

Decision Notice

Decision 234/2014 Shetland Line (1984) Ltd and Transport Scotland

Tender Evaluation – Northern Isles Ferry Services

Reference No: 201401121

Decision Date: 11 November 2014



Scottish Information
Commissioner

Summary

On 17 October 2013, Shetland Line (1984) Limited (SLL), through its solicitors, asked Transport Scotland for analysis and assessment information relating to the tenders for the Northern Isles Ferry Services (NIFS) contract. Transport Scotland provided information, redacted in terms of FOISA on the basis that various exemptions applied.

Following investigation, during which further information was disclosed, the Commissioner found that Transport Scotland was entitled to withhold the remaining information, on the basis that its disclosure would be likely to prejudice substantially the effective conduct of public affairs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

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 24 May 2012, a staff member at Transport Scotland made an affidavit in relation to the tender process for the NIFS, which had been awarded to a company called Serco.
2. On 17 October 2013, Maclay Murray and Spens LLP, on behalf of their client, SLL, wrote to Transport Scotland in relation to the NIFS tender process and requested the following information:
 - a) Confirmation of whether Transport Scotland carried out an analysis of demand for freight services prior to submission of bids and, if so, copies of any documents referred to by Transport Scotland;
 - b) Full details of the assessment carried out by Transport Scotland (referred to at paragraph 7 of the affidavit referred to in paragraph 1), including copies of any documents prepared by Transport Scotland;
 - c) Full details of the assessment carried out by the external consultant on behalf of Transport Scotland, including copies of any documents prepared by the external consultant on behalf of Transport Scotland; and
 - d) Full details of the evaluation carried out (and conclusions reached) by the Transport Scotland Evaluation Panel in respect of the bidders' proposals for freight service.

In this decision, all references to correspondence with SLL include correspondence with its solicitors.

3. Transport Scotland acknowledged the request, but failed to provide a substantive response. On 19 December 2013, SLL wrote to Transport Scotland and requested a review on the basis that it had failed to respond.
4. Transport Scotland acknowledged the requirement for review, but again failed to provide a substantive response. On 11 February 2014, SLL wrote to the Commissioner, applying for a

decision on the basis that it was dissatisfied with Transport Scotland's failure to respond to its requirement for review. This resulted in the Commissioner issuing Decision 069/2014.

5. Transport Scotland notified SLL of the outcome of its review on 6 May 2014. It provided SLL with information, subject to redactions (which Transport Scotland explained) in terms of sections 30(c), 33(1)(b) and 38(1)(b) of FOISA. Further information was redacted as not being within the scope of the request.
6. On 22 May 2014, SLL wrote to the Commissioner, stating that it was dissatisfied with the outcome of Transport Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that SLL 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.

Investigation

8. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 28 May 2014, in line with agreed procedures, the Ministers were notified in writing that an application had been received from SLL and asked to provide the Commissioner with the information withheld from SLL. Transport Scotland provided the information and the case was then allocated to an investigating officer.
9. Subsequent references to contact with or submissions from Transport Scotland are therefore references to contact with or submissions from the Ministers on behalf of Transport Scotland.
10. SLL said that it accepted the redaction of any personal data in terms of section 38(1)(b), but disputed whether all of the information requested had been provided. It also challenged the redactions in terms of sections 30 and 33 of FOISA.
11. The investigating officer subsequently contacted Transport Scotland, 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. Transport Scotland was asked to justify its reliance on sections 30(c) and 33(1)(b) of FOISA. It was also asked to explain the steps it had taken to establish what information it held and which fell within the scope of the above requests.
12. Transport Scotland responded with submissions on these points.
13. The Commissioner is satisfied that the request was for information about "demand for freight". On a reasonable interpretation, she accepts that the majority of the information withheld, and redacted from the documents disclosed, does not relate to "demand for freight" and therefore does not fall within the scope of the request. Discussions during the investigation clarified what information did fall within the scope of the request. As a result of this process, additional information was disclosed to SLL.
14. SLL acknowledged receipt of the information provided during the investigation, and confirmed that it wished a decision on the information which remained withheld.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both SLL and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

