



Scottish Information  
Commissioner

## **Decision 233/2006 Mr Mike Portlock and Glasgow City Council**

### *Cost of bouillon products*

**Applicant: Mr Mike Portlock**  
**Authority: Glasgow City Council**  
**Case No: 200501687**  
**Decision Date: 13 December 2006**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## Decision 233/2006 Mr Mike Portlock and Glasgow City Council

***Cost of bouillon products – whether disclosure would, or would be likely to, prejudice substantially the commercial interests of any person.***

### Relevant Statutory Provisions and other Sources

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Freedom of Information (Scotland) Act 2002: sections 1(1) (General entitlement); 33(1)(b) (Commercial interests and the economy).

The full text of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### Facts

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Mr Portlock wrote to Glasgow City Council (the Council), requesting information about bouillon products used by the Council. The Council provided Mr Portlock with some of the information he had requested but refused to disclose the price that the Council paid for the products on the grounds that disclosure would, or would be likely to, prejudice substantially the commercial interests of Glasgow City Council and its supplier under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The decision to withhold the information was upheld by the Council on review and the Council's internal review concluded that the main reason for continuing to withhold the information was the substantial prejudice to the Council's commercial interests rather than those of its supplier. Mr Portlock was dissatisfied with this response and applied to the Commissioner for a decision.



## Background

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1. On 2 March 2005, Mr Portlock sent an e-mail to Glasgow City Council (the Council), requesting information about bouillon products it used. In his e-mail, Mr Portlock asked the Council three specific questions:
  - a) What is your usage of the different bouillon products you buy?
  - b) How much do you use by brand and at what price?
  - c) What is your approach/attitude toward salt content/levels in these products?
2. The Council responded to Mr Portlock's request on 18 March 2005. In its letter the Council provided answers to all of Mr Portlock's questions with the exception of the price that the Council paid for the bouillon product. The Council informed Mr Portlock that such information could not be provided on the grounds that disclosure might prejudice substantially the commercial interests of the Council and its supplier. The Council withheld the information under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA), which states that information is exempt from release if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
3. Mr Portlock wrote back to the Council on 18 March 2005, and asked the Council to review its decision to withhold information he had requested. Mr Portlock argued that the public had a right to know the prices paid for products purchased by public bodies. He also questioned how the disclosure of such information could prejudice substantially the commercial interests of the Council and its supplier. Mr Portlock added that other public bodies had published such information for all contracts over £500 in value.
4. The outcome of the Council's review was issued to Mr Portlock on 19 April 2005. In its letter the Council stated that it had concluded that the original decision to withhold the pricing information under section 33(1)(b) of FOISA was correct. The Council stated that the information requested consisted of pricing information on prices offered to the Council on the understanding that these would not become public knowledge. It added that should such information be disclosed there would be a very real risk that the Council would not be able to achieve the same pricing advantages in future.



5. The Council also argued that disclosure would influence its supplier's decision on whether or not to bid for future tenders and any unwillingness to take part in tendering exercises on the part of suppliers would be prejudicial to the Council's commercial interests. The Council also considered the public interest arguments for and against disclosure. It concluded that the balance of the public interest favoured the decision to withhold the pricing information requested.
6. Mr Portlock was dissatisfied with the Council's response and applied to me for a decision on 9 May 2005. An investigating officer was then assigned to this case. Mr Portlock's application was validated by establishing that he had made a written request for information to a Scottish public authority, and had applied to me only after requesting that the authority review its response to his request.

## The Investigation

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7. The investigating officer contacted the Council on 12 May 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was invited to provide comments on the issues raised by Mr Portlock's case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation. The Council was also asked to provide further information about its reliance on section 33(1)(b) of FOISA.
8. The Council responded on 21 June 2005. It provided a number of documents for the purpose of the investigation and a detailed statement of its case for withholding the pricing information.
9. The Council sent further information to my investigating officer for the purposes of the investigation on 17 October 2005. A copy of a letter was also supplied which the Council had received from one of the companies that provided it with foodstuffs. The Council argued that this letter tended to indicate the general sensitivity which attached to price and other details in this sector.



