finds that Glasgow City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Streetwork.



The Commissioner finds that the Council misapplied the exemptions in sections 33(1)(a) and 33(1)(b) of FOISA to the information considered above, and by so doing the Council failed to comply with Part 1 and particularly section 1(1). The Commissioner also finds that, by taking more than six months to respond to Streetwork's request for information, the Council significantly breached the requirements of section 10(1) of FOISA.

The Commissioner therefore requires the Council to provide Streetwork with complete copies of the documents listed in its schedule as GCC8 and GCC9 by **17 October 2008**.

Appeal

Should either Streetwork or the Council 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.

Kevin Dunion
Scottish Information Commissioner
1 September 2008



Appendix

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.

...

- (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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

33 Commercial interests and the economy

- (1) 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).