Information held by Transport Scotland

16. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. Section 1(6) qualifies this obligation, making it subject to other provisions of FOISA which allow authorities to withhold information or charge a fee for it. The restrictions contained in section 1(6) are not applicable in this case.
17. In its submissions to the Commissioner, Transport Scotland explained the searches and enquiries it undertook to ascertain whether it held further information falling within the scope of SLL's requests. It provided evidence of the outcomes of these, which focused on the Ferries Unit (which it submitted was the only part of the organisation which could be expected to hold information falling within the scope of the request).
18. Transport Scotland explained that all relevant staff members in the Ferries Unit were asked to conduct searches of their email inboxes. In addition, the Scottish Government's electronic Records Management System was searched. Transport Scotland confirmed that all relevant information would be saved in the electronic filing system as a matter of routine. It noted that these searches did not identify any relevant information, other than that provided to the Commissioner.
19. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) Transport Scotland interpreted SLL's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held and which fell within the scope of each request.
20. The Commissioner must now consider Transport Scotland's application of sections 30(c) and 33(1)(b) of FOISA to the information remaining withheld. Having considered this information, the Commissioner accepts that it all falls within the scope of parts c) and d) of SLL's request.

Section 30(c) – prejudice to effective conduct of public affairs

21. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
22. As the Commissioner has said in previous decisions, there is a high standard to be met in applying the tests contained in section 30(c). The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

23. Transport Scotland explained the background to this request. In May 2012, the Ministers announced their intention to award a contract for the operation of the NIFS to Serco. Transport Scotland explained that SLL was one of the unsuccessful bidders and appealed to the Courts to stop the contract award: this challenge was rejected by the Court. Transport Scotland explained that SLL continue to pursue this action through the Courts, with a Commercial action ongoing in the Court of Session.
24. Transport Scotland further explained that the Court would be taking a view as to whether or not SLL should be awarded compensation. It stated that SLL was seeking to argue, through a legal action, that the NIFS procurement process was legally flawed.
25. In addition, Transport Scotland stated that following the issue of the review outcome, SLL sought to apply to the Court for access to this particular information, along with other information, as part of the ongoing proceedings. A Specification of Documents was currently under consideration by the Court. Although this application had not been made at the time of the review, Transport Scotland submitted that it recognised then that SLL had a right to (and might in fact) do this.
26. Against this background, Transport Scotland submitted that section 30(c) applied to some of the information in the documents. The outcome of this tender process was still subject to legal challenge, it submitted, so disclosing such information into the public domain would be likely to undermine the Court process and, by extension, the administration of justice.
27. Transport Scotland stated that once the legal case is concluded, the information withheld under section 30(c) would become less sensitive. At present, however, and in response to the request, disclosure would be likely to prejudice substantially the effective conduct of public affairs, by allowing SLL to use the information to seek to justify its legal claim for compensation.
28. Transport Scotland also submitted that while it believed the procurement process to have been robust, it would put the Ministers in an unfair position if SLL were to be given copies of its internal correspondence and correspondence with consultants about bidders. The Ministers would not have equivalent access to SLL's own internal correspondence.
29. Transport Scotland argued that disclosure would also jeopardise the robustness of its contract evaluation process, by risking significantly undermining confidence in its procurement processes. This, it stated, was particularly sensitive as there were two further ferry contracts where the retendering process would be initiated in the next 12 months. It was important to secure as many good quality tenders as possible for these. Disclosure of this information at this point, therefore, would (in Transport Scotland's view) prejudice substantially the effective conduct of public affairs.
30. Finally, Transport Scotland argued that disclosure would be likely to impact negatively on its ongoing working relationships with some of the other unsuccessful bidders, who would be more reluctant in future to provide information they considered sensitive, for fear that it would be released into the public domain. Given that there were limited numbers of ferry operators able to bid for such contracts, Transport Scotland considered it important to maintain good working relationships with these operators to ensure they were not put off tendering in future.
31. SLL did not consider the ongoing legal challenge to the tender process, or any potential for undermining the robustness of the tender evaluation process, to be relevant to the application of the section 30(c) exemption. It did not believe Transport Scotland had provided evidence that disclosure would be likely to have a negative impact on its working relationship with other bidders.

