



Scottish Information
Commissioner

**Decision 034/2006 - Mr David Smith of Pentland Homeowners
Association and Dundee City Council**

Information relating to re-roofing works at Tullideph Road, Dundee

**Applicant: Mr David Smith of Pentland Homeowners
Association**

Authority: Dundee City Council

Case No: 200501925

Decision Date: 28 February 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 034/2006 – Mr David Smith of Pentland Homeowners Association and Dundee City Council

Information relating to re-roofing works at Tullideph Road, Dundee – information withheld under section 33(1)(b) – substantial prejudice to commercial interests – section 33(1)(a) – trade secrets – section 36(2) – disclosure would constitute an actionable breach of confidence – section 17 - information not held – section 30(c) – substantial prejudice to effective conduct of public affairs

Facts

Mr Smith made several information requests to Dundee City Council in March and April 2005, regarding the cost of re-roofing works at 28-30 Tullideph Road, Dundee. Pentland Homeowners Association, which represents owners of ex-council houses, felt that the bills presented to members were not sufficiently detailed.

Some information was provided by Dundee City Council but the answers received did not satisfy Pentland Homeowners Association. On behalf of the Association Mr Smith made a formal request for information under the Freedom of Information (Scotland) Act 2002 (FOISA) on 18 March 2005. In its response the Council provided some of the information asked for but told Mr Smith that other information was either not held by the Council or could not be provided without causing substantial prejudice to commercial interests. The Council upheld this decision on review and Mr Smith applied to the Commissioner for a decision.

Outcome

The Commissioner found that where the Council had advised Mr Smith that information was not held it was able to demonstrate that sufficient searches had been carried out to establish that this was the case. The Council had not, however, informed Mr Smith of this and therefore had not applied section 17 of FOISA appropriately.



The Commissioner found that the Council had not provided sufficient evidence to support its assertion that other information should be withheld under the exemptions in sections 33(1)(a), 33(1)(b) and 36(2) of FOISA and therefore, in respect of this information, that it had not dealt with the request in accordance with section 1(1) of FOISA.

The Commissioner also considered whether certain information should be withheld under section 30(c) of FOISA rather than section 33(1)(b), but concluded that this exemption did not apply.

The Commissioner found that the Council had failed to provide Mr Smith with advice and assistance under section 15 of FOISA in relation to certain information provided to him.

Appeal

Should either Mr Smith or Dundee City 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 18 March 2005 Mr Smith wrote to Dundee City Council (the Council) with eight information requests regarding the re-roofing of 28-30 Tullideph Road, Dundee.
2. Mr Smith asked for:
 - a) the list of tender applicants
 - b) tenders received including their prices
 - c) a list of materials used in the works and their wholesale costs
 - d) the cost of (a named subcontractor's) loft insulation
 - e) the cost of (a named subcontractor) returning to make good its work
 - f) the name of the Clerk of Works or Site Agent or Inspector who signed the Certificate of Completion
 - g) the qualification held by (a named individual)
 - h) confirmation that (a second named individual) was a qualified Clerk of Works



3. The Council replied on 14 April 2005. It provided Mr Smith with the list of applicants tendering for the works (item a above) but told him that his request was otherwise refused, citing section 33(1)(b) of FOISA. The Council believed that disclosure of the information would or would be likely to prejudice substantially the commercial interests of the contractor who carried out the work, and that this would interfere with the Council's ability and statutory duty to secure best value.
4. Mr Smith wrote to the Council on 25 April 2005 seeking a review of this decision. The Council wrote back on 24 May 2005 upholding the decision without modification.
5. Mr Smith appealed to me for a decision on 30 May 2005, and the case was allocated to an investigating officer.

