

Decision 031-2006 – Mr William McCormack and Dumfries & Galloway Council

Request for information about Housing Support providers funded under Supporting People

Applicant: Mr William McCormack
Authority: Dumfries & Galloway Council
Case No: 200502264
Decision Date: 28 February 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 031/2006 – Mr William McCormack and Dumfries & Galloway Council

Request for names of Housing Support providers funded under Supporting People, and the amount of grant allocated to those providers under that funding programme.

Facts

Mr McCormack asked Dumfries and Galloway Council (the Council) for the names of all Housing Support providers funded under the Supporting People funding programme on the dates 14 April 2003 and 14 April 2004, and providers expected to be funded in this way at 14 April 2005. He also asked for the amount of Supporting People grant allocated to these providers during the same periods.

The Council provided the names of the Housing Support providers but withheld the information about their grant allocation under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA), which exempts information which would be likely to cause substantial prejudice to the commercial interests of any person.

Outcome

After considering the Council's arguments in respect of the information withheld, the Commissioner concluded that the Council had not dealt with the request in accordance with Part 1 of FOISA and ordered the full release of the information requested by Mr McCormack.

The Commissioner also found that the Council had been in breach of Part 1 of FOISA in failing to inform Mr McCormack of his rights to request a review of the Council's decision and his right to appeal to me, when first responding to his request.



Appeal

Should either Mr McCormack or Dumfries & Galloway Council wish to appeal against the Commissioner's 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 of receipt of this notice.

Background

1. On 14 March 2005 Mr McCormack wrote to Dumfries & Galloway Council (the Council) asking for the names of all Housing Support providers funded under the Supporting People funding programme on the dates 14 April 2003 and 14 April 2004, and providers expected to be funded in this way at 14 April 2005. He also asked for the amount of Supporting People grant allocated to these providers as at the same dates.
2. The Council replied on 31 March 2005, providing the names of all Housing Support Providers funded under Supporting People on the dates identified by Mr McCormack.
3. The Council refused to supply information about the amount of grant allocated to the Housing Support Providers from the Supporting People funding programme, deciding that this information was exempt from disclosure under section "33(b)" (later confirmed to be section 33(1)(b)) of the Freedom of Information (Scotland) Act 2002 (FOISA).
4. The Council told Mr McCormack that if he were to refine his request and describe the specific information he required, it might be possible to supply information which was not classed as commercially sensitive.
5. Mr McCormack asked the Council to review this decision (undated letter), challenging the view that the release of the information about the grant allocations would prejudice substantially the commercial interests of any Housing Support provider.
6. The Council replied on 27 April 2005, providing Mr McCormack with details about its review procedure and asking him to make his request for a review to a named officer. In its letter the Council pointed out that although information about the amount of grant paid to the Council is in the public domain, the amount paid to individual Housing Support providers via contracts is subject



to a review process to be completed before 31 March 2006.

7. The Council also asked Mr McCormack to note that it was facing significant grant reductions from the Scottish Executive over the next three years, which might mean that the amounts paid to individual providers could change during this period. It might also be necessary in some cases to subject the individual providers to the Local Authorities Tendering Procedures. The Council stated that in its view the public interest in disclosing the information was outweighed by that in maintaining the exemption.
8. Mr McCormack wrote again to the Council on 27 May 2005 with another request that it review its decision, addressed to the officer identified in the Council's letter of 27 April. He pointed out that grant amounts to some providers were already in the public domain and were included in Council minutes.
9. The Council wrote back to him on 27 June 2005 after its Compliance Review Panel had considered his request. It upheld the decision to withhold the information. In summary, the reasons given were as follows:
 - The Scottish Procurement Directorate Freedom of Information Guidance states that where work is in progress or "phase", it is appropriate to refuse to disclose under section 33(1)(b) of FOISA until that phase is completed.
 - Premature disclosure of proposed policies or the decision making process would lead to confusion, which would not be in the public interest.
 - The disclosure of the information would substantially prejudice the negotiating position of the Council in awarding contracts to service providers, with an impact on securing "best value" and on the requirement to ensure that service providers can meet the contract specification needs.
10. Mr McCormack appealed to me for a decision on 14 July 2005. In his letter he disputed the Council's view that the disclosure of the information he had requested was commercially sensitive or would have an impact on future tendering for contracts, and argued that disclosure would be in the public interest.
11. The case was allocated to an investigating officer.



