



Scottish Information
Commissioner

**Decision 057/2006 Mr DH Telford on behalf of VB Contracts
Ltd and East Lothian Council**

Request for due diligence information

**Applicant: Mr DH Telford
Authority: East Lothian Council
Case No: 200500983
Decision Date: 29 March 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 057/2006 Mr DH Telford on behalf of VB Contracts Ltd and East Lothian Council

Request for due diligence information – failure by the Council to respond to the request under section 10(1) of FOISA - failure to issue a notice of review in accordance with section 21 - information subsequently supplied by authority during the course of the investigation – applicant remained dissatisfied - held that all of the information held by the Council in relation to the request has now been supplied to the applicant

Facts

Mr DH Telford acting on behalf of VB Contracts Ltd requested all information pertaining to and a full copy of the due diligence that was obtained or carried out by East Lothian Council (the Council) in respect of both Innovate East Lothian Limited and Ballast PLC trading as Ballast Special Projects. The Council did not respond fully to this request for information and on 14 February 2005 the applicant sought a review. Mr Telford was dissatisfied with the response he received to this request for review and on 21 March 2005 he applied to the Scottish Information Commissioner for a decision.

Outcome

The Commissioner finds that the Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that it failed:

- 1) to respond within 20 working days to Mr Telford's request for information as required by section 10(1) of FOISA
- 2) to respond within 20 working days to Mr Telford's request for review as required by section 21(1) of FOISA
- 3) to issue a notice of review in compliance with section 21(1) of FOISA.

However, the Commissioner finds that the Council has now supplied all information it holds relating to this request to Mr Telford.



Appeal

Should either the Council or Mr Telford wish to appeal against this decision, there is a right to 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 10 January 2005 Mr DH Telford acting on behalf of VB Contracts Ltd wrote to the Council) and requested:
 - All information pertaining to and a full copy of the due diligence that was obtained or carried out by the Council in respect of both Innovate East Lothian Limited and Ballast PLC trading as Ballast Special Projects.
2. The Council responded to this request on 9 February 2005 indicating that the PPP Project Manager was currently reviewing the diligence documentation and that the Council would be able to respond by the end of the current week. Even though this correspondence did not provide Mr Telford with a full response to his request, the letter from the Council included information about his right to seek a review under section 20(1) of FOISA and provided details of who he should contact in that event.
3. Mr Telford did not receive a substantive response to his request by the end of that week.
4. On 14 February 2005 Mr Telford requested a formal review of the Council's failure to provide the information requested and to respond substantively to his request for information.
5. The Council responded to Mr Telford's request for review on 25 February 2005 and supplied a copy of "some financial evaluation information obtained prior to Financial Close in 2002 on Ballast Nedham NV" which it had obtained from PricewaterhouseCoopers (PwC).



6. The Council indicated, however, that some of the information which Mr Telford had asked for and which the Council held within the PwC report might be subject to exemptions from the duty to disclose. The Council indicated that it would be contacting the other parties mentioned in the financial evaluation report to ascertain whether they maintained that the information should not be disclosed, in particular, under section 33(1) of FOISA in that disclosure would, or would be likely to, prejudice substantially their commercial interests.
7. In a letter of 2 March 2005 Mr Telford expressed his dissatisfaction with this response indicating that the information supplied was insufficient and that the information he sought was that relating to Ballast PLC and not to Ballast Nedham NV.
8. Mr Telford received no further response to his request from the Council and on 21 March 2005 he applied to the Commissioner for a decision.
9. The case was allocated to an Investigating Officer.

The investigation

10. Mr Telford's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to the Commissioner only after asking the authority to review its response to his request.
11. The investigating officer contacted the Council on 1 April 2005 informing it that an application had been received from Mr Telford and inviting its comments on the issues raised by the application under section 49(3) of FOISA. The investigating officer also sought certain information from the Council. Given that Mr Telford had not been provided with a full substantive response to his information request the investigating officer also set out the scope of the investigation.
12. The Council was advised that the investigation would focus on two separate matters:
 - whether or not Mr Telford should be supplied with the information requested
 - the manner in which the Council had handled this request
13. The Council was asked to provide the following information:
 - whether, in terms of FOISA, the information requested by Mr Telford would be supplied or withheld.