Investigation

6. Mr Smith's appeal was validated by establishing that he had made his request to a Scottish public authority (i.e. Dundee City Council), and had appealed to me only after requesting the authority to review its response to his request.
7. The information withheld from Mr Smith was considered to be items (b) to (h) as listed in paragraph 2 above.
8. A letter was sent on 21 June 2005, informing the Council that an appeal had been received and that an investigation into the matter had begun. Unfortunately this letter was returned to my Office unopened, and a second letter, dated 18 July 2005, was sent to the Council.
9. The Council was asked to supply:
 - a) copies of the information requested by Mr Smith and withheld from him
 - b) its detailed reasons why substantial prejudice to commercial interests would result from the release of the information (including the views of the relevant contractors on the matter)
 - c) its reasons why the release of the information would interfere with the Council's ability to secure best value
 - d) copies of any notes, emails or other internal correspondence relating to Mr



Smith's request.

10. The Council replied on 23 August 2005. It now believed that some of the information requested by Mr Smith (items c, d and e) was not held by the Council. It provided brief reasons for believing that the remainder of the information requested was exempt under section 33(1)(b) and that it was in the public interest for the exemption to be upheld.
11. This reply failed to provide the investigating officer with sufficient detail to assess whether the Council had correctly applied the exemption in section 33(1)(b), or whether adequate steps had been taken to establish that the information was not held. Further requests for clarification were made in phone calls to the Council and in two emails sent on 9 and 26 September 2005. As no response was forthcoming, on 13 October 2005 the Council was issued with an Information Notice requiring it to provide the information requested by the investigating officer.
12. A reply was received dated 27 October 2005. In its letter the Council explained what steps had been taken to establish that information was not held. It also gave detailed reasons for believing that disclosure of the information withheld would affect the Council's ability to secure best value.
13. With regard to item b from Mr Smith's request, the Council provided the investigating officer with a copy of the Bill of Quantities for the roof repairs works which included the re-roofing work at 28-30 Tullideph Road. The Council advised that no other documents relating to item b were held by the Council.
14. With regard to items c, d and e from Mr Smith's request, the Council advised the investigating officer that the Quantity Surveyor responsible for the Contract in 2000 had searched the existing records of the contract and found none of the information requested.
15. With regard to items f, g and h, the Council pointed out that the list of tendering companies already supplied to Mr Smith included information that made it clear that the project was signed off by the Principal Architect and not a Clerk of Works.
16. The Council also noted that the solicitors representing the commercial firm involved in the re-roofing works were of the opinion that to release the information would constitute an actionable breach of confidence (as well as prejudice to its commercial activity). In a further letter, dated 16 November 2005, the Council confirmed that on those grounds (which were expanded upon in that letter) it wished to rely in addition upon the exemption in section 36(2) of FOISA.



17. In its letter of 16 November the Council also stated that, on the advice of the commercial firm involved, it believed that some of the information withheld constituted trade secrets and should be withheld under section 33(1)(a) of FOISA.
18. The Council also argued in its letters that it did not consider disclosure of the information requested to be in the public interest and provided its reasons.

The Commissioner's Analysis and Findings

Items c, d and e - information not held

19. I note that Mr Smith was not informed that information relating to items c, d and e from his request was not held by the Council. Accordingly, the Council failed to give Mr Smith notice that the information was not held as required by section 17 of FOISA. It was only during correspondence with my Office that the Council revealed that a search of documents relating to the contract for the roofing works had found none of the information requested in relation to those points of Mr Smith's request.
20. The Council was asked what steps it had taken to establish that the information relating to items c, d and e was not held. The Council explained that for each project carried out for the Housing Department the Council maintained three files, the first of which was held by the Director of Housing while the second and third files were held by the City Architectural Services Officer's Architectural Services staff and Quantity Surveyor's staff. Each of these files was checked and the information was not found.
21. The Council submitted that all items of correspondence were copied into each of these files and while it was acknowledged to be possible for an item of correspondence to be missing from one file, it was not thought likely that it would be missing from all three files.
22. The Council also provided the investigating officer with copies of all contract documents held, and I am satisfied that the information requested by Mr Smith is not contained in those documents.
23. I accept that the Council does not hold information relating to items c, d and e from Mr Smith's request.