Investigation

12. Mr McCormack's appeal was validated by establishing that he had made his request to a Scottish public authority (i.e. Dumfries & Galloway Council), and had appealed me only after requesting the authority to review its response to his request.
13. A letter was sent to the Council on 28 July 2005, informing the Council that an appeal had been received and that an investigation into the matter had begun.
14. In order to investigate the case, the Council was asked
 - a) For copies of the information which had been withheld from Mr McCormack.
 - b) For its reasons for believing the information to be exempt under section 33(1)(b), beyond those already stated in correspondence with Mr McCormack.
 - c) For an explanation of the specific harm that would be caused to particular commercial interests if the information was to be released.
15. The Council replied on 5 August 2005, providing the information and commentary requested by the investigating officer.
16. On 25 October 2005 the investigating officer wrote to the Council asking for clarification and further comment on a number of points. In particular, the Council was asked how the information withheld related to the ongoing service review and how its release would substantially prejudice the Council's commercial interests.
17. On 14 November 2005 the investigating officer spoke to the Council's Commissioning Manager for the Supporting People programme, who explained that the Council had a statutory duty to review all services by March 2007, and would have to renegotiate the existing contracts before that date. The value of those contracts had not changed since 2003, so revealing the amount previously paid would weaken Council's position in the forthcoming negotiations. The Council was faced with making savings of £1.7 million in respect of the new service contracts.
18. The Council confirmed the information provided in the phone call in a letter dated 12 December 2005. In this letter it also explained that releasing information about previous grant allocations would allow service providers to



manipulate the service they provided in order to secure grant funding, and to produce inaccurate data in the ongoing review process. So, for instance, a service provider might see what services other providers were being paid for and decide to tender for certain provision of services which they knew they could not deliver. Alternatively, the service provider might inflate the service they could deliver at reduced costs in order to secure the grant funding. It argued that the potential impact on the clients would be enormous if such situations arose.

19. In this letter the Council widened its argument to consider the prejudice that would be caused to the commercial interests of the other service providers, if one provider had obtained information which was not available to others. The Council anticipated that costings would then become public knowledge prior to any negotiations, with the result that contracts would be decided through an unstructured auction.
20. The Council pointed out that there was a recognised process in place which it believed had served the clients, the service providers and the Council well. It believed that this business process would be undermined if some service providers had information not known by others, and that confusion would result if the information came to be in the public domain.
21. The Council argued again that it was relevant to consider the Scottish Procurement Directorate Freedom of Information Guidance issued in December 2004, on the grounds that the information requested was part of the review process, which was work in progress and therefore “in phase”, strengthening the argument that it was exempt from disclosure.
22. Finally, the Council pointed out that it must find savings of £1.7 million from the Supporting People Programme budget over the next three years, with as little impact as possible on service delivery.

The Commissioner’s Analysis and Findings

23. The information withheld from Mr McCormack was the amount of Supporting People grant (i.e. the annual contract value) allocated to the various service providers as at 14 April 2003, 14 April 2004 and expected to be allocated at 14 April 2005. The Council has already released the names of the service providers.
24. In its correspondence with Mr McCormack and with my Office the Council has given a number of reasons for believing that this information is exempt from



disclosure under section 33(1)(b) of FOISA. This exemption allows the information to be withheld if its disclosure would substantially prejudice the commercial interests of any person (including the Council); however, the Council must also demonstrate why the public interest lies in withholding the information rather than releasing it.

25. In a previous decision (014-2005) I considered whether a Council is capable of having “commercial interests”. I found that “Commercial interests are different from financial interests and relate to the ability to participate successfully in a commercial activity, such as the sale and purchase of goods and services. In another decision (061-2005) I found that “There is no requirement that these [commercial] activities are profit making before this exemption can be engaged.”
26. I have looked in turn at the arguments submitted by the Council to justify its use of the exemption in section 33(1)(b), and have not found that the Council has demonstrated that it has commercial interests relating to the changes in the provision of housing support services and the negotiation of contracts relating to those services. Although the purchase of services by the Council from the tendering companies might be regarded as participation in a commercial activity, it does not necessarily follow that the Council has commercial interests relating to that activity. My reasoning on this matter is detailed in the paragraphs below.
27. In reaching my decision in this case I have also considered whether release of the information would substantially prejudice the commercial interests of any of the agencies or companies bidding to supply housing support services in future.

