

Decision Notice



Decision 095/2008 Mr D H Telford on behalf of V B Contracts Ltd and East Lothian Council

Minutes of meetings in respect of Council's PPP Project

Reference No: 200701112

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www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr D H Telford, on behalf of VB Contracts Ltd, requested minutes of meetings from East Lothian Council (the Council). The Council provided copies of the minutes, but redacted some information which it considered to be exempt under section 33(1)(b) of FOISA.

Following an investigation, the Commissioner found that the Council had partly dealt with Mr Telford's request for information in accordance with Part 1 of FOISA. He found that the Council did not hold some of the information Mr Telford had asked for. However, he also decided that information which had been withheld from Mr Telford was not exempt under section 33(1)(b) of FOISA on the basis that its disclosure would not, and would not be likely to, prejudice substantially the commercial interests of any of the parties in question. He therefore ordered the Council to disclose the information to Mr Telford.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 16(1) Refusal of request; 17(1) (Notice that information is not held) and 33(1)(b) (Commercial interests and the economy)

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

Decision 028/2006 - Mr DH Telford on behalf of VB Contracts Ltd and East Lothian Council

<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200502018.asp>

Background

1. On 9 May 2007, Mr Telford, on behalf of VB Contracts Ltd, wrote to the Council requesting the full, unedited minutes of four meetings, and information relating to a particular statement made by the Council in relation to Ballast plc.



2. Mr Telford's 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. VB Contracts Ltd was one of Ballast plc's sub-contractors. The chronology is summarised in paragraph 15 of an earlier decision by the Commissioner *Decision 028/2006 Mr DH Telford on behalf of VB Contracts Ltd and East Lothian Council*.
3. The Council replied to Mr Telford on 7 June 2007 and provided him with:
 - a. Minutes of the meeting of 25 November 2003 with redaction of information which the Council considered to be commercially sensitive;
 - b. A note of a telephone conversation of 28 November 2003 with parts redacted which the Council considered to be commercially sensitive. The Council explained that there had been no meeting on 28 November 2003;
 - c. Minutes of the meeting of 11 December 2003 with redaction of information which the Council considered to be commercially sensitive;
 - d. Minutes of the meeting of 23 January 2004 with the redaction of information which the Council considered to be commercially sensitive; and
 - e. An answer to Mr Telford's question about the statement made about Ballast plc.
4. Mr Telford wrote on 28 June 2007 to the Council requesting it review its decision to withhold parts of the minutes and file notes.
5. On 26 July 2007, the Council notified Mr Telford of the outcome of its review. On review, the Council decided to disclose some of the information which it had originally withheld from Mr Telford, but continued to withhold information from the minutes and file notes which it considered to be exempt.
6. Mr Telford wrote to the Commissioner on 10 August 2007 stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Telford had made a request for information to a Scottish public authority (i.e. the Council) and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

8. On 3 September 2007, the Council was notified in writing that an application had been received from Mr Telford and was asked to provide the Commissioner with specified items of information required for the purposes of the investigation. The Council responded with the information requested and the case was allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, asking it in terms of section 49(3)(a) of FOISA to provide comments on the application and to respond to specific questions on the application.
10. During the investigation, the Council decided that part of the information withheld on review was, due to the time which had elapsed since its creation, no longer commercially sensitive and released this information to Mr Telford.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the information and submissions presented to him by both Mr Telford and the Council and is satisfied that no matter of relevance has been overlooked.
12. Mr Telford was dissatisfied that the Council had originally told him that the meetings of 11 December 2003 and 23 January 2004 had not been minuted. Given that minutes had now been provided to him for these meetings, he asked the Commissioner to investigate why he had been told the minutes did not exist.
13. The Council explained to the Commissioner that it thought that it had sent Mr Telford this information and apologised for this oversight. The Council stated that it did not have copies of any meetings which had taken place between Innovate and their partners (for example, Lloyds, Ballast plc, Balfour Beatty) which the Council did not attend, and this was what it had referred to when it had told Mr Telford that it did not hold minuted information.

Section 17 – Notice that information is not held

14. In his application, Mr Telford stated that he was dissatisfied that the Council had not provided him with all of the information he had requested. He noted that the minutes of the meeting of 11 December 2003 contained a reference to an explanation which was to be given in writing in respect of Innovate's decision to make a deal with Ballast rather than to pursue them legally. Mr Telford considered that this written explanation was pertinent to his request, but that he had not been provided with this written explanation.