Items f, g and h – information already provided



24. The investigating officer was advised by the Council that information already released to Mr Smith (item a - the list of tendering companies) included a statement to the effect that the project was signed off by the Principal Architect and not a Clerk of Works. The implication was that Mr Smith's requests for information about the individuals he believed to be involved in signing off the work were superseded in the light of this information.
25. Mr Smith confirmed to the investigating officer that he was content to accept this response in relation to items f, g and h, and would not require the Council to provide the specific information requested.
26. I note that at no point did the Council write to Mr Smith to let him know that the list of tendering companies also included information relevant to items f, g and h from his request. In this respect I find that the Council failed in its duty to advise and assist the applicant, as laid down in section 15 of FOISA.

Item b – details of tenders – information withheld under sections 33(1)(a), 33(1)(b) and 36(2)

27. Mr Smith asked for “tenders received including their prices”. The Council has confirmed that its usual procedure is to destroy all unsuccessful tenders within a few weeks of the conclusion of the tender process, and that it therefore holds only limited information about the unsuccessful tender bids.
28. The Council withheld all information about the tenders received for the roofing works which included the works at 28-30 Tullideph Road, stating that the exemption in section 33(1)(b) applied. The Council also applied the exemptions in sections 33(1)(a) and 36(2) to the tender documents from the successful company.

Section 33(1)(a) – trade secret

29. Only the information relating to the successful tender bid has been withheld under section 33(1)(a).
30. Section 33(1)(a) allows a public authority to withhold information which constitutes a trade secret. Even if information does constitute a trade secret, the information should still be disclosed if the public interest in the release of the information is greater than the public interest in withholding the information.. There is no definition of a trade secret in FOISA, but I have published guidance on section 33 which includes some issues to consider when deciding whether information constitutes a trade secret. The guidance can be found on my website at <http://www.itspublicknowledge.info/legislation/briefings/section33.htm>



31. In my guidance I have advised public authorities that these are the types of questions they should consider in determining whether something is a trade secret:
- Is the information used for the purpose of trade?
 - Would the release of the information cause harm?
 - Is the information common knowledge?
 - How easy would it be for competitors to discover or reproduce the information for themselves?
32. In coming to a view on this aspect of the case I have considered the Council's submission. I have also referred to the Irish Information Commissioner's decision on Case 98049, 90056, 98057 – Henry Ford & Sons, Nissan Ireland and Motor Distributors Ltd and the Office of Public Works, which looks at the case law on trade secrets and confidentiality from a number of jurisdictions.
33. The Irish Information Commissioner was asked to consider whether a price quoted in a tender was a trade secret. The applicant referred to the case of an English case, *Faccenda Chicken Ltd v. Fowler & Others* [1986] 1 All ER to support this view, and drew attention to the comment of Neill, L.J. that "We can well appreciate that in certain circumstances information about prices can be invested with a sufficient degree of confidentiality to render that information a trade secret or its equivalent."
34. The Irish Information Commissioner accepted that during the tendering process the price offered by each company was confidential, and that a strong case could be made that, at that time, the price was a trade secret; this view was based on discussions of the meaning of "trade secret" in the case of *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967 v.r.373]. In that case Gowans J. stated:
- "An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his contemporaries; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others".
35. However, the Irish Information Commissioner noted that Neill, L.J. in the *Faccenda Chicken* case had made it clear that the secret nature of information need not last indefinitely, observing that "innumerable...pieces of information are capable of being trade secrets, though the secrecy of some information may only be short lived". The Commissioner concluded that only



in exceptional circumstances would historic price information qualify as a trade secret, noting also a key requirement that the information in question must be in current use in the trade. Finally, the Commissioner placed considerable importance on the value of the information to competitors.

