

# Decision Notice



Decision 005/2010 Leckie and Leckie Limited and the Scottish Qualifications Authority

Tender documentation

Reference No: 200900582  
Decision Date: 20 January 2010

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**

Scottish Information Commissioner

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



## Summary

Leckie and Leckie Limited (Leckie and Leckie) requested from the Scottish Qualifications Authority (the SQA) a copy of the tender submission and pre-qualifying questionnaire for the company awarded the contract to publish past examination papers. The SQA responded by providing some information to Leckie and Leckie, but relied on the exemptions in sections 33(1)(a) and 38(1)(b) of FOISA for withholding certain information. Following a review, as a result of which the SQA also applied the exemption in section 33(1)(b) of FOISA to the withheld information, Leckie and Leckie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SQA had dealt with Leckie and Leckie's request for information in accordance with Part 1 of FOISA, having applied the exemption in section 33(1)(b) correctly on the basis that disclosure of the withheld information would be substantially prejudicial to the commercial interests of the successful bidder. Therefore the Commissioner did not require the SQA to take any action.

## Relevant statutory provisions and other sources

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15 (Duty to provide advice and assistance); 33(1)(b) (Commercial interests and the economy).

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 13 January 2009, Leckie and Leckie wrote to the SQA to request the following information:
  - a. A copy of Bright Red Publishing's (the successful tendering company's) tender submission.
  - b. A copy of Bright Red Publishing's (the successful tendering company's) completed pre-qualifying questionnaire.



2. A response was provided by the SQA on 9 February 2009. Within its response, the SQA provided redacted versions of the two requested documents to Leckie and Leckie. The SQA relied on the exemptions in sections 33(1)(a) (which relates to trade secrets) and 38(1)(b) (which relates to personal data) of FOISA for withholding certain information from them.
3. Leckie and Leckie wrote to the SQA on 17 February 2009 requesting a review of its decision. In particular, Leckie and Leckie explained that it was comfortable with not having sight of the information the SQA considered to be personal and fully accepted its opinion on this matter. However, Leckie and Leckie went on to explain that it disputed the SQA's decision to withhold other information under the exemption in section 33(1)(a). It believed that the contract had been awarded with an unacceptably high level of risk and sought to be in a position to assess fully the transparency of the procurement process. Leckie and Leckie also highlighted a section in the pre-qualification questionnaire used for this procurement, which stated that the SQA might be required to disclose information in the questionnaire response in line with FOISA.
4. The SQA notified Leckie and Leckie of the outcome of its review on 17 March 2009. With its response the SQA provided certain further information to Leckie and Leckie which it had previously redacted. With this exception, it upheld its position that the information should continue to be withheld. The SQA relied on the exemption in section 33(1)(b) for withholding the information.
5. On 25 March 2009, Leckie and Leckie wrote to the Commissioner, stating that it was dissatisfied with the outcome of the SQA's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Leckie and Leckie 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 1 April 2009, the SQA was notified in writing that an application had been received from Leckie and Leckie and asked to provide the Commissioner with any information withheld from it. The SQA responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SQA, 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 SQA was asked to provide submissions to justify its reliance on the exemptions in section 33 of FOISA and to clarify which of these exemptions it was seeking to rely on in withholding the information.
9. A full response was received from the SQA.



10. Further correspondence was entered into with the SQA during the course of the investigation.
11. During the course of the investigation Leckie and Leckie explained that it was not concerned about receiving certain of the information which had been redacted from the pre-qualification questionnaire. Therefore the Commissioner will not consider the SQA's redaction of bank account details or a bank employee's telephone number in the decision notice.
12. All relevant submissions received from both the SQA and Leckie and Leckie will be considered in the Commissioner's analysis and findings below.

### **Commissioner's analysis and findings**

---

13. 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 Leckie and Leckie and the SQA and is satisfied that no matter of relevance has been overlooked.