15. The Council confirmed several times to the Commissioner that it does not hold the written explanation referred to in the minutes and stated that it disagreed with Mr Telford's comment that the Council had lost such an explanation.
16. The issue which the Commissioner must decide is whether, at the time of Mr Telford's request, the Council held this written explanation.
17. This issue must be decided on the balance of probabilities. In considering the balance of probabilities, the Commissioner will consider all relevant factors, including the quality of the public authority's analysis of the request, the scope of any search for the information requested, the rigour and efficiency with which it was conducted and any explanation as to why the information would not normally be held.
18. The Council was asked to explain why, in the light of specific mention in the minutes of a document, it claimed that no such document is held.
19. The Council stated that the minute was a verbatim record of a meeting and that it was possible that the minute had not been circulated to all attendees or accepted in the formal sense as a true record. It was drawn to the Commissioner's attention that the comment about a written explanation being provided to the Council was a remark made by an employee of Innovate, and not by an official of the Council. The Council said that if that remark had been acted upon by Innovate, and a written explanation prepared, it had not been shared with the Council.
20. As to why this document was not requested by the Council from the person who made the remark, the Council explained to the Commissioner, as it had to Mr Telford, that it did not have a contractual relationship with Ballast, but rather that Ballast had a contractual relationship with Innovate. As a consequence, the inclusion of Ballast's liabilities in any rescue package was an issue for Innovate and their partners, not for the Council.
21. The Council explained that searches had been carried out for information falling within the scope of the request by the Council employee who had attended the minuted meeting and who was responsible for this PPP project. The employee searched the Council's records of this PPP project. The Commissioner accepts that the relevant documents were therefore searched by a Council official with expertise in this area and with knowledge of the subject matter.
22. The Commissioner regards the scope of the Council's search as reasonable and, while noting Mr Telford's point that the Council later located records which it had originally told him did not exist, there is nothing in the Commissioner's investigation to suggest that there was any intention to mislead Mr Telford. He therefore accepts that this was an oversight by the Council.



23. The Commissioner also takes note of the context of the meeting and the written explanation which is referred to in the future tense (“will prepare”). The Commissioner notes the Council’s explanation about the various contractual relations amongst the parties at the meeting, the extent of the Council’s interest in the details of the rescue package and that the comment recorded about the written explanation is from someone outwith the Council attending the meeting. As such, the Council would have little control regarding the creation of such a document. Mr Telford’s point that the Council *should have* obtained a copy does not, by itself, assist in deciding whether the Council ever held a copy of such a document (if, in fact, it was ever prepared).
24. Having considered the submissions made by the Council and Mr Telford, the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not at the time of Mr Telford’s request) hold the written explanation in question.

Section 33(1)(b) – Commercial interests and the economy

25. During the investigation, the Council confirmed that it had relied on the exemption in section 33(1)(b) of FOISA to withhold information from Mr Telford (see the Commissioner’s comments on technical breaches of FOISA, below). Section 33(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). The exemption in section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA.
26. Some of the information originally withheld from Mr Telford in terms of section 33(1)(b) was disclosed by the Council during the investigation, on the basis that it was no longer exempt. However, there remained a small part of the information which the Council continued to claim fell within the terms of this exemption.
27. When relying on the exemption in section 33(1)(b) of FOISA, an authority needs to demonstrate whose commercial interests would be, or would be likely to be, prejudiced substantially by disclosure, the nature of those commercial interests and how these interests would be prejudiced substantially.
28. During the investigation, the Council identified several persons whose commercial interests would, according to the Council, be likely to be prejudiced substantially if the information redacted from the minutes were to be disclosed. These persons included the Innovate Consortium (which included Lloyds TSB, who were the funders of the East Lothian Schools PPP project).



29. The Council emphasised that PPP projects were highly competitive and explained that a person putting forward a bid for such a project would invest a substantial amount of time and resources in making the bid. For this reason, the Council said, disclosure of information which revealed commercial aspects of a tender may give a competitor an advantage. The Council explained the distribution of risk and profit for such projects and took the view that disclosure of certain information, even after four years, would give a competitor an advantage in this market and would substantially prejudice bodies, including Innovate and Lloyds TSB, which were still involved in such a market. In particular, the commercial interests of these persons would, or would be likely to be, prejudiced substantially by their relative strengths and/or weaknesses in respect of the tendering exercise if the information were made public.
30. The Council said that it had sought Innovate's and Lloyds TSB's view on the withheld information and they considered this information still to be commercially sensitive.
31. The Commissioner is satisfied that the interests of the persons identified by the Council are sufficiently commercial in character for commercial interests to be engaged for the purposes of section 33(1)(b) of FOISA. He accepts that the Council has identified sufficiently the persons whose commercial interests might be harmed by disclosure and the nature of those commercial interests.
32. The Commissioner will now consider the information withheld and whether the Council has provided sufficient evidence of why disclosure would, or would be likely to, prejudice substantially the identified interests in terms of section 33(1)(b).

File Note of meeting of 25 November 2003

33. The only information now withheld from this minute relates to the amount of Third Party Income (TPI) guarantees. The Council withheld this information on the basis that it was commercially sensitive and that disclosure would prejudice the competitiveness of Innovate in bidding for future contracts. The Council considered that Innovate's use of a guaranteed TPI is innovative and that it was not aware of any other education PPP project reaching procurement stage which had featured anything similar.
34. The Commissioner must decide not just whether this information is commercially sensitive, but whether its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. In this case, the Council has stated that disclosure would prejudice Innovate's competitiveness in bidding for PPP projects. However, the Commissioner is of the view that the nature and the extent of the harm to Innovate have not been substantiated by the Council. Whether or not the use of a guaranteed TPI was a unique and innovative feature at the time the tender was drawn up, the fact that the tender included such a feature has been disclosed in other material made available to Mr Telford. Furthermore, the fact that the TPI guarantee existed was already in the public domain long before that (see for example *Recycling PPPs: a study of the UK Secondary Market* in PPP- InDepth April/May 2006 [http://www.cityandfinancial.com/assets/File/Sample_Issue6%20WEB\(1\).pdf](http://www.cityandfinancial.com/assets/File/Sample_Issue6%20WEB(1).pdf)). No evidence has been provided to show that this disclosure has had any harmful effect on Innovate or any other person.