36. I share the view that the degree to which information may be secret is something which may vary over time. In this case I think it is important to consider the nature of the information withheld, in reaching a conclusion whether or not it still possesses the quality of being a secret.
37. The Council has stated that each tender consists of three elements: cost of materials; cost of labour; and overheads/profit. After studying the documents withheld I have come to the conclusion that it would not be possible to work out the company's profit margins from the information provided in the Bill of Quantities without further information about the purchase costs of materials or services from suppliers.
38. The tender information formed the basis of a contract agreed some six years ago, in 2000. The sensitivity of any information in the tender and its interest to a potential competitor is likely to have decreased significantly over that time: the prices quoted by the tendering company would not now be any guide to their submission for any similar tender in future. It seems to me that any element of secrecy now associated with the information in the tender document would relate to the way in which the prices for each element were calculated, rather than the prices themselves. As I have said in the previous paragraph, I do not accept that the method of computing the company's prices could be worked out from the information available in the document in question, or that it would now be of use or value to the company's competitors.

Conclusion

39. I do not accept that the information withheld from Mr Smith could now be held to constitute a trade secret, and therefore I do not accept that it should be withheld under section 33(1)(a). As the exemption cited is not upheld there is no requirement for me to consider the public interest in withholding or releasing the information in relation to section 33(1)(a).

Section 36(2) – potential actionable breach of confidence

40. I will next examine whether the information requested by Mr Smith can be withheld under section 36(2), which allows a public authority to refuse to provide information obtained from a third party if its disclosure by the public authority would constitute a breach of confidence actionable in court. This is an absolute exemption which does not require the public authority to consider



whether it is in the public interest to disclose the information.

41. For an actionable breach of confidence to arise there are three factors to consider:
 - a) whether the information has the necessary quality of confidence
 - b) whether the information was received in circumstances which impose an ongoing obligation to maintain confidentiality
 - c) whether disclosure has happened without authorisation by the person who communicated the information, causing damage to that person.
42. The Council has been advised that solicitors acting for the successful tendering company take the view that disclosure of the information requested would constitute an actionable breach of confidence. The Council has accepted this view. It has provided arguments which purport to show that all three tests identified in the previous paragraph have been met.

Does the information have the necessary quality of confidence?

43. As noted above, the Council has stated that each tender consists of three elements: cost of materials; cost of labour; and overheads/profit. All of this information is considered to be confidential for the following reasons:
 - Obtaining the best price for materials can only be achieved by establishing good working relationships with suppliers. Those suppliers would not expect preferential rates given to a particular client to be divulged.
 - Sub-contractors are named in the contract, alongside their rates for the relevant portions of the contract. It is common for sub-contractors to provide different rates to different contractors for the same piece of work and the sub-contractors themselves (whose identity is not common knowledge) would regard this information as confidential.
 - Disclosure of information about the company's overheads and profit margins could result in the company's tendering process being broken down into constituent parts such as cost of preparation of the tenders and maintaining future targets for the business.
44. I have come to the conclusion that these arguments should be discounted. The tender document (the Bill of Quantities) does not contain information about the company's suppliers or sub-contractors. It simply shows the estimated costs for carrying out different elements of the job, including cost of labour. It provides a space where the company could have added a figure for "percentage addition for incidental costs, overhead and profit as defined" in relation to labour and materials, but the company did not submit any such figures. As previously stated, it would not be possible to work out the company's profit margins from the information provided in the Bill of



Quantities without further information about the purchase costs of materials or services from suppliers.

45. Given that the reasons advanced to support this view bear so little relation to the actual contents of the documents withheld, I believe it is questionable whether the information withheld does now have the necessary quality of confidence. I accept, however, that the information provided in the tender was not common knowledge and could only have been produced by the tendering company using the skills and knowledge of its staff.
46. However, it seems to me that any character of confidence now associated with the information in the tender document must relate to the way in which the prices for each element were calculated, rather than the prices themselves (especially after six years have passed). As I have said above, I do not accept that the company's method of computing prices could be established from the information in the documents withheld from Mr Smith, and I therefore believe that there is no strong argument to support the view that the information has the necessary quality of confidence.
47. In passing, I note that although the Bill of Quantities does not list any subcontractors, Mr Smith has named a subcontractor in his information request. This casts some doubt on whether this particular information could still be regarded as having the necessary quality of confidence, if in fact it had been included in the tender as claimed by the tendering company and the Council.

Was there an obligation on the Council to maintain confidentiality?