## The Commissioner's Analysis and Findings

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10. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Portlock and the Council and I am satisfied that no matter of relevance has been overlooked.

### Mr Portlock's submission

11. In his application to me, Mr Portlock detailed the reasons for his dissatisfaction with the way the Council had dealt with his request. He did not accept the Council's argument that disclosure would damage the Council's ability to obtain the best commercial terms in future and he suggested that the release of such information would sharpen competition and lead to a reduction in prices, which would be beneficial to the public.

### The Council's submission

12. The Council provided a statement of its case in a letter to my Office, dated 21 June 2005. In its letter the Council stated that it had responded to Mr Portlock's request by providing all but one of the pieces of information requested, i.e. the price that the Council paid for the product. The information was refused under section 33(1)(b) of FOISA.
13. The Council stated that the prices for bouillon were contained in the contract between the Council and its supplier, Kerry Foods Ltd. The contract had been awarded to Kerry Foods Ltd following a competitive tendering process which the Council had carried out in compliance with European procurement directives. The process involved all tenderers submitting "blind" tenders. Each tenderer was also required to submit a certificate of non-collusion confirming that they had not discussed the value of their tender with any other tenderer or potential tenderer.
14. Following appraisal of the tender returns, the contracts were awarded by the Commercial Operations Committee on 30 January 2002. The agenda, report and minutes of this committee are public documents which are available through the Council's website (<http://tinyurl.com/yqs4q9>) and the contracts awarded were done on the basis of each individual item being awarded to the tenderer who provided the most economically advantageous tender for that particular product or product line. The Council pointed out that bouillon therefore represented only one product out of a much wider range covered by the contract it has with Kerry Foods Ltd.



15. In accordance with the recommendations contained within paragraph 47 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (<http://www.scotland.gov.uk/Publications/2004/09/19894/42619#41>), which concerns cases where information has been received from a third party and to disclose that information without their prior consent would constitute an actionable breach of confidence, the Council advised Kerry Foods Ltd that the pricing information had been requested by a third party and sought Kerry Foods Ltd's views on disclosing the information.
16. Kerry Foods Ltd responded to the Council by letter indicating that it considered the information to have been submitted in confidence, that it would be damaging to its commercial interests for the Council to release the information in question, and that the release of the information could affect its decision on whether or not to tender for contracts in future.
17. In its letter, dated 19 April 2005, Kerry Foods Ltd stated that when it entered into a trading agreement with the Council through the tender process, it assumed that it was a fundamental term of the arrangements between them that commercial confidentiality would be preserved "at least in respect of the pricing and financial information of our contract." Kerry Foods Ltd added that it believed disclosure of such information would damage their competitive position in the market for their products and would prejudice their commercial interests. As well as affecting its decision to bid for future tender contracts, Kerry Foods Ltd stated that any such disclosure "would certainly influence the commercial structure of our future tenders".
18. The Council also provided correspondence from other major foodstuff suppliers which echoed these views and concerns. It was argued by the Council that the market for commodities of this nature was already restricted, and the withdrawal of these companies from it would have a significant impact on the levels of competition available.
19. The Council conceded that when it tendered for foodstuffs including bouillon, there was no explicit statement regarding either the confidentiality or lack thereof of the information submitted by tenderers. The Council stated that, while some of the letters from suppliers (including Kerry Foods Ltd) indicated that they had proceeded on an implied obligation of confidentiality, the Council was not satisfied that the requirements of a legally binding obligation such as would raise issues under section 36(2) of FOISA existed in relation to this request. The Council added that it was of the view that the contract between it and Kerry Foods Ltd did not create such an obligation.



