

Decision Notice



Decision 131/2013 Salmond's Mini-Coach Hire Ltd and West Lothian Council

Transport operating contracts

Reference No: 201300520
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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 23 November 2012, Salmond's Mini-Coach Hire Ltd (Salmond's) asked West Lothian Council (the Council) for information relating to transport operating contracts. The Council responded by withholding the information on the basis that release would substantially prejudice the contractors' commercial interests. Following an investigation, the Commissioner did not accept that the Council had demonstrated the degree of prejudice required and required the Council to supply the withheld information to Salmond's.

Relevant statutory provisions

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

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

Background

1. On 23 November 2012, Salmond's wrote to the Council requesting the following:
... information to show all the current operating contracts for Social Work routes for the transport of clients in West Lothian. I would like it to include the current routes, which bus/taxi company they are being carried out by, for what price and also who is the person responsible for the distribution of these contracts.
2. The Council responded on 28 November 2012 and withheld all of the information under the exemption at section 33(1)(b) of FOISA (Commercial interests and the economy).
3. On 7 December 2012, Salmond's wrote to the Council requesting a review of its decision. Salmond's stated they did not believe that disclosure would prejudice the commercial interests of anyone and commented that similar information had been disclosed by the Council in the past without any apparent commercial prejudice resulting.



4. The Council notified Salmond's of the outcome of its review on 10 January 2013. It disclosed all the information to Salmond's except for "price per journey" information, which it continued to withhold under section 33(1)(b) of FOISA.
5. On 19 February 2013, Salmond's wrote to the Commissioner's office, stating that they were 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 Salmond's made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted the Council, asking it to provide a copy of the withheld information and giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). In particular, the Council was asked to justify its reliance on section 33(1)(b) of FOISA in relation to the withheld information.
8. Salmond's was also contacted by the investigating officer for comments. They provided evidence that the Council had disclosed "price per journey" information to them on previous occasions.
9. The relevant submissions received from both the Council and Salmond's will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Salmond's and the Council. She is satisfied that no matter of relevance has been overlooked.

Submissions from Salmond's

11. Salmond's submitted that there had been inconsistencies in the Council's handling of this information request when compared to other, similar requests. Salmond's provided the Commissioner with an email received from the Council's Operational Services on 9 September 2011, in response to a previous request for similar information. On that occasion, the Council provided the "price per journey" information (for special needs home to school transport as at 15 July 2011).



12. Salmond's noted that in the review outcome of 10 January 2013, the Council had provided the identities of the successful operators for the specified special needs transport routes, but had withheld the "price per journey" information on the grounds that it was commercially sensitive.
13. Salmond's also referred to a separate information request made only two days prior to this on 8 January 2013, asking the Council for the "price per journey" information and the identities of successful operators for five recently tendered mainstream transport routes. Salmond's provided the Commissioner with evidence that the Council responded to this request on the same day, providing the "price per journey" information while withholding the identities of successful operators. This response, from the Council's Passenger Transport Service, explained that the identities of the successful operators were being withheld as commercially sensitive information, in accordance with the most recent legal advice received. However, nothing was said about disclosure of the "price per journey" information being commercially sensitive.
14. In its application to the Commissioner, Salmond's stated that it considered the inconsistent responses received from different departments of the Council, in relation to "virtually identical" requests for information, to be unsatisfactory.

Submissions from the Council

15. The Council acknowledged differences in the outcomes of requests for similar information, informing the Commissioner that the differences lay in the interpretation of legal advice by the respective Council services.
16. The Council stated that it did not have a designated officer or corporate team with responsibility for responding to Freedom of Information requests. Each Council service had a designated Information Liaison Officer (ILO), who would monitor and co-ordinate all responses issued by their particular service. The information released or withheld would vary depending on the information which had been requested, the information held and any assessment by the particular ILO of any exemptions which might apply. ILOs could request advice on the application of an exemption from solicitors in the legal services team.
17. The Commissioner's concern here is with the application of Part 1 of FOISA to the requests Salmond's made on 23 November 2012. She cannot consider whether the Council acted in accordance with Part 1 in dealing with the other requests referred to by Salmond's. On the other hand, the effects of earlier releases of similar information may be relevant in considering the risk of harm occurring should the information requested in this case be disclosed.
18. Before leaving this point, however, the Commissioner would also note that (whatever arrangements it may consider appropriate for managing Freedom of Information) the Council is a corporate body and not simply a collection of individual public services. While she cannot comment in any detail on the handling of the previous cases identified by Salmond's, the Commissioner would expect there to be good substantive reasons for handling two requests differently where the information, timing and other circumstances are similar in each case.



19. The Council went on to provide submissions in respect of the application of section 33(1)(b) of FOISA to this particular case.

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

20. The Council submitted that it was withholding the “price per journey” information under section 33(1)(b) of FOISA, which 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.
21. 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.
22. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

Whose commercial interests would (or would be likely to) be harmed by disclosure

23. In this case, the Council identified substantial prejudice to the commercial interests of the specific operators whose information was requested (i.e. those currently providing the services in question).