32. SLL believed Transport Scotland had relied on hypothetical factors to withhold the information and did not believe there to be any genuine link between disclosure of the information and the predicted harm. It referred to *Decision 011/2007 Mr Allan Young and Scottish Borders Council*¹, where the Commissioner did not accept the argument (also deployed in support of the section 30(c) exemption) that disclosure of weighting figures for job evaluation scores might cause employees to lose confidence in the job evaluation scheme and possibly go on strike.
33. As in that case, SLL submitted, Transport Scotland had failed to provide evidence to support its prediction of harm. In this connection, it noted that the tender process had long since been concluded and the contract awarded.
34. While acknowledging SLL's reference to previous decisions by the Commissioner, the Commissioner must emphasise that each case, and the information withheld in that case, has to be considered on its own merits, in the context of the circumstances prevailing at the time the public authority carried out its review.
35. In this case, the Commissioner has considered both Transport Scotland's and SLL's submissions carefully, along with the withheld information. She accepts that section 30(c) may be engaged by the disclosure of information, where there is a genuine prospect of that disclosure undermining significantly either the administration of justice or the integrity of a public authority's tendering processes (including, potentially, significant harm to future relationships with bidders). She notes that information relating to one of the unsuccessful bids (that of SLL) has been released into the public domain in response to this request: however, SLL was represented by solicitors in making and pursuing this request and the Commissioner must presume that public disclosure of this information was anticipated by SLL, along with any likely consequences of making the information public.
36. From the arguments presented by Transport Scotland in this case, the Commissioner is not persuaded that disclosure of the remaining withheld information would be capable of harming the administration of justice, to the extent required for there to be substantial prejudice to the effective conduct of public affairs. In effect, she has been asked to conclude that this would (by definition) be the outcome of any disclosure of information relating to the award of a contract, where that contract was subject to legal challenge or where such challenge was reasonably apprehended. It should be clear from the nature of this exemption, as narrated above and as considered by the Commissioner in numerous decisions, that she cannot do this.
37. The Commissioner has also considered the impact of disclosure on future tendering exercises. Again, she could have been provided with more focused arguments by Transport Scotland. There is some force in SLL's arguments about the relative age of the withheld information. On the other hand, the Commissioner acknowledges the relevance of there being a limited number of operators who are in a position to bid for important contracts of this kind, and of there being similar tendering exercises in prospect within the next year. In the circumstances, she is prepared to accept that disclosure of the withheld information would be likely, in its impact on relations with potential bidders for these contracts, to prejudice substantially the effective conduct of public affairs. Consequently, she accepts that Transport Scotland was entitled to apply the exemption in section 30(c) of FOISA to the remaining withheld information.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200601481.aspx>

38. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must, therefore, go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Public Interest Test – section 30(c)

39. As stated in previous decisions, the “public interest” is not defined in FOISA, but has been described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has also been held that the public interest does not mean “of interest to the public” but “in the interests of the public”, i.e. disclosure must serve the interests of the public.

Submissions by SLL

40. In its application to the Commissioner, SLL identified a public interest in transparency and in ensuring that Transport Scotland was properly and effectively conducting such procurement processes. They stated that if Transport Scotland’s evaluation process was not robust, the public interest would favour disclosing such information in order that the process could be scrutinised and improved in the future.

41. SLL also submitted that it was relevant to the public interest, in this case, to consider whether disclosure would contribute to:

- ensuring effective oversight of expenditure of public funds and public value for money
- ensuring that any public authority with regulatory responsibilities was adequately discharging its function
- ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading errors

It also believed it relevant to consider whether there was a public interest in avoiding “undermining Transport Scotland’s position in an ongoing legal challenge” (as claimed by Transport Scotland).

42. SLL submitted that the NIFS was a lifeline service relied upon by the residents of Orkney and Shetland and the businesses serving the Islands. They stated that this includes themselves, not only as a tenderer for the provision of the service, but as a consumer like any other local business. There was clear public interest, SLL submitted, in ensuring that the Northern Isles received a service meeting their needs and providing best value. It cited the number and range of responses to the consultation carried out by the Ministers in 2011/2 as evidence of the scale of public interest here. It also considered the issues raised to be of relevance to the forthcoming tenders for the Clyde and Hebrides ferry services.

