

Decision Notice



Decision 163/2012 Scotia Animations Limited and Aberdeen City Council

Correspondence with contractor

Reference No: 201201189
Decision Date: 8 October 2012

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
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St Andrews KY16 9DS
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Summary

Scotia Animations Limited (SAL) asked Aberdeen City Council (the Council) for correspondence sent by the Council to a specific contractor. The Council withheld the information, on the basis that release would prejudice the Council's commercial interests substantially. Following an investigation, the Commissioner refused to accept this argument (or the withholding of the name of a sub-contractor as confidential) and required the Council to provide the withheld information to SAL, subject to the redaction of personal data.

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); 36(2) (Confidentiality)

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 9 February 2012, solicitors acting on behalf of SAL wrote to the Council requesting information relative to a specific contractor which included the following:
"all communications made to the winning tenderer by the Council for the period September 2011 to today's date."
References in this decision to SAL should be read as including solicitors acting on SAL's behalf.
2. The Council responded on 8 March 2012. While certain information was disclosed, the Council advised that other information falling within the scope of the above request was being withheld in terms of section 33(1)(b) of FOISA. It considered disclosure would prejudice its own commercial interests: it had been put on notice that an unsuccessful bidder wished to challenge the winning tender and believed disclosure would have a real and substantial impact on its ability to deal with such a challenge.



3. On 3 May 2012, SAL wrote to the Council requesting a review of its decision. In SAL's view, the Council's ability to deal with a challenge to its decision in a procurement process was not commercial in nature.
4. The Council notified SAL of the outcome of its review on 24 May 2012, upholding its original response.
5. On 11 June 2012, SAL 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 SAL 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 19 June 2012, the Council was notified in writing that an application had been received from SAL and was asked to provide the Commissioner with any information withheld. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on section 33(1)(b) of FOISA in relation to the withheld information. Noting the redaction of personal data from what had been released to the applicant, the investigating officer also asked the Council whether it considered section 38(1)(b) of FOISA to apply to the withheld information (this became the subject of further discussion during the investigation, SAL confirming that it had no objection to the redaction of personal data from any information released to it: consequently, the Commissioner does not require to consider the application of section 38(1)(b) in this decision).
9. The Council responded on 31 July 2012, with submissions to the effect that the information was exempt in terms of section 33(1)(b). It explained that only one document fell within the scope of the request. The Council also submitted that the name of a sub-contractor was withheld under section 36(2) of FOISA, a matter it did not believe had been raised by SAL in seeking a review or subsequently.
10. It was explained to the Council that SAL did not appear to have been advised at any point of the Council's application of section 36(2) in relation to certain information. It was asked to provide submissions as to why it considered section 36(2) of FOISA to apply applied to any of the information contained in the email in question. Further submissions were provided on section 33(1)(b), but not on section 36(2).



11. The relevant submissions received from both the Council and SAL will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. 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 SAL and the Council and is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – commercial interests and the economy

13. The Council submitted that the information it was withholding was exempt in terms of 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.
14. 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.
15. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
16. In this case, the Council submitted that disclosure of the information would have prejudiced, or would have been likely to prejudice, substantially both its own commercial interests and those of the specific contractor involved. It explained that the procurement of the festive lighting (the subject matter of the tendering exercise in question) was a commercial transaction, the contractor being the supplier. In the circumstances, the Commissioner accepts that both the Council (in procuring the service in question in a commercial market) and those providing the service would have relevant commercial interests in the information requested.
17. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests she has identified would, or would likely to, be prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 15 above: such prejudice must be at least likely before the exemption can apply.



18. The Council advised that the contract for the festive lighting was concluded in October 2011 and still had another two years to run. It described the withheld information as “the intellectual property of the contractor” and as having been “provided to the Council in confidence” (although it did not, with the exception of two references to a sub-contractor, claim the exemption in section 36(2) of FOISA to apply to the withheld information).
19. Further, the Council argued that the release of the information was only of interest to SAL, noting that SAL had already advised that they may still refer the matter to the Ombudsman and that they intended to use what they had collected to formulate their next bid. In the Council’s view, it should be able to explore issues regarding the performance or monitoring of a contract freely and cooperatively with the contractor. The Council considered disclosure of the information would damage this freedom, to the detriment of the contract.
20. The Commissioner has considered all of the information withheld, along with the submissions received. In this case, she acknowledges that, at the time the Council dealt with SAL’s case, it had been put “on notice” that the earlier award of the festive lighting contract might be the subject of legal action (which might, conceivably, mean that the disclosure of information relating to the contract could impact prejudicially on the commercial interests of either the Council or the incumbent contractor).
21. On the question of harm in this particular case, however, the Commissioner must be persuaded by the submissions she has received from the Council, as they relate to the information requested by SAL and withheld by the Council. While the Council described the information as the contractor’s intellectual property, and considered it to have been provided to the Council in confidence, she notes that the information was sent *by* the Council *to* the contractor. On the submissions she has received, and having considered the withheld information, the Commissioner cannot accept either contention as being applicable to that information.
22. The Commissioner acknowledges that public authorities and contractors may find value in exploring contractual performance or monitoring issues “freely and cooperatively” with the contractor. It will not follow, however, that disclosure of such free and cooperative discussions (assuming the withheld information could be considered to have that character) will necessarily result in (or be likely to result in) substantial prejudice to either party’s commercial interests.
23. The Commissioner further notes that the Council asked the contractor what impact the release would have on their business, but received no response. The Council was therefore unable to give a view of the likely impact of the disclosure on the contractor’s business.
24. In all the circumstances, therefore, the Commissioner, is not satisfied, having considered the withheld information and the submissions received from the Council, that disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of either the Council or the current contractor. She cannot, therefore, accept that the Council was correct in identifying the information as exempt under section 33(1)(b) of FOISA.



25. 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.
26. During the investigation, the Council also submitted that certain information (the name of a sub-contractor) should be withheld in terms of section 36(2) of FOISA.

Section 36(2) - Confidentiality

27. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest (this is commonly known as "the public interest defence").
28. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
29. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
30. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - a. the information must have the necessary quality of confidence;
 - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - c. unauthorised disclosure must be to the detriment of the person who communicated the information.



31. Despite being asked to do so, the Council made no submissions to the Commissioner as to why the name of the sub-contractor fell to be withheld in terms of section 36(2) of FOISA. Based on the information available to her, the Commissioner is not satisfied that either part of the two-stage test can be met to justify the withholding of the information in terms of section 36(2) of FOISA. On the face of it, the information would not appear to have been obtained by the Council from another person. In any event, the Commissioner must question how the name of a sub-contractor carrying out work in the public domain could be considered to possess the necessary quality of confidence, particularly where the Council has not claimed the surrounding information to possess that quality.
32. Consequently, the Commissioner can only conclude that the Council was not entitled to rely upon section 36(2) of FOISA in withholding the name of the sub-contractor.
33. The Commissioner therefore requires the Council to provide SAL with the withheld information. Given that SAL has no objection to the redaction of personal data, the Council may redact this information prior to release.

DECISION

The Commissioner finds that Aberdeen City 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 SAL, by wrongly applying section 33(1)(b) of FOISA to withhold the information. She further found that the Council were not entitled to withhold the information under section 36(2) of FOISA.

The Commissioner therefore requires the Council to provide SAL with the withheld information, subject to the redaction of personal data, by 22 November 2012.

Appeal

Should either Scotia Animations Limited or Aberdeen City 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
8 October 2012



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).

...



36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.