- where some or all of information was to be withheld, which of the exemption(s) in FOISA applied to the information withheld, why the exemption(s) applied and an analysis of the public interest test in relation to each exemption applied (where appropriate).
- if all information was to be withheld, copies of the information requested.
- If only some of information was to be withheld, two copies of the information requested with the information to be withheld clearly marked.
- copies of any internal documents or correspondence relating to Mr Telford's request for information dated 10 January 2005, or his subsequent request for review of 14 February 2005 and letter of 2 March 2005.
- details of the process followed in responding to Mr Telford's request for review dated 14 February 2005.

Council's submissions

14. The Council responded to this letter on 15 April 2005. The Council indicated that Mr Telford had now been sent a full copy of the due diligence requested. The Council advised that no exemptions had been claimed and that on receipt of this information Mr Telford would have all of the information the Council held relevant to Mr Telford's request.
15. The Council also provided information on the way in which the request had been handled. The Council indicated that its own copy of the letter dated 9 February 2005 contained a different paragraph which purported to enclose a copy of the due diligence report on Innovate and Ballast provided to the Council by PwC. The Council accepted, however, that the copy received by Mr Telford did not include this wording or the report.
16. The Council reported that the PPP Projects Office had been unable to find the report following the receipt of the request for information. The Council did not know whether this was because it had been lost within that Office or whether it was within the Council's records but could not be found. This had not been established. However, the PPP Projects Manager obtained another copy from PwC.
17. The Council reported that it was not clear what had happened to Mr Telford's letter of 2 March 2005 and who had received it. The process followed when Mr Telford's request was first received was not documented. The Council indicated that internal discussions regarding this request were largely verbal.



Subsequent correspondence between the parties following purported compliance with the applicant's request

18. Mr Telford contacted the Commissioner following receipt of the due diligence report supplied by the Council. He indicated that he was dissatisfied with the way in which the Council had handled his request and also with the information provided. He considered the report supplied to simply be a checklist. Where this document referred to information seen by PwC which satisfied them to the consortium's financial viability Mr Telford indicated that he wanted to see that information.
19. Mr Telford also advised that the information supplied by the Council related to a consortium led by a company entitled "Innovate Projects Limited" whereas he was seeking information in respect of a company entitled "Innovate East Lothian Limited" and their consortium member "Ballast PLC Trading as Ballast Special Projects Ltd."
20. In subsequent correspondence Mr Telford indicated that a search of Companies House had found no record of "Innovate Projects Limited." He indicated that he had ascertained that Innovate East Lothian Limited was formed as DUNWILCO (955) Limited on 19 September 2001 and had changed its name to Innovate East Lothian Limited on 25 April 2002.
21. For its part, the Council considered that it had fully complied with Mr Telford's request for information and had supplied him with all information that the Council held relating to his request for information.

Redefined terms of investigation

22. It became apparent in the course of subsequent correspondence between the parties that there was disagreement on the information held by the Council relevant to Mr Telford's request and on the identity of the company about which Mr Telford was seeking information.
23. The investigating officer wrote to both parties to redefine the terms of this investigation. Both parties were advised that the investigation would focus on the Council's statement that the information supplied to Mr Telford was all of the information the Council held relevant to his request. The investigating officer intended to do this by seeking:
 - documentation from the Council confirming the legal status of all companies/bodies referred to in correspondence and in the PwC report
 - information from the Council about the documentation obtained as part of the due diligence process.



24. The Council was asked to supply the Commissioner with the following information:
- documentation (preferably legal documentation) confirming the legal status and relationship of the bodies mentioned in the correspondence and documentation supplied to Mr Telford.
 - information about the documentation the Council originally received as part of the due diligence process; for example, whether it had been provided with information alongside the due diligence report prepared by PwC
 - information pertaining to the due diligence process and who held this information.