#### **Recent Court of Session Opinion**

14. The Commissioner notes that the information request by Leckie and Leckie was for copies of documents. 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.
15. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Leckie and Leckie and the SQA that the SQA questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the SQA has subsequently had with the Commissioner that the SQA was unclear as to what the information request sought.
16. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.



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

17. The SQA has relied on the exemption in section 33(1)(b) for all of the information that has been withheld within the invitation to tender for a contract document and the pre-qualification questionnaire. The information which has been withheld in these documents generally falls into the following areas:

Information redacted from pre-qualification questionnaire:

- Technology used

Information redacted from invitation to tender for a contract document under:

- Amount of finance invested by a sub-contractor in a specified area
- Strategy and detailed proposals for marketing and sale of products
- Pricing structure
- Production and distribution arrangements
- Detailed timescales for implementation
- Contingency planning

18. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (the definition of “person” includes a public authority). This is also a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.
19. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify whose commercial interests would be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Generally, if substantial prejudice is being claimed to the interests of a third party, the views of that third party will be relevant (although the final decision on disclosure must be one for the authority itself).
20. The SQA argued that the commercial interests of the consortium led by Bright Red Publishing Ltd would be substantially prejudiced by disclosure of the redacted information, as it was involved in a commercial venture (a contract with the SQA for the publication of a product to be sold to a targeted audience).



21. In justifying its contention that premature disclosure of the withheld information (i.e. disclosure in response to Leckie and Leckie's request or request for review) would substantially prejudice the consortium led by Bright Red Publishing Ltd, the SQA submitted in particular that should any marketing strategy become known to the general public prior to the commencement of any campaign, it would lessen the effect of the campaign and this in turn would have a direct impact on sales and therefore on projected income. It was particularly concerned that a competitor offering a similar/alternative product would be in a position to launch a counter campaign. It pointed out that the customer base for the product was limited and it was unlikely that any one customer would purchase both the successful bidder's product and a competitor's alternative: as a consequence, any detrimental effect would have a greater impact. There were limits to what the successful consortium could do to mitigate its losses in this event, given the nature of the product and the timing of the contract implementation.
22. In considering the SQA's reliance on the exemption, the Commissioner has first considered whether the consortium led by Bright Red Publishing Ltd have relevant commercial interests and he is satisfied that they do. Commercial interests will generally relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of generating revenue. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that these requirements are met in relation to the consortium's performance of the contract let by the SQA.
23. Having considered the withheld information in both the pre-qualification questionnaire and the invitation to tender document, together with the submissions from the SQA, the Commissioner had had regard to the views he has expressed in numerous decisions and reiterated in his briefing *Commercial interests and the economy* (which relates to then section 33 exemptions). This says:

"The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.

FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied."
24. The Commissioner has also been mindful of when the contract for the publication of past examination papers was awarded to the successful tenderer and when work commenced on the contract itself. In its submissions, the SQA has explained that the contract was awarded to the successful company on 19 December 2009, a contract being signed on 22 January 2009 with work commencing on 1 February 2009. The implementation timetable continued throughout 2009, however, with key elements of the work remaining to be started when the SQA carried out its review.





25. Having considered the withheld information and all relevant submissions, the Commissioner is satisfied that it would be exempt under section 33(1)(b). The Commissioner accepts that release of all of the information at the time the SQA dealt with Leckie and Leckie's request for information, or its request for a review, would (or would be likely to) prejudice substantially the commercial interests of the consortium led by Bright Red Publishing Ltd.
26. The Commissioner takes this view as the withheld information is very specific about the strategies the successful tenderer would employ should the contract be awarded to them, and the unique approach they would take to implement those strategies and thereby fulfil the contract. At the time of the SQA's review (completed on 17 March 2009) the contract had only relatively recently been awarded to the successful company and work had only recently commenced on certain parts of the contract. The implementation process was still at an early stage and in certain respects had not commenced. The Commissioner accepts the submissions of the SQA that were the redacted information to have been disclosed to Leckie and Leckie at that time, there was a clear risk that it could have been used in a manner which would be detrimental to the consortium's ability to generate income from their product, which would in turn have been detrimental to the successful consortium's commercial interests. The Commissioner is satisfied that such harm would have met all the requirements for substantial prejudice set out in paragraph 23 above. The Commissioner also accepts that certain information in respect of a third party's finances, while not necessarily capable of causing substantial prejudice in the manner argued by the SQA, was clearly of considerable sensitivity at the relevant time and would have been likely, if disclosed, to cause substantial prejudice to that party's commercial interests.

