

Decision Notice



Decision 122/2009 Mr Alex Neil and South Lanarkshire Council

Financial Model

Reference No: 200801339

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www.itspublicknowledge.info

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Summary

Mr Neil requested from South Lanarkshire Council (the Council) a financial model held in connection with the Council's Public Private Partnership (PPP) schools project. The Council responded by stating that the information was withheld under sections 33(1)(b) and 36(2) of FOISA. Following a review, Mr Neil remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Neil's request for information in accordance with Part 1 of FOISA. He found that the information was properly withheld under section 36(2) of FOISA, on the basis that it was information supplied by a third party and disclosing it would constitute a breach of confidence which could give rise to a court action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); section 15(1) (Duty to provide advice and assistance) and 36(2) (Confidentiality).

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

Background

1. On 18 June 2008 Mr Neil, who had previously received a copy of a Project Agreement and Schedules (the Contract) between the Council and InspirED relative to SLC's PPP schools project, wrote to the Council requesting the following information:

"I would appreciate if you could send me the financial model agreed between the parties prior to the execution date as updated from time to time in accordance with the terms of the agreement, for the purposes of calculating the unitary charge which is referred to in Schedule part 7 under 85.4 Contractor to provide full details and Schedule part 7 section b Unitary Charge Adjustment." [see paragraph 10 below]
2. The Council responded on 18 July 2008, stating (with explanations) that the information requested was exempt in terms of sections 33(1)(b) (Commercial interests and the economy) and 36(2) (Confidentiality) of FOISA.



3. On 31 July 2008, Mr Neil wrote to the Council requesting a review of its decision. On the basis that the Contract was entirely funded by taxpayers' money, he argued that taxpayers were entitled to know the relevant financial models. He also believed there to be ample precedent for disclosure. He suggested that the main reason for confidentiality was because disclosure might expose the true cost of the project and therefore show it had been poor value for the taxpayer: he did not believe this to be a valid reason for refusal.
4. The Council notified Mr Neil of the outcome of its review on 29 August 2008, upholding its original decision to withhold the information under the exemptions in sections 33(1)(b) and 36(2) of FOISA.
5. On 11 September 2008 Mr Neil wrote to the Commissioner, 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. He commented that he believed the information requested should be in the public domain.
6. The application was validated by establishing that Mr Neil had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 30 September 2008, the Council was notified in writing that an application had been received from Mr Neil and asked to provide the Commissioner with any information withheld from the applicant. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to Mr Neil's request, with particular reference to the requirements of sections 33(1)(b) and 36(2). The Council confirmed its reliance on sections 33(1)(b) and 36(2), adding that it also wished to rely on the exemption relating to trade secrets in section 33(1)(a) of FOISA. Further communications in relation to the financial model followed. The Council's arguments will be considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Neil and the Council and is satisfied that no matter of relevance has been overlooked.
10. On 21 June 2006 the Council concluded the Contract with InspirED for the delivery of its Secondary Schools Project, the then annual Unitary Charge being £29.012m. The Contract contains schedules and at Schedule Part 7, Section B it states;
- UNITARY CHARGE ADJUSTMENT**
1. *Where, in terms of the Agreement [i.e. the Contract], an alteration of the Unitary Charge is expressly directed to be made pursuant to section B of Schedule Part 7, the Unitary Charge shall be adjusted in the Financial Model to ensure that:*
 - 1.1 *the minimum and average Debt Life Cover Ratio as calculated in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and*
 - 1.2 *the minimum and average Forecast Annual Debt Service Cover Ratio as calculated in the Financial Model as a result of the relevant adjustment is maintained at the same level of such ratio in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and*
 - 1.3 *the Blended Equity IRR as calculated in the Financial Model as a result of the relevant adjustment is maintained at the same level of such return in the Financial Model in effect immediately before the relevant re-running of the Financial Model.*
 2. *On each and every occasion that the Financial Model is adjusted pursuant to this Section B of Schedule Part 7 there shall be delivered to the Authority [i.e. the Council] a printed copy of the Financial Model (and associated workbook) as rerun as a result of the relevant adjustment together with one copy on computer disc (complete with all formulae and data) together also with a certificate in terms acceptable to the Authority (acting reasonably) from the auditors of such Financial Model.*
11. The Council submitted that the Financial Model had been developed for InspirED by a company called CICB World Markets plc (CICB), which had invested considerable time, expense and effort in its creation. It also submitted that the model was the copyright of CIBC, which had developed, refined and checked it over a period in excess of 10 years. It argued that the model was exempt under section 36(2) of FOISA.