Subsequent submissions from the Council: identity of parties

25. The Council advised that there was no separate and specific diligence carried out on behalf of the Council on Innovate East Lothian Limited (the company mentioned in Mr Telford's request) because the Council considered it unnecessary. Innovate East Lothian Limited was formed at or very shortly before the date of Financial Close in the project, which took place on 19 December 2002. In subsequent correspondence the Council confirmed that Innovate East Lothian Limited was incorporated on change of name on 25 April 2002 from an off-the-shelf company.
26. The Council advised that up until that date the company taking the project forward was Innovate Projects Limited. A decision was made by this Consortium to create and use a differently named company belonging to the same Consortium and backed by the same bank funders. This company was Innovate East Lothian Limited.
27. In respect of the Innovate Consortium member, Ballast PLC, trading as Ballast Special Projects Limited, the Council advised that the PwC financial evaluation report evaluated the parent company of Ballast or Ballast PLC, Ballast Nedam NV. The report also gave financial information on Ballast or Ballast PLC.
28. The Council indicated that the Innovate Consortium was incorrectly referred to in the PwC report as "Innovate Projects Limited"; the word "Limited" having been included in error. The Council indicated, however, that the members of the consortium were specified and evaluated by PwC. (In fact, the Council had also referred incorrectly to the Innovate Projects Limited in its submissions to the Commissioner – see paragraph 26 above).
29. The Council supplied certain information relating to the legal identities of the bodies referred to in the due diligence report.



Further submissions from the Council: information pertaining to the due diligence

30. The Council indicated that it had received a financial due diligence report from PwC on each of the three bidders for the Council's PPP Project. The Council enclosed a copy of the report. The Council indicated that the due diligence information was used with other supporting information; for example, technical, legal and educational in the evaluation process which culminated in the Innovate Consortium being selected as the preferred bidder.
31. The Council reported that all of the lodged information was retained and filed in the Project's Data Room. The information relating to the two unsuccessful bidders was eventually removed and relocated to the Council's archive storage but the documents/information relating to the Innovate Consortium had been retained in the Data Room.

Analysis and findings

32. It would be helpful to provide some background to Mr Telford's request. The request relates to the East Lothian Council – Schools and Community Services PPP. This project involved the development of Dunbar Grammar, Knox Academy, Musselburgh Grammar, North Berwick High, Preston Lodge High and Ross High, as well as a community learning centre in Musselburgh and a swimming pool in Prestonpans. One of the members of the Innovate Consortium (which formed the company Innovate East Lothian Ltd) carrying out this project, Ballast PLC, subsequently went into administration.

Identities of legal entities the subject of due diligence

33. The first step in this investigation was to confirm the identities of the parties involved to ensure that the information provided to Mr Telford related to Innovate East Lothian Limited and Ballast PLC trading as Ballast Special Projects as set out in his original request.
34. This process has not been assisted by the Council's initial failure to explain to Mr Telford the relationship between Innovate East Lothian Limited and the Innovate Consortium and the relationship between Ballast PLC and the Innovate Consortium. Confusion has also been caused by PwC incorrectly referring to the Innovate Consortium as Innovate Projects Ltd in its due diligence report and the fact that the Innovate Consortium is also described by the title of Ballast-Innovate. The Council also did not make clear to Mr Telford that PwC was acting as its financial advisers.