Would release of the information adversely affect the re-negotiation of contracts?

28. The main arguments put forward by the Council against releasing the information focus on the detrimental effect that this would have on the process of negotiating new Housing Support service contracts with service providers.
29. The Council has stressed that it must make significant changes to the existing pattern of housing support provision in Dumfries and Galloway, finding ways of delivering the required services while making savings of £1.7 million. As part of its service review, the Council will renegotiate all existing contracts with service providers.
30. The Council is concerned that the release of figures showing the grant allocation to individual service providers over the previous three years will have the following adverse effects on the process of re-negotiating the



contracts:

a) some service providers would suffer detriment to their commercial interests if other service providers had additional information not known to them.

b) if the information was made known, service providers could manipulate the service they provided, or might inflate the service they can deliver at reduced costs, in order to secure grant funding. This poses a serious risk to vulnerable clients.

c) if previous allocations become public knowledge prior to the negotiations, contracts would be decided through an unstructured auction.

d) the Council has in place an established and tested process for allocating funding to service providers, which would be undermined if some service providers had information not known by others.

31. Regarding point a) above, I take the view that if the information was provided to Mr McCormack, the Council could choose to make it available to all other interested parties by publishing it on its website, or including it in the invitation to tender for the new housing support contracts. It is of the essence of FOISA that information available under it is available to all. I therefore do not accept the arguments relating to possible commercial prejudice to the interests of other potential service providers.
32. Regarding point b) above, the Council fears that the information could be misused by service providers when bidding for the new contracts. Having considered the nature of the information requested by Mr McCormack, I cannot see how the scenario described by the Council would result from the release of the information concerned. Housing support services provided under the Supporting People programme cover a wide range of services and client groups. Revealing the total figure allocated to a particular service provider would not in itself provide any information about the service agreement: it would not show what type of service the provider had been contracted to deliver, or the number of clients covered by the contract. It is difficult to see how information which reveals only the total grant allocated to individual service providers could be used to strengthen the negotiating position of other service providers in any future review of their contracts.
33. In coming to this view I have also taken into account the fact that some information about the grant allocation of individual service providers is already in the public domain and available to any interested party. The Council informed Mr McCormack that a Committee report is submitted for approval when a contract has been awarded or materially altered. Such reports are in the public domain. For example, a report submitted to the Education and Community Services Committee on 26 April 2005, and now available on the



Council's website, discusses changes to the grant allocation to certain housing support service providers and gives details of the relevant contract values.

34. I have also considered whether the release of the total figure of money allocated between the different housing support service providers would weaken the Council's position in future negotiations and make it more difficult for the Council to secure best value. Although I do not consider that the Council's arguments in this respect are relevant to the exemption in section 33(1)(b), relating to commercial interests, I accept the possibility that the outcome envisaged by the Council might prejudice substantially the effective conduct of public affairs. Section 30(c) exempts information where disclosure would, or would be likely to have such an effect. I have taken this into consideration when examining the Council's arguments as detailed below.
35. The Council argues that a service provider might base expectations of future contract values on a calculation of the money available to the Council in previous years. However, it is a matter of public record that the Supporting People grant from the Executive is to be reduced. For instance, the Council's own Supporting People News (December 2005) carries an item headed "£2.7m cut for Dumfries and Galloway" and gives baseline funding figures for the years 2005-08. I therefore consider that it is unreasonable to take the view that the release of the annual contract values for previous years could seriously mislead service providers about the money available for future contracts.
36. With regard to points c) and d) in paragraph 30 above, I take the view that the Council must always be responsible for satisfying itself that service providers bidding for contracts are in fact capable of delivering the service required, and that its arrangements for assessing tenders are robust enough to prevent the Council from being misled on such questions. I do not accept that the release of the information requested by Mr McCormack could undermine the processes associated with the award of new contracts and the future provision of housing support services to the degree anticipated by the Council; the information is simply not detailed enough to lend itself to this type of misinterpretation.
37. I accept that the Council has developed an established process for arranging the delivery of housing support services. However, I do not accept that the release of the information requested by Mr McCormack would jeopardise this process. As I have said before, I do not accept that the information is detailed enough to affect future bids or negotiations, or the grant allocation process.