43. SLL went on to submit that if the information redacted disclosed errors in the process or a breach of the then applicable Public Contracts (Scotland) Regulations 2006, the public interest surely lay in exposing errors so that they may be corrected and avoided in the future (rather than in preventing Transport Scotland’s position from being undermined). If no such errors existed, SLL argued, Transport Scotland’s position could not be undermined: any unwarranted challenge would be rejected by the Court, as the proper forum to determine such issues. Therefore, SLL submitted that there could be no risk of Transport Scotland’s evaluation process being unjustifiably undermined.

² : <http://www.scotland.gov.uk/Publications/2010/12/08124947/0>

44. SLL made reference to the factors in Commissioner's guidance³ on the public interest test which should not be taken into account when applying the public interest test. These included:
 - possible embarrassment of government or other public authority officials
 - the risk of the applicant misinterpreting the information
 - possible loss of confidence in government or other public authority.
45. SLL suggested that these were precisely the kind of considerations which had influenced Transport Scotland in its application of the public interest test.
46. SLL further submitted that it could not be in the public interest for a bidder for a public contract to be denied the possibility of identifying that it had been affected by an authority's breach of duty, merely because the authority wished to avoid the consequences of discovery of potentially improper conduct. SLL stated that the clear interest of the public lay in ensuring that Transport Scotland was using its powers correctly.
47. SLL concluded by submitting that there was a public interest in compliance with procurement law by public authorities, and in ensuring that public companies competing in public tendering processes were allowed to do so on a fair and equal basis.

Submissions by Transport Scotland

48. Transport Scotland acknowledged the public interest in disclosing information as part of open, transparent and accountable government.
49. In this case, however, Transport Scotland submitted that there was a greater public interest in avoiding significantly prejudicing its position in the ongoing legal challenge. It also identified a strong public interest in avoiding damaging its working relationships with the other bidders, which it needed continue working with and which (as described above) were likely to be less willing to engage in future in the event of disclosure.
50. Therefore, taking account of all the circumstances of this case, Transport Scotland concluded that the public interest in applying the exemption outweighed any public interest in disclosure.

The Commissioner's conclusions

51. As noted above, the Commissioner has rejected potential harm to the ongoing legal process as a relevant factor (in this case) in making a finding on substantial prejudice. While she must therefore reject further consideration of such harm in assessing the public interest, she does not need to disregard the existence of these proceedings completely. The proceedings form part of the context in which the information was requested: if not actually raised, they were clearly in the minds of both parties at the time of Transport Scotland's review
52. In relation to future tendering, the Commissioner has already acknowledged the risk of substantial prejudice to the effective conduct of public affairs as a result of disclosure in this case. She accepts that such harm would not be in the public interest, bearing in mind the relatively small number of potential tenderers and the proximity of future tendering exercises.
53. While SLL has a clear interest in the information requested, the Commissioner considers this to be specific to SLL, in the context of its tender and subsequent legal challenge. Issues of wider public interest may come to light as a result of the judicial process, but (in the present circumstances) the Commissioner considers the Court to be the proper forum to examine

³ : <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTest.aspx>

and determine such issues. Indeed, SLL appears to have acknowledged this in its submissions.

54. The Commissioner recognises, however, that there is a general public interest in disclosure for reasons of transparency and accountability, with particular reference to the proper award of public contracts and expenditure of public funds.
55. Taking all of the circumstances into account, on balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding the information. In all the circumstances, therefore, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. As a consequence, the Commissioner finds that Transport Scotland was entitled to withhold the remaining information to which they applied this exemption.
56. The Commissioner is satisfied that Transport Scotland's arguments on section 30(c) apply to all the information still withheld from SLL. In the circumstances, she is not required to consider Transport Scotland's application of section 33(1)(b) of FOISA (although she would observe that it is not entirely clear which elements of the remaining withheld information Transport Scotland's section 33(1)(b) arguments could apply to).

Decision

The Commissioner finds (in respect of the information remaining withheld at the close of the investigation) that Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by SLL.

Appeal

Should either SLL or Transport Scotland wish to appeal against this decision, they have the right to 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

11 November 2014

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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