48. There was no specific obligation of confidentiality in the contract for the works in question. However, the Council has argued that, by its very nature, a tender process is considered confidential. Bids are submitted in sealed envelopes. When the relevant committee of the Council considers the bid, the overall figures are revealed to the public but details of the candidate and a breakdown of the figures in the tender are not disclosed. When a contract is entered into between a public authority and a private company it is implied that the information used in the tender relating to the contract (as well as the contract terms) will remain confidential. The Council was aware that its client had a reasonable expectation that the information provided in the tender (with the exception of the overall figures) would remain confidential.
49. On the basis of the arguments submitted by the Council, it seems that the Council agrees with the successful tendering company that there was a mutual understanding that the information in the tender would be treated as confidential.



50. I accept that all of the information submitted in the tender would have been confidential at the time of submission to and evaluation by the Council. Even after certain pricing information would have come in to the public domain around the time the contract was awarded, I accept that other tender information would have remained confidential. I am not, however, convinced that the Council is still under an obligation to maintain confidentiality in this matter.
51. In reaching this conclusion, I am mindful of the considerations taken into account by the Irish Information Commissioner in the case described at paragraphs 32 - 35 above, all of which point to pricing information losing relevance (and therefore any element of confidentiality) with the passage of time in all but exceptional circumstances. The tender information in this case formed the basis of a contract agreed some six years ago, in 2000. The sensitivity of any information in the tender (and in particular any interest to a potential competitor) is likely to have decreased significantly over that time: the prices quoted by the tendering company would not now be any guide to their submission for any similar tender in future. I take the view that the Courts would be unlikely to uphold an obligation of confidentiality for information which is now only of historical interest.

Would disclosure without authorisation cause harm?

52. The Council argues, for the reasons set out at paragraph 43 above, that any disclosure of the information requested by Mr Smith would be likely to lead to future loss of business for the successful contractor and damage to relationships with suppliers and sub-contractors. As discussed above, I do not accept the relevance of the arguments provided by the Council in relation to the possible harm that would be caused to the company by the release of the information requested.

Conclusion

53. I do not consider that the disclosure of the information by the Council would constitute an actionable breach of confidence under section 36(2) of FOISA and therefore do not uphold the Council's decision to withhold the information about the successful tender under this particular exemption.

Section 33(1)(b) – substantial prejudice to commercial interests

54. The Council has argued that releasing the information about the tenders would cause substantial prejudice to the commercial interests of the successful tendering company. It also raised concerns that disclosure of the information would prejudice the Council's ability to secure best value in future contracts.



Commercial prejudice to the interests of the successful tendering company

55. The Council has argued that the release of the information requested by Mr Smith would cause serious commercial detriment to the successful tendering company, as contracts relating to public sector housing are highly competitive.
56. In my briefing on the exemption in section 33(1)(b) I said:
" in order to claim these exemptions, the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time. Authorities should therefore consider disclosing the information asked for unless it would cause real, actual and significant harm".
57. When asked for more details of the damage that would be caused to the commercial interests of the successful tendering company, the Council responded with the reasons listed in paragraph 43. As noted previously in this decision notice I have considered and rejected those arguments as proof that substantial prejudice is likely to occur if the information is released into the public domain (paragraph 44). In particular I would reiterate that the passage of time has reduced the potential value of the information to any competitors for future tenders, as prices will undoubtedly have changed.
58. I do not accept that the release of the information requested by Mr Smith would cause substantial prejudice to the commercial interests of the successful tendering company. I therefore do not uphold the Council's decision to withhold this information under section 33(1)(b) of FOISA. As I do not consider that the exemption applies to the information withheld, there is no requirement for me to consider whether the public interest favours the release of the information or the withholding of the information. The tender information from the successful company should be provided to Mr Smith.