Is the information part of the procurement process?



38. The Council has explained that it considers the statistical information withheld from Mr McCormack to be part of the review process which will inform the Supporting People team when negotiating new contracts with service providers.
39. The Council has pointed to guidance from the Scottish Procurement Directorate, which identifies four phases of the procurement process: Initiation; Tendering; Contract conclusion; and Contract delivery. The guidance includes a table with suggested responses to requests for certain kinds of information. The commercial sensitivity of certain information will be time-critical and therefore it will be appropriate to withhold that information under FOISA when it is “in phase”, but not necessarily after that phase is complete.
40. The Council has confirmed that it considers the information withheld to fall within the Initiation phase, which the Scottish Procurement Directorate guidance describes as follows:

”This phase covers information developed by the public body during the planning for, and initiation of, a particular procurement activity up until an intention to procure is ready for issue.”
41. I do not recognise this as a description of the information withheld from Mr McCormack. The figures he requested were not generated as part of the preparations for the new contract negotiations but are instead a record of the Council’s grant allocation to its various housing support service providers over the last three years. While the figures may be used by the Supporting People team to inform its review of the housing support services, I do not accept that this was the primary purpose of the information, or that the information is now inextricably linked to the other information required for the service review.
42. Even if I were to accept that the information withheld was “in phase”, the Council would still have to demonstrate that substantial commercial prejudice would be caused by the release of the information in order for the exemption in section 33(1)(b) to apply.
43. Having considered the various arguments put forward by the Council in support of its decision to withhold the information under the exemption in section 33(1)(b) of FOISA, I have concluded that the Council has failed to demonstrate that it has commercial interests which could be affected by the disclosure of the information in question. The Council has also failed to show that substantial prejudice would be caused to the commercial interests of any other person if the information requested by Mr McCormack was to be provided.



44. I therefore do not accept that the information requested by Mr McCormack should be withheld under the exemption in section 30(1)(b) of FOISA. As I do not consider that the exemption applies, I am not required to consider whether the public interest is better served by withholding or releasing the information.
45. I have not found any other reason for the information to be exempt from disclosure under FOISA besides those put forward by the Council.

Failure to inform Mr McCormack of the review process or his rights of appeal

46. I note that the original reply to Mr McCormack's request (letter dated 29 March 2005) did not provide him with details of the Council's review procedure or his right to appeal to me, as section 19 of FOISA requires a public authority to do when issuing a refusal notice under section 16(1).
47. The Council has notified me that its procedures have been revised in the intervening period, and that its letter templates have been changed to comply with the requirements of FOISA.
48. I would observe, however, that the Council's initial (27 April 2005) response to Mr McCormack's requirement for review appears to have been less than helpful in the circumstances. Given that Mr McCormack was not advised where to direct his requirement, it was hardly surprising that he sent it to the officer who issued the original decision and I find it difficult to understand why that officer could not simply have passed it on to the officer responsible for reviews. On the other hand, I accept that it would have been appropriate for the Council to have responded in the way it did had the applicant been made aware of where to seek a review.

Decision

I find that Dumfries and Galloway Council has not dealt with Mr McCormack's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paragraphs 23 – 40 above, in that it misapplied section 33(1)(b) of FOISA and therefore did not respond to the request in accordance with section 1(1) of FOISA.



I require Dumfries and Galloway Council to provide Mr McCormack with the information previously withheld from him. I am obliged to give Dumfries and Galloway Council at least 42 calendar days in which to supply Mr McCormack with the information as set out above. In this case, I require Dumfries and Galloway Council to take these steps within 45 calendar days of the date of receipt of this notice.

I accept that Dumfries and Galloway Council has already taken steps in respect of its failure to comply with section 16(1) and I do not require further action from the Council on this point.

Kevin Dunion
Scottish Information Commissioner
28 February 2006