#### *Public interest test*

27. As the Commissioner is satisfied that all of the redacted information under investigation has been correctly withheld under the exemption in section 33(1)(b) of FOISA, he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA. He must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
28. In its application to the Commissioner, Leckie and Leckie put forward its concern as to the winning consortium's ability to deliver the contract and its view that in consequence the contract had been awarded with an unacceptably high level of risk.
29. When applying the public interest test, the SQA submitted that it had taken into consideration the following factors favouring disclosure of the withheld information:
  - the openness and transparency of all SQA procurement processes
  - public confidence in the ability of the tendering company to deliver the contract
  - the range and quality of the product.
30. When considering these arguments, the SQA advised that it had taken into account the information already available in the public domain, and how disclosure of the withheld information would add to public debate.



31. In relation to the openness and transparency of the process, the SQA stated that its procurement process was open to audit and required it to give feedback, on request, to all unsuccessful bidders. It explained that in this instance feedback was given. It is the SQA's view that disclosure of a single tender submission would not assist the public understanding of the decision making process, as it would need the disclosure of all tenders submitted to allow for a full comparison.
32. The SQA took the view that pre-emptive disclosure of the marketing strategy would not add to public confidence in the ability of the tendering company to deliver the contract. It referred to the winning bidder's existing products aimed at the specific market as a more useful indicator.,.
33. In respect of the range and quality of the product, the SQA pointed out that this was not detailed within the tender and that therefore the successful company's current products would be a better indicator.
34. In considering the public interest arguments against disclosure, the SQA stated that it considered the possible loss of the product to the public should disclosure lead to circumstances which might cause a reduction in the company's viability. It suggested that pre-emptive disclosure of the marketing strategy to the public could reduce its overall impact and might result in lower sales. It believed that disclosing the information to a direct competitor could allow the competitor to adopt similar marketing, which could seriously affect the trading position of the successful bidder.
35. As indicated above, Leckie and Leckie's concerns relate to the level of risk involved in awarding the contract to the successful bidder.
36. The Commissioner accepts the general public interest in transparency and accountability and the more specific one in ensuring that a contract is awarded to a company with the ability to fulfil the contract, particularly where this involves spending from the public purse. He acknowledges that the withheld information might cast some light on these matters and that the successful tenderer would have been aware of the possibility of disclosure should FOISA require this.
37. On the other hand, the Commissioner has taken account of the information already released to the applicant. He also notes the mechanisms currently in place within the SQA to ensure that the awarding of contracts is fair and appropriate, with the provision of constructive feedback for unsuccessful tenderers. He accepts that disclosure of one tender submission would not provide a full picture of the decision making process, with a view to learning why one tenderer was awarded a contract over another. In this particular case, given the timing of the handling of the request in relation to the award and implementation of the contract, he sees a clear public interest in allowing the successful tenderer to fulfil the contract without fear that their strategies and processes will be disclosed to the public at so early a stage in its implementation.





38. Taking account of these factors, in particular the question of timing, the Commissioner finds that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA.
39. As the Commissioner is satisfied that all of the information was correctly withheld under section 33(1)(b) of FOISA, he is not required to consider the application of the exemption in section 33(1)(a).

## **DECISION**

The Commissioner finds that the SQA complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Leckie and Leckie Limited.

## **Appeal**

---

Should either Leckie and Leckie Limited or the Scottish Qualifications Authority 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**  
**20 January 2010**



## 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 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.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

##### 33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (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).



...