Information about the unsuccessful tenders

59. The Council submitted no arguments to support its decision that information relating to the unsuccessful tender bids should be withheld under section 33(1)(b). It has stated that it holds only limited information relating to the unsuccessful bids, consisting of the tender summary sheets from each company showing the sum bid for the works, and a letter which went out to each company showing the names of the companies invited to tender and listing the bids in order of value. Given what the Council has advised about its practice of destroying unsuccessful tenders a few weeks after completion of the tender process, I accept that this is the case.
60. I have taken the view that the same arguments apply to this information as apply to the information about the successful tender. Although this



information was provided in confidence and was commercially sensitive at the time of the tender process, it cannot be regarded in this way now. The information itself reveals nothing that would give a competitor any advantage in a similar tendering process in future. The passage of time has decreased the commercial sensitivity of the information. I do not consider that substantial prejudice would be caused to the companies concerned if this information was to be released.

61. I therefore do not accept that the release of the information held by the Council in relation to the unsuccessful tender bids would cause substantial prejudice to the commercial interests of the companies concerned if it was released, and I do not uphold the Council's decision to withhold this information under section 33(1)(b) of FOISA. As I do not consider that the exemption applies to the information withheld, there is no requirement for me to consider whether the public interest favours the release of the information or the withholding of the information. The tender information from the unsuccessful companies should be provided to Mr Smith.

Prejudice to the Council's interests

62. The Council did not argue that disclosure of the information provided by the successful tendering company would affect its own commercial interests, but did raise concerns that disclosure was likely to affect the Council's ability to secure best value, which is a statutory duty.
63. Although I have rejected the arguments for withholding this information under the exemption in section 33(1)(b), and am therefore not obliged to consider the Council's arguments relating to the public interest, the Council has raised issues which I think it is important to address in this decision notice.
64. The Council has argued that the release of the information relating to the successful tender would seriously damage business confidence, in that the company involved is known to be unwilling to have its tender price for the re-roofing works disclosed. This would make it less likely that companies would wish to bid for Council contracts in future, and therefore make it more difficult for the Council to secure best value in awarding contracts.
65. The Council also argued that revealing tender prices for individual parts of contracts would interfere with commercial competition amongst contractors who wish to provide services to Councils, and that in order for best value to be secured, contractors should have no idea what level of tender for particular works might be successful so that tenders are as low as contractors can afford to make them.
66. These concerns were advanced as arguments to show that the public interest would be best served by withholding the information under section 33(1)(b),



although the arguments used to support the use of the exemption in 33(1)(b) referred only to the commercial interests of the successful tendering company and not the Council. Given the importance the Council appears to attach to these arguments, I have considered their relevance to the application of section 30(c) of FOISA.

67. Section 30(c) of FOISA exempts information if its disclosure would or would be likely to prejudice substantially the effective conduct of public affairs. However, even if the Council's arguments were considered in relation to the exemption in section 30(c), my view would remain unchanged that the disclosure of the information withheld from Mr Smith would be unlikely to have the full consequences envisaged by the Council.

68. The Council has argued that disclosure would prejudice its ability to secure best value in future. The Council explained that in accepting a tender it was required to strike a balance between quality and cost in order to ensure that public funds are spent appropriately and that the Council's customers receive best value. The Council believed that in such situations disclosing the Bill of Materials would not ensure effective oversight of this process. It envisaged the possibility that a member of the public might seek out another company who would carry out the works for less than the accepted tender bid. However, the Council would then have to assess the contractor's experience, financial standing, claims history, record of works etc. before engaging them to carry out the work. In the Council's view:

"The delays attendant on that process would make the orderly procurement of public works difficult if not impossible and in all likelihood more expensive because of the time passing between tenders being received by the Council, the opportunity being given to members of the public to find a contractor prepared to do the work for less, the assessment of any other Contractors and the eventual award of the contract to one of them."

69. I do not consider that the scenario outlined by the Council to be in any way realistic. It seems highly unlikely that the Council could be required to withdraw from a contract issued after a successful tender bid on the grounds that a member of the public had found a cheaper contractor who might, after investigation of their experience, financial standing etc., provide better value to the Council's customers. In constructing this argument I feel the Council has overlooked one of the main issues associated with the requirement to secure best value, which is to improve openness and accountability and, through enhanced public scrutiny of its expenditure, increase public confidence in the financial decisions taken by the Council.