35. The Council had supplied Mr Telford with a due diligence report produced by PwC which referred to a company called Innovate Projects Limited. The Council advised that PwC had incorrectly referred to the Innovate Consortium as Innovate Projects Limited in its report. The Innovate Consortium (or Ballast-Innovate) had submitted the bid to undertake this Project. The Innovate Consortium was made up of a number of companies.
36. The PwC report on the pre-qualification bids lists the members of the Innovate Consortium. The list includes Ballast PLC. The PwC report confirms that the parent company of Ballast Nedam NV was assessed.
37. The Council advised that no separate due diligence had been carried out on Innovate East Lothian Limited as it was a company set up by the Innovate Consortium near to Financial Close of this project. The Council provided the Commissioner with the accounts from Innovate East Lothian Limited from 1 October 2002 to 31 March 2004 which demonstrate that there has been recent transactions between Ballast UK PLC and Innovate East Lothian Limited. The accounts also list the transactions and the relationship of that party to Innovate East Lothian Ltd. Ballast UK PLC is listed (along with other members of the Innovate Consortium) as a "Fellow group undertaking of shareholder".
38. From the information supplied to him, the Commissioner understands and accepts that the members of the Innovate Consortium (or Ballast-Innovate) were financially evaluated by PwC. In the case of Ballast PLC the parent company of Ballast Nedam NV was assessed.
39. The Commissioner also understands that it is not unusual for a Special Purpose Vehicle or Special Purpose Entity to be established to carry out a project of this kind and that in such cases, a Shelf Company is often purchased and used. The Commissioner understands that this was the process followed in this case and explains the formation of Innovate East Lothian Limited by the Innovate Consortium.
40. Therefore, for the purposes of this investigation, the Commissioner is satisfied with the explanation provided by the Council in respect of the various entities relevant to this project. By this, he means that he is satisfied that the due diligence exercise was carried out on the members of the Innovate Consortium rather than on Innovate East Lothian Ltd which was set up subsequent to this exercise and was formed from a shelf company. As a result, the due diligence information sought by Mr Telford, in fact, relates to the members of the Innovate Consortium (or Ballast-Innovate) rather than to Innovate East Lothian Ltd.

Information held relevant to Mr Telford's request

41. The second step in the investigation was to ascertain whether Mr Telford had been supplied with all information pertaining to the due diligence exercise as set out in his original request. There was protracted correspondence between the investigating officer and the Council to clarify the information held by the Council relevant to Mr Telford's request.



42. The Commissioner learned from this correspondence that PwC, as financial advisers to the Council, had carried out two evaluations; one at pre-qualification stage and one at a later stage when the number of possible bids had been reduced to three. The Council advised that the pre-qualification evaluation by PwC (*Financial Evaluation of pre-qualification Submissions: February 2001*) (“the February 2001 Report”) was a precondition for potential bidders being invited to tender and therefore was a requirement for progressing to “preferred bidder” status.
43. Mr Telford had been supplied with the section from the February 2001 Report which related to the Innovate Consortium. This section was entitled Appendix F. The Council advised that it did not hold this document at the time of Mr Telford’s request but had obtained a copy from PwC. The Council advised that the other appendices to this document related to the other 7 bidders and were therefore not relevant to Mr Telford’s request.
44. The Council advised that of the 8 consortia that formally lodged an interest at the pre-qualification stage, 3 were selected to submit a bid for the Project. In October 2001 a further financial evaluation was carried out on these 3 bids by PwC *East Lothian Council Schools and Community Facilities PPP Project: Financial Evaluation of Bids of October 2001* (“the October 2001 Report”). On receiving Mr Telford’s request the Council had considered providing Mr Telford with the whole of this report which would have involved releasing information about the other two bidders. On the advice of PwC, however, Appendix F of the February 2001 Report was sent to Mr Telford as being more relevant in respect of the strength of the Innovate Consortium and its suitability regarding bidding for the Project.
45. In response to the Investigating Officer’s query about the relevance of the October 2001 Report to Mr Telford’s request, the Council advised that it would be willing to supply the whole report to Mr Telford with certain financial information redacted. As a result, a copy of this information was subsequently supplied to Mr Telford in a redacted form.
46. Mr Telford had requested all information pertaining to the due diligence exercise. He subsequently advised the Commissioner that where PwC reported that “sufficient information had been submitted to indicate that the candidate is capable of fulfilling the contract” as it did in the February 2001 Report Mr Telford wanted to see this information.
47. The Commissioner therefore asked the Council to advise on the information that PwC would have considered as part of the due diligence process and to indicate whether the Council held any of this information.
48. The Council advised that PwC would have accessed sources outwith the Council to assess the financial strength of the Innovate Consortium. It reported that PwC would have considered the financial model within the bids, copies of which the Council retained in the Data Room. It advised that PwC would also have been speaking to bidders in order to obtain clarification on information within the bids.