Section 36(2) - Confidentiality

12. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
13. In relation to section 36(2), the Commissioner's *Decision 181/2006 Ms Helen Puttick of the Herald and Greater Glasgow NHS Board* recognised that a two-stage test must be fulfilled for this exemption to apply. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person.
14. In support of its application of section 36(2) the Council stated that the Financial Model had been supplied to the Council by another person, namely InspirED. The Council did not consider itself to have played any role in the preparation of the Financial Model, particularly in relation to the formulae and information about the cost projections of InspirED. The Commissioner accepts this in the circumstances and consequently is satisfied that the first part of the section 36(2) test has been fulfilled.
15. In considering the second part of the test, the Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy this second element to this test. These are:
 - a. the information must have the necessary quality of confidence;
 - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - c. unauthorised disclosure must be to the detriment of the person who communicated the information.
16. Having considered the information requested by Mr Neil and the arguments put forward by the Council, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence, in that the information is not common knowledge and could not readily be obtained by Mr Neil through any other means.
17. The Council also referred to Clause 59.1 of the Contract, which provides that the parties shall keep "all matters relating to the Agreement and the Project Documents" confidential. It considered this obligation to include the Financial Model and consequently believed it to have been received in circumstances which imposed an obligation on it to maintain confidentiality.



18. The Commissioner notes that the Contract makes explicit provision for the Financial Model in a number of places, including Schedule Part 7 referred to above and Clause 4.48 (which provides for its initial delivery to the Council). In the circumstances, the Commissioner accepts that the Financial Model and its adjustment are matters relating to the Agreement for the purposes of Clause 59.1.
19. Clause 59.2 of the Contract lists "permitted disclosures" when clause 59.1 shall not apply, including (Clause 59.2.11.3) "any disclosure for the purposes of ... responding to a request for information under [FOISA] in accordance with Clause 59.2A.1 (Freedom of Information) below". Clause 59.2A.1, as would be expected, relates to the Council's exercise of its obligations under FOISA, so Clause 59.2.11.3 would not permit the disclosure of information to which an exemption in Part 2 of FOISA had been properly applied. The section 36(2) exemption, therefore, still requires to be considered. Having taken account of all relevant provisions of the Contract, therefore, the Commissioner is satisfied that the Financial Model, was subject to an obligation of confidentiality when the Council concluded the Contract.
20. The Commissioner notes, however, that this information was requested approximately two years after the Contract was concluded and has to consider whether that obligation of confidence remained in force when Mr Neill's request was dealt with and the subsequent review carried out. In this regard, the Commissioner has taken into account the views of the Information Tribunal in the case of *Derry City Council v The Information Commissioner (EA/2006/0014)*, where it stated, when commenting on the suggestion that an implied obligation of confidence would end after a limited time period, that
"In our view the effect of the obligation, however created, would last until the information in question had either passed into the public domain or had ceased to have commercial significance." (para 34(d)).
<http://www.informationtribunal.gov.uk/Documents/decisions/DerryCityCouncilVInfoComm11Dec06v9307.pdf>
21. As indicated above, the Commissioner is satisfied that the withheld information had not passed into the public domain by the time of Mr Neil's request or that of the subsequent review. It was also the subject of a clear obligation of confidentiality in the Contract. Noting that Mr Neil was seeking the Financial Model "as updated from time to time in accordance with the terms of the agreement" and having considered the relevant provisions of the Contract and the Council's submissions (including those in respect of detriment addressed in greater detail below), the Commissioner is satisfied that the information concerned would have retained commercial significance at that time. It was clearly still a living document and as such part of the operation of the Contract. The Commissioner can see no basis for determining that the provisions of Clause 59.1 did not continue to apply.
22. The Commissioner is therefore satisfied that the information was communicated in circumstances that created an obligation of confidence which was still in existence at the time this request was made and at the time the review was carried out.



23. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence (in that respect, the test of detriment is different from establishing whether, for example, disclosure would prejudice substantially the commercial interests of any person when considering the exemption at section 33(1)(b) of FOISA).
24. Here, it is clear that the Council believes disclosure would be detrimental to the interests of InspirED, who provided the information to the Council (and indeed CICB, who designed the Financial Model). It is also clear from information provided in the course of the investigation that this view is shared by InspireED, whose consent to disclosure was sought and declined.
25. The Council intimated that the release of the Financial Model would or would likely to prejudice the commercial interest of InspirED's in that it would have significant commercial interest and value to its competitors. The Financial Model would, the Council argued, provide a competitor with the means to replicate and/or produce a more competitive model, or be used to gain a competitive commercial advantage, which would prejudice substantially the commercial interests of InspirED and its shareholder organisations.
26. Specifically the Council submitted that information within the model, such as investors' Internal Rate of Return (IRR), was commercially sensitive and could be used by InspirED's competitors to gain a competitive advantage by undercutting the IRR, thus prejudicing its commercial interests substantially. Discussions with the Council and InspirED explained in some detail the significance of the various elements of the Financial Model, particularly when taken collectively.
27. The Commissioner notes that the Financial Model consists of very lengthy and detailed computer spreadsheets, which include provision for the various details listed at paragraph 10 above in relation to Schedule Part 7, Section B, and details of assumptions, calculations, methodologies and projections applicable over the term of the contract.
28. The Commissioner accepts that the Financial Model is a tool which was being used by InspirED to make significant financial calculations in relation to the contract, that release to the public, which would include competitors, would be detrimental to InspirED, and consequently that the third requirement of an actionable breach of confidence is met.
29. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence above are met in this case, given the nature of this particular Financial Model.
30. Whilst the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is known as the public interest defence.



31. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
32. In this case, the Council stated that it could not identify any public interest defence which would justify the release of the information requested. In relation to the awarding of the contract, the Council drew the Commissioner's attention to its Executive Committee report of 2 February 2005, which is published on the Council's website, indicating that the award of the contract was not based on the terms of the Financial Model but rather on the amount of the Unitary Charge (which was determined without using the Financial Model) and the quality of the successful bid.
http://www.southlanarkshire.gov.uk/portal/page/portal/SLC_PUBLICDOCUMENTS/EDUCATION_DOCUMENTS/Schools%20documents/SECONDARY%20SCHOOL%20MODERNISAT%202.PDF
33. In coming to a decision on this matter, the Commissioner has taken account of the submissions made by Mr Neil in relation to the public interest. Mr Neil noted that the Contract had been awarded two years prior to his request for information and argued that disclosure was in the public interest, to enable the public to see what value for money had been obtained for the expenditure.
34. While there may be a general public interest in economy, efficiency and effectiveness in the expenditure of public funds and more particularly in transparency and fairness in the award of public contracts, there has been no suggestion in this case of wrongdoing, or specific concern over the awarding of the contract in question or the price being paid for it by way of an annual Unitary Charge. The Commissioner accepts that the annual Unitary Charge, which represents the level of public expenditure on this particular project, has been made available to the public by the Council. There is, on the other hand, the strong public interest in the maintenance of confidences.
35. In considering this matter, the Commissioner also considered previous relevant decisions by the United Kingdom Information Commissioner and in particular paragraph 37 of *Decision FS50142318 - Somerset NHS Primary Care Trust*, which states:
"However the Commissioner is not convinced that the disclosure of information illustrating how the Service Provider arrived at the prices contained in the contract, details of its projected costs, profits, cash flow and tax liability would be of great assistance to the public in assessing whether public money was being spent wisely. It is the overall pricing structure, rather than how those prices were arrived at, which would have been of most significance in assessing the value for money of what was being proposed. Whilst the disclosure of this information might have provided some assistance in assessing whether the contract for this particular treatment centre was providing value for money, the Commissioner is not convinced it would have made a significant contribution."
http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50142318.pdf)
36. Having considered all the arguments, therefore, the Commissioner does not consider there to be a reasonable argument in this case for the release of confidential information on public interest grounds and in this instance is satisfied that the Council correctly withheld the information under section 36(2) of FOISA.



Section 33(1)(a) and (b) - Commercial interests and the economy

37. The Council also applied the exemption in section 33(1)(a) and (b) of FOISA to certain information. As the Commissioner has found all of this information to be exempt and correctly withheld under section 36(2) of FOISA, he is not required to (and will not) go on to consider the application of section 33(1)(a) and (b) in this case.

Recent Court of Session Opinion

38. The Commissioner notes that the information request by Mr Neil was for a copy of a document. He notes that in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
39. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Neil and the Council that the Council questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the Council has subsequently had with the Commissioner that the Council was unclear as to what the information requested sought.
40. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.

DECISION

The Commissioner finds that South Lanarkshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Neil.



Appeal

Should either Mr Neil or South Lanarkshire 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
02 November 2009



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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...



36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.