20. The Council stated that its initial response to Mr Portlock indicated that the interests being prejudiced in this instance under section 33(1)(b) of FOISA were those of both the Council and its contractor. While this view was reiterated in the internal review decision letter, the internal review concluded that the main reason for continuing to withhold the information was the substantial prejudice to the Council's commercial interests (any such prejudice to the supplier not having been substantiated). It expanded on the nature of its own commercial interests and I will examine these in greater detail at paragraphs 29 -32 below.
21. The Council referred to the European procurement regime, particularly the Public Supply Contracts Regulations 1995 (SI 1995/201 as amended) and the underlying and related EU procurement directives concerning matters relating to the confidentiality of information provided to a contracting authority by a supplier. The Council stated that it was of the view that detailed cost breakdowns (of which the requested information would be a part) should be regarded as confidential in nature where there was genuine commercial sensitivity attaching to the rates in question. However, the Council preferred to approach the matter from the perspective of commercial prejudice rather than basing its position on an interpretation of European law. It did not regard the supplier's designation of material as conclusive and in any event had been unable to identify any particular requirements as to confidentiality made by the supplier at the relevant time. It did not regard itself as being obliged to agree to such requirements retrospectively.
22. In evaluating the public interest in relation to disclosure of the information, the Council considered the general public interest in information being accessible, whether disclosure would contribute to ensuring effective oversight of the expenditure of public funds in order to obtain value for money, and whether disclosure would ensure fairness in relation to future tendering applications. Among factors favouring withholding the information, the Council considered the public interest in securing value for money in relation to public expenditure, the possibility that disclosure could undermine competitive tendering exercises by providing competitors with an unfair advantage, and the possibility of frustrating the legislative intentions behind section 8 of the Local Government in Scotland Act 2003 (which concerns the relaxation of restrictions on supply of goods and services by local authorities).



23. Having referred to the relevant portions of the Scottish Procurement Directorate document “Scottish Public Sector Procurement & Freedom of Information Guidance” (<http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>), the Council concluded that the balance of the public interest favoured withholding the information, considering (amongst other factors) the amount of relevant information disclosed already, the measures taken by the Council to secure compliance with the relevant regulatory requirements, the need to secure the best possible value for money and avoid unnecessary expenditure, and the importance of protecting the Council’s ability to trade in a competitive marketplace and thus generate funds to support service delivery.

### **Section 33(1)(b) – Commercial interests**

24. Section 33(1)(b) of FOISA states 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, without prejudice to that generality, a Scottish public authority).
25. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, the nature of those commercial interests and how these interests will be substantially prejudiced. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
26. Even where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still 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.
27. The Council stated that the information requested by Mr Portlock concerned the prices paid by it for commodities and the Council’s position was that disclosure of the information would prejudice substantially its own commercial interests. It was stated that Kerry Foods Ltd had indicated that it considered disclosure would prejudice its own commercial interests, but the Council was not satisfied that the supplier had substantiated this claim and therefore did not advance damage to Kerry Foods Ltd’s commercial interests as a justification for withholding the information. Accordingly, it claimed the exemption in section 33(1)(b) of FOISA in respect of its own commercial interests only.





28. In summary therefore the Council is no longer claiming that the information is exempt by virtue of the commercial interests of its supplier being prejudiced substantially, and it does not advance the case that the disclosure of the information would constitute a breach of confidence by the Council. The Council however does maintain that the disclosure of the information would prejudice substantially its own commercial interests, and it is that matter which I go on to address.
29. In relation to its own commercial interests, the Council argued that it was a major purchaser of foodstuffs, with an annual spend in the region of £18million. Direct and Care Services, the relevant department within the Council, had accordingly devised highly developed purchasing strategies in order to minimise expenditure and secure best value in order to ensure the best use of public funds.
30. The Council also argued that disclosure of the information requested by Mr Portlock could result in any special prices offered to the Council in the context of its competitive tendering processes becoming common knowledge in the purchasing community. It was argued that this would in turn lead to suppliers being able to match each others' prices and that there would be a "very real risk" that disclosure would result in a levelling of the field. This would be to the detriment of the Council since there would be no incentive for a supplier to offer lower prices to one organisation if this would lead them to them lowering across the board. The Council therefore submitted that there would be a very real risk of it losing the ability to secure pricing advantages if the information were to be released. Given the scale of the Council's purchasing in this area, it was argued that any loss of competitive advantage would be to its substantial prejudice through the higher prices which would follow.
31. The Council stated in addition that Encore Catering, the trading wing of Direct and Care Services, participated in competitive tendering situations as a tenderer rather than a purchaser. It submitted that recent legislation (sections 8 and 10 of the Local Government in Scotland Act 2003) had extended the scope for local authorities carrying out such work. The level of any bid submitted for catering contracts would depend upon a number of factors which could be ascertained by competitors through the disclosure of commodity prices. The Council argued that this would enable competitors of Encore Catering to calculate the likely tender price which Encore Catering would submit, to the detriment of the Council's ability to compete in the market place in future. The Council was of the view that this would prejudice its commercial interests substantially and indicated the scale of the relevant contracts.
32. The exemption under section 33(1)(b) of FOISA relates to the commercial interests of an individual or organisation. When considering this exemption, it is important that a distinction is drawn between the commercial interests of an organisation and its financial interests.