49. From the information supplied by the Council, it appeared that the financial content of the actual bids submitted by the Innovate Consortium at both stages were relevant to Mr Telford's request as these were considered during the evaluation process. The Council was asked to indicate whether it held this information and whether it would be willing to supply copies to Mr Telford.
50. The Council advised that it no longer held the Innovate Consortium bid submitted at pre-qualification stage. However, the Council obtained a copy of this document from an external consultant. The Council advised that it was happy to supply Mr Telford with a copy of the section of this submission that provided information on the Innovate Consortium's financial strength as it considered this information to be relevant to Mr Telford's request. Mr Telford was subsequently supplied with a copy of this information.
51. The Council advised that certain information contained in the subsequent Innovate Consortium bid was also relevant to Mr Telford's request. This was material which provided information on the Innovate Consortium's financial strength and strategy. The Council advised that it was happy to provide most of this information but was obliged to withhold certain financial information because it was covered by a confidentiality clause contained in the Innovate Consortium bid relating to the confidentiality of commercially sensitive information.
52. The Council therefore redacted certain information from these documents on the basis that it was exempt by virtue of section 36(2) of FOISA which states that information is exempt if its disclosure by the authority would constitute a breach of confidence by that person or any other person. The Council supplied Mr Telford with a redacted version of this document.
53. On receipt of this information Mr Telford expressed dissatisfaction with the information supplied. He reaffirmed that he was seeking the information submitted "to indicate that the candidate is capable of fulfilling the contract" as recorded in the PwC report.
54. Mr Telford has been supplied with copies of extracts from both bids submitted by the Innovate Consortium which includes information about the Consortium's financial ability to carry out the project. He has also been supplied with the relevant excerpts from the evaluation reports produced by PwC. The Council has advised that Mr Telford has all information relevant to this request.
55. Mr Telford has intimated that he would have expected additional investigations to be carried out into the financial viability of the bidders to fulfil the contract and that reliance would not simply have been placed on the information contained within the bids.



56. As a result, the Commissioner carried out his own research into the due diligence process and the kind of information that will be reviewed. In many cases, the published guidance on this subject concerns the buying and selling of companies. However, this information does confirm that the emphasis is on the company's own financial records. The Commissioner's research confirms that in many cases the due diligence will be carried out by specialists; the legal aspects by lawyers and the financial aspects by financial advisers. It will be for these specialists to identify the information they wish to review as part of this process.
57. In this case, PwC, the Council's financial advisers, were charged with carrying out due diligence on the financial aspects of the bids for this project and presumably would have identified the information they needed to consider as part of this process.
58. The PwC reports actually set out the information reviewed as part of the due diligence exercise. Appendix F to the February 2001 Report refers to information contained within the Innovate Consortium's pre-qualification bid. It also refers to a review of "audited financial statements, Stock Exchange documents and recent Textline information". The Report explains that an assessment of the solvency and financial strength of the principal consortium members (including equity providers) was performed. The Report explains that the principal test is an assessment based upon Dun & Bradstreet ratings, a tool providing business information.
59. The PwC October 2001 Report indicates in section 2.1 that the financial evaluation was based upon the bid submissions responses and subsequent clarification responses. This accords with the submissions made by the Council.
60. The Commissioner notes that Mr Telford has not challenged the redactions made to the material supplied to him. Therefore these were not considered as part of the investigation.