The nature of those commercial interests

24. In the circumstances, the Commissioner accepts that those providing the services would have relevant commercial interests in the information requested. They are providing the services for profit, in a competitive environment.

How those interests would (or would be likely to) be prejudiced substantially by disclosure

25. The Council stated that it was not necessary to show that actual prejudice or commercial damage had been caused, but rather that if it had not already occurred, damage would be likely at some time in the future. The Council submitted that, in the current financial climate, the award of a council transport contract was an important element to the business of a small taxi firm, and any opportunity for a competitor to undercut or otherwise influence a tender would produce a situation where the ability to win the contract would be at risk.



26. The Council explained that local authority commercial tendering was conducted on a confidential basis, to ensure that each operator submitted the most competitive tender possible. It was of the view that an opportunity to review the details of a competitor's bid, such as price per journey, would allow a firm to review the service they were offering and perhaps reduce or increase the number of journeys per contract or review the routes on offer, to position themselves as the most competitive bid. Disclosure would thus place the current operators at a substantial disadvantage in any future tendering exercise.
27. The Council confirmed that it had not consulted any of the operators concerned in relation to disclosure.
28. Salmond's stated that in the past it had been Council practice to disclose the type of information now being withheld. Salmond's was unaware of any commercial prejudice resulting from this.

The Commissioner's conclusions

29. The Commissioner acknowledges that information will be exempt under section 33(1)(b) of FOISA where its disclosure would be likely to cause substantial prejudice to a person's commercial interests in the future. It is not necessary in every case to demonstrate that actual prejudice has occurred. On the other hand, the authority does need to be able to demonstrate a likelihood of prejudice – the harm must be probable and not simply possible. It must result from disclosure of the particular information requested, in the context of that particular request. Generic, hypothetical concerns, however well presented, will not suffice.
30. In this case, the Council's arguments appear to relate to the potential consequences of disclosure of this type of information. It is not clear what factors were taken into consideration by the Council in concluding that these concerns (which appear relevant, in general terms) would be applicable to disclosure in response to Salmond's request. There is no suggestion, for example, that the Council took account of the relevant sections of the Scottish Ministers Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004¹. Clearly, the Council did not take into consideration the views of those they believed would be most directly affected by disclosure – the operators themselves.
31. The Commissioner also notes that no account appears to have been taken of the timing of the request, in relation to either the award of the contracts concerned or their subsequent retendering. Overall, the Council appears to have dealt with the withheld information as a class, rather than as specific information requested by the applicant. After more than eight years of operation of the access to information regime created by FOISA, it should be apparent to Scottish public authorities that this is not the appropriate approach to harm-based exemptions.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



32. The Commissioner has considered the Council's generic arguments. She notes that the Council's transport contracts are not awarded on the basis of price alone, factors such as the quality and substance of the service offered also being instrumental in the award process. The withheld price information is therefore only part of the content of any successful bid.
33. The Commissioner is not persuaded that disclosure of the "price-per-journey" information alone, without the other elements of the tenders, would necessarily be likely to present the level of commercial damage claimed by the Council. Disclosure of whole terms of the successful bids might inform a competitor as to how to set out a future bid so as to enhance their prospects of success, but success on that occasion would also depend upon the extent to which the bidder demonstrated that they were capable of meeting the requirements set by the Council on that particular occasion, in accordance with whatever criteria the Council set at that time.
34. Clearly, too, the Council has disclosed "price-per journey" information in the past. Even if it did not do so on any other occasion, it acknowledges that it released such information in September 2011. There is no suggestion that the information, or the circumstances surrounding its request and disclosure, were different in any material respect in that earlier case and in the present case. Neither is there any suggestion that the earlier disclosure caused any prejudice to the commercial interests of the operators concerned, or indeed any disquiet on the part of those operators. It is not for the Commissioner to establish that prejudice is unlikely, but clearly this previous disclosure does nothing to support the Council's contention that it is (or was) likely.
35. In all the circumstances, therefore, the Commissioner is not satisfied that disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of the successful operators. She cannot, therefore, accept that the Council was correct in identifying the information as exempt under section 33(1)(b) of FOISA.
36. As the information cannot be considered to have been exempt under that section, the Council was not entitled to withhold the information under section 33(1)(b). In the circumstances, the Commissioner is not required to go on to consider the application of the public interest test.
37. The Commissioner therefore requires the Council to provide Salmond's with the withheld "price per journey" information.



DECISION

The Commissioner finds that West Lothian Council (the Council) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Salmond's, by wrongly applying section 33(1)(b) of FOISA to withhold the information.

The Commissioner therefore requires the Council to provide Salmond's with the withheld information by 21 August 2013.

Appeal

Should either Salmond's Mini-Coach Hire Ltd or West Lothian 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.

Margaret Keyse
Head of Enforcement
5 July 2013



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-

...

- (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).

...