33. Financial interests will generally relate to the financial affairs of an organisation, and will include, but will not be limited to, the revenue generated by an organisation and the management of its financial assets. Commercial interests, however, will relate more directly to trading activity undertaken by an organisation, and will include activity relating to the ongoing sale and purchase of goods and services by that organisation, frequently for the purpose of revenue generation.
34. In order for the test under section 33(1)(b) of FOISA to be satisfied, therefore, it is my view that the interests which are at risk of harm must go beyond those relating solely to the purchase by a Scottish public authority of goods and services which are required for the effective fulfilment of its functions, statutory or otherwise. While the purchase of such goods may entail activity which engages with commercial operators, it will not necessarily follow that the authority has commercial interests in relation to that activity.
35. I therefore accept that public authorities can have commercial interests, but only in specific instances where I am satisfied that a particular commercial activity is being carried out. In this case, I accept from the information provided by the Council that the operations of Encore Catering are commercial in nature and that, to that extent, the Council has commercial interests which are capable of being engaged by the exemption in section 33(1)(b) of FOISA.
36. The issue is not quite so clear cut with respect to the procurement of bouillon. I have in other cases not accepted that where the authority simply purchases goods and services from a commercial contractor that this engages its commercial interests even though it may have a financial interest in whether disclosure affects its ability to secure advantageous terms.
37. In this case however it is clear that the commodity purchase is used at least in part to supply a commercial catering function. Insofar as that is the case I am prepared to accept that the exemption is engaged.
38. The issue which must be considered in relation to the application of the exemption under section 33(1)(b) of FOISA to the information requested by Mr Portlock, however, is whether release of the information withheld would, or would be likely to, prejudice those interests substantially.
39. Paragraph 72 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code) indicates that the prejudice caused to a particular interest following release of information should be "real, actual, and of significant substance" before the test of substantial prejudice can be considered to have been met.



40. What I have to consider are two separate but related matters if disclosure were to be made.
41. Firstly would the Council be able to secure such an advantageous contract in the future and if not would this prejudice substantially its commercial interests, as represented by its catering company?
42. Secondly would the effect of the disclosure of the price allow commercial competitors to estimate with some degree of accuracy the likely tender bid being made by Encore for commercial catering contracts, allowing competitors an unfair advantage in the tendering process to the extent that the Council's commercial interests are prejudiced substantially?
43. The Council has argued that disclosure of the price would mean that it would be unable to secure advantageous prices, presumably on the basis that the tendering company would come under pressure from its other customers to match any price offered to Glasgow City Council. In turn the company would either decline to take part in future tenders or would offer a less attractive price. This could have an impact on the financial interests of the Council and as some part of the quantities bought are for its commercial activities it could affect its commercial interests by causing an increase in the cost in commodities used in the preparation of its meals, and consequently the competitiveness of its own external tender bids.
44. It may seem unlikely that companies would not tender to supply foodstuffs to Glasgow. As the Council points out, it has an annual spend of £18 million per annum. Furthermore it is a sought after contract as according to the Council it has sophisticated business systems and logistics operation which make it more attractive to tenderers than equivalent contracts with other purchasers.
45. However in this case the information being sought here is the unit cost of only one relatively small product line in a much larger contract, which involves a variety of suppliers. The question I have to consider is if the unit price was disclosed would the Council be able to secure the same advantageous terms. Although the nature of the product is not so specialised that other companies could not be found to supply it, would they do so if the unit price was known, or would they be able to match or better the price currently secured from Kerry Foods? It seems to me that unit prices are particularly sensitive and it may well be that because the contract is not so substantial in the scheme of things that companies might opt not to bid to preserve their terms with other customers or to bid at a higher price. If that were the case it would harm the financial interests of the Council.
46. However even if a price rise did occur would this substantially prejudice the commercial interests of the authority as claimed under section 33(i)(b).