Conclusion

61. The Commissioner is satisfied with the Council's explanation as to why the due diligence exercise relevant to Mr Telford's request was carried out on the members of the Innovate Consortium, including Ballast UK PLC, rather than on Innovate East Lothian Ltd, the company referred to in Mr Telford's request.
62. Mr Telford has been supplied with the relevant excerpts from both PwC reports. He has also been supplied with excerpts from both bids submitted by the Innovate Consortium. The Council has advised that the information PwC would have considered as part of the due diligence exercise would have been the financial models within the bids. The Council advised that PwC would also have made its own external enquiries and discussed the content of the bid with the bidders.
63. In conclusion, therefore, the Commissioner is satisfied that Mr Telford has now been supplied with all information relevant to his request held by the Council.



Subsequent request for information

64. At a late stage in the investigation Mr Telford forwarded further requests for information to the Commissioner which related to a meeting that the Council had had with Ballast Nedam NV concerning its commitment to the Lothian Schools Project. Mr Telford was of the view that these information requests fell within the scope of his original request for information.
65. The Investigating Officer sought the views from the Council on this matter who advised that “the meeting that took place between Ballast Nedam NV and the Council subsequent to Ballast’s press release announcing they were withdrawing from the UK market was not part of any formal due diligence that would take place in respect of financial models, business plans, etc. The meeting was arranged to allow Ballast the opportunity to verbally clarify their position regarding their continued involvement with their three live education PPP projects in the UK, and to confirm that the East Lothian project was one of these projects.”
66. Mr Telford has been advised that, as a result, his new requests do not fall within the scope of his original request for information (and therefore this application). He was advised that he could, of course, request this information directly from the Council. Mr Telford disputes this view and therefore the Commissioner feels it is appropriate to address this matter in his decision.
67. The Commissioner understands that a due diligence exercise is carried out prior to completion of a transaction, whether that it is buying a company or choosing a contractor for a project. It is carried out to establish the state of the company and whether it is worth choosing or purchasing. In this case, the Commissioner understands that the meeting between Ballast Nedam NV and the Council took place in Autumn 2003. Therefore, it post-dated the formal due diligence process carried out by PwC which, as mentioned above, took place in 2001 and Financial Close which took place in December 2002.
68. The Commissioner understands that by the time of the meeting in Autumn 2003 the Innovate Consortium had already been awarded the PPP contract and, as such, the due diligence process had been completed.

Handling of the request by the Council

69. The Council did not respond substantively either to Mr Telford’s request for information or to his request for review within 20 working days. Although the Commissioner is now satisfied that Mr Telford has received all information held by the Council relevant to his request he wishes to comment on the way in which the Council handled this request for information.



70. A public authority should clearly identify the information being supplied to the applicant and explain, if necessary, its relevance to the applicant's request. In some cases, where a volume of information is being provided the Commissioner would expect the authority to enclose a schedule. Where an authority considers only part of or an appendix to a document to be relevant the authority should explain this to the applicant and its context.
71. Likewise where information relates to a body other than the one referred to in the applicant's request, as in this case, the authority should explain the relevance of this information to the applicant's request.
72. In this case, not only did the Council fail to respond within 20 working days but exacerbated Mr Telford's frustration by supplying a document the relevance of which to his request was not immediately evident (an appendix referring to another company). It was also clear from subsequent correspondence that the authority held additional information which was also relevant to the applicant's request.
73. In considering a request for information the authority should not only supply the most relevant information. Instead, FOISA requires it to supply (unless exemptions apply) all information it holds relevant to the request.

Decision

The Commissioner finds that East Lothian Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that it failed:

- 1) to respond within 20 working days to Mr Telford's request for information as required by section 10(1) of FOISA
- 2) to respond within 20 working days to Mr Telford's request for review as required by section 21(1) of FOISA
- 3) to issue a notice of review in compliance with section 21(1) of FOISA.

The Commissioner finds that Council has now supplied all information it holds relevant to Mr Telford's request. He does not require the Council to take any remedial steps in relation to the failures to comply with Part 1 as set out above.

Margaret Keyse
Head of Investigations
29 March 2006