70. As noted in paragraph 64, the Council has also argued that the release of the information relating to the successful tender would seriously damage business confidence, in that the company involved is known to be unwilling to have its



tender price for the re-roofing works disclosed. The Council pointed out that the tender was accepted in October 2000, four years before FOISA came into force, and therefore neither the Council nor the company could have anticipated that the tender price for the works might be made public.

71. I accept that at that time of the tender process there may have been a general implicit understanding that information provided in a tender bid and on which a contract was based would not be released into the public domain. It may be that suppliers might initially be deterred from bidding for future tenders if it appears that information provided in confidence may later be released to the public. However, the Council has a responsibility to develop ways of working with external suppliers and companies which takes into account the new information culture which FOISA has introduced. This should include ensuring that existing contractors have a clear understanding of which information, if any, is deemed to be confidential, and that existing confidentiality clauses should not be expected to exempt information from disclosure under FOISA for ever.
72. In this case, after considering the declining commercial sensitivity of the information together with the Council's legal responsibilities under FOISA, I am not prepared to accept the Council's argument that release of the information now will damage business confidence to such an extent that it would seriously affect the Council's ability to attract sufficient tenderers to secure best value. I believe it is clear that the information in question no longer possesses the quality of confidentiality and that a decision to order its release would not imply that all information relating to tenders would automatically be made available on request. I think it unlikely that potential suppliers would be seriously deterred from doing business with the Council on these grounds.
73. I have also considered whether the release of this information might deter companies from submitting tender bids for future work. I accept that this is a risk, but one which is perhaps not as great as the Council might fear. In this decision notice I have stated my view that information supplied during a tendering process can, at least at that time, be confidential in nature. I have also acknowledged that the release of information from tenders could in some circumstances cause substantial commercial prejudice; the fact that in this case I have concluded that no such prejudice would occur should not be taken to mean that in every case involving information about a tender bid I would reach the same conclusion.
74. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code) provides some guidance to public authorities entering into public sector contracts, and states: "The general aim should be to facilitate more effective access to information about the procurement of public services" (paragraph 49). As I noted in



paragraph 71 above, it is the Council's responsibility to develop new ways of doing business with the private sector which take into account the requirements of FOISA and its aim of increasing the openness and accountability of public authorities.

75. The impact of Freedom of Information on procurement practices has also been recognised by the Scottish Procurement Directorate, which has produced guidance on Scottish Public Sector Procurement and Freedom of Information. The guidance recognises that the confidentiality of information and its potential to cause harm if disclosed is likely to alter with the completion of different phases of the procurement process.

Decision

I find that Dundee City Council has not dealt with Mr Smith's request for information fully in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

I find that where the Council stated that information was not held, it was able to demonstrate to me that such was the case. It did not, however, inform Mr Smith that it did not hold the information and therefore did not comply with section 17 of FOISA in respect of that information.

I find that the Council breached section 15 of FOISA in failing to provide Mr Smith with advice and assistance in relation to items f, g, and h from his request, in that it did not advise him that certain information relating to these items was to be found within the information released to him.

I also find that the Council was not justified in withholding information relating to item b of Mr Smith's request under sections 36(2), 33(1)(a) or 33(1)(b) of FOISA and therefore, in respect of this information, that it did not deal with the request in accordance with section 1(1) of FOISA.

I require the Council to provide Mr Smith with the information it holds in relation to the tenders submitted for the roofing works at 28-30 Tullideph Road, namely: the Bill of Quantities submitted by the successful tendering company for the City Road 1st Development Roof Repairs (Phase 1); the tender summary sheets submitted by each company for the roof repairs at St Mary's 13th Development Contract; the Tender Return Sheet; the Summary Sheet from the successful company; and a letter sent to each company after the conclusion of the tendering process listing the companies involved and the bids submitted in order of value.



I am obliged to give Dundee City Council at least 42 days in which to supply Mr Smith with the information as set out above. In this case, I require the Council to take these steps within two months of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
28 February 2006