35. The remaining issue, then, is whether revealing the actual amount of the TPI Guarantee would, or would be likely to, prejudice substantially Innovate's commercial interests in respect of future PPP bids. It is not at all clear why this would be so. The sum is particular to the specific contract. The document from which this figure is redacted was already more than three years old when Mr Telford made his request in 2007, and reflects a sum which had been agreed with the Innovate Consortium as far back as 2002. The basis on which the income guarantee has been calculated is not apparent from the sum alone. No information has been provided to the Commissioner as to whether Innovate is currently making bids for contracts in which TPI Guarantees feature. However, even if this were the case, it seems unlikely to the Commissioner that the disclosure of a figure specific to a particular project, agreed some six years in the past, would, or would be likely to, prejudice substantially Innovate's commercial interests by adversely affecting its ability to win future PPP contracts.

The File Note of meeting of 23 January 2004

36. On page 6 of 9 of the note of this meeting, the Lloyds TSB figures on outstanding debt, equity bridge, net exposure, bond and cash settlement were redacted because they were linked to the original financial model and to the rescue package which Lloyds TSB, Innovate and Ballast were trying to agree. The Council submitted that it considered this information to be commercially sensitive as it is related to how Lloyds TSB structures the financing of PPP bids, which was a critical feature of bid costs and project viability.
37. The Commissioner has recognised in previous decisions (for example *Decision 034/2006 Mr David Smith of Pentland Homeowners Association and Dundee City Council*), that the disclosure of information from tenders could, in some circumstances, cause substantial prejudice to commercial interests. Conversely, he has also recognised that the commercial sensitivity of information tends to decline over a period of time.
38. The information in question relates to the tender and is recorded in minutes from 2003 and 2004. The Commissioner notes that the information is not a detailed breakdown, as would be found in a financial model, and also that a substantial time has elapsed since these figures were created or recorded. The Commissioner does not accept that the Council has sufficiently evidenced the advantage a competitor would get with this information, or how the disclosure of the information would, or would be likely to, prejudice substantially, the commercial interests of Lloyds TSB, particularly given that the information is particular to this project and was, at the time of Mr Telford's request, well over four years old. As a consequence, it is very unlikely that a competitor could gain an advantage from this information.
39. Furthermore, the Commissioner has also noted that some of the figures withheld from Mr Telford in this document have already been disclosed to him by the Council in other documents. This not only raises the question as to whether the information is actually exempt under FOISA, but also casts doubt on the Council's claim that the release of this information would, or would be likely to, have a substantially prejudicial effect given that no evidence of harm from the partial release of this information has been suggested or evidenced.



40. The Commissioner is not satisfied that the Council has evidenced that disclosure of the information in the minutes of 23 January 2004 would, or would be likely to, prejudice substantially the commercial interests of Lloyds TSB.
41. In conclusion, therefore, the Commissioner has determined that the information redacted from the minutes of 25 November 2003 and of 23 January 2004 is not exempt under section 33(1)(b).
42. Given that he has found that the exemption does not apply, he is not required to go on to consider where the public interest test contained in section 2(1)(b) of FOISA.

Technical matters

43. Where a public authority refuses to disclose information on the basis of one of the exemptions in Part 2 of FOISA, section 16(1)(c) of FOISA requires the public authority to specify the exemption in question.
44. The Council failed to specify which exemption it was relying on to withhold information from Mr Telford when responding to his initial request for information and did not correct this error when responding to his request for review. On both occasions, the Council simply advised Mr Telford that the information was “commercially sensitive” without specifying the actual exemption which it considered applied to the information.
45. It is important that public authorities comply with the requirements of section 16 when responding to information requests so that applicants know the basis on which information is being withheld from them.

DECISION

The Commissioner finds that East Lothian Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Telford.

The Commissioner finds that the Council was correct to state that it did not hold a written explanation of the rescue package

However, the Commissioner finds that the information which the Council withheld from Mr Telford (contained within the minutes of 25 November 2003 and 23 January 2004) is not exempt under section 33(1)(b) of FOISA. The Commissioner therefore requires the Council to provide Mr Telford with an unredacted copy of the minutes of 25 November 2003 and 23 January 2004, by **4 October 2008**.

The Commissioner also notes that the Council failed to comply with section 16(1)(c) in responding to Mr Telford’s information request. However, he does not require the Council to take any action in response to this failure in response to this particular application.



Appeal

Should either Mr Telford or the Council wish to appeal against this 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
19 August 2008



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which –

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.



17 Notice that information is not held

(1) Where-

- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

33 Commercial interests and the economy

(1) Information is exempt information if-

- (a) ...
- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).