47. I have been supplied with details of the unit price paid by the Council and the number of units supplied under the contract. A proportion of the commodity is used for commercial as opposed to care service and other non commercial functions. It is not unreasonable to assume that if the price did increase this would be factored into the tender bids which Encore submits for external contracts and, all other things being equal, would cause those bids to be higher than they would otherwise be, as a result of increased bouillon costs.
48. The effect of this is not easy to gauge at this remove- it would depend on the nature of the contract and the extent to which bouillon was used in fulfilling that contract; it would depend on the overall competitiveness of Encore's bid which may still be accepted because of other aspects of best value. However at the very least a commodity price increase would affect the profitability of any successful bid and at the worst bids for external contracts would be, or would be likely to be, less successful. In the circumstances of this case it is not unreasonable for the Council to fear that its commercial interests would be substantially prejudiced.
49. However I am less convinced by the second ground of the Council's argument. Even if the price of this commodity was known I do not believe that it would be possible for competitors to estimate with any degree of accuracy the value of any tender bid made by Encore for catering contracts. It seems to me that a competitor would have to know with a high degree of accuracy many more components of the costs being borne by Encore, and how these costs were being factored into a bid by Encore before such a claim could be substantiated. The Council claim that the salary scales of staff in the Council's employ are already known and this in conjunction with commodity costs would be sufficient to allow an accurate estimate of a Council tender to be made. Again I think this is unlikely – it would need specific details of staff employed on the contract in terms of numbers and salaries; cost of overheads and costs of all raw materials and commodities being used in the fulfilling the terms of the contract to come up with an accurate estimate. Much of that information is not known and so far as commodities rate concerned this application only request the price paid for bouillon. Release of that information by itself would not allow the calculation to be made as feared by the Council.

### **The public interest test**

50. Even though it would substantially prejudice the commercial interest of the Council, release of the information may still be in the public interest. However I have not found there to be a compelling public interest argument for disclosure of the unit costs.
51. In dealing with Mr Portlock's request the Council has provided details of what the bouillon is used for, the type and brand of bouillon and the quantities used in a 12 month period of each type ( chicken, ham and beef.)



52. Additional information is also in the public domain by way of the Minutes of the Commercial Operations Committee of the Council which set out in detail the value of the various product lines within an overall contract for the supply and delivery of grocery foods which includes a specific line for sauces and gravy mix.
53. It seems to me therefore that detailed information has been provided or is available to satisfy the public interest in knowing what the Council spends and on what, and that this has been done without the harm which further detailed disclosure would or would be likely to bring about.
54. Mr Portlock has argued that release of the specific unit prices would sharpen competition and lead to a reduction in prices. That is a possible outcome. However I have found that in this case it would be more likely to reduce competition and increase prices. I do not think that outcome would be in the public interest and accordingly I find that in all the circumstances of this case that the public interest in disclosure is outweighed by that in maintaining the exemption.

#### *Conclusion*

55. I uphold the Council's decision to withhold the pricing information requested by Mr Portlock under section 33(1)(b) of FOISA, for the reasons given above.

#### **Decision**

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I find that Glasgow City Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by relying upon the exemption under section 33(1)(b) of FOISA in relation to pricing information about bouillon products requested by Mr Portlock.



## Appeal

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Should Mr Portlock or Glasgow City Council wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**13 December 2006**

## 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.

##### 33 Commercial interests and the economy

(1) Information is exempt information if-

(a) ...

(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).