

Decision Notice



Decision 102/2011 Mr Tom Gordon of The Herald and City Building (Glasgow)
LLP

Tendering process for Vehicle Fleet Services Contract

Reference No: 200900992
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Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Gordon, Scottish Political Editor of The Herald, requested from City Building (Glasgow) LLP (CBG) information relating to the award of a contract for vehicle fleet management services. CBG withheld the information in its entirety under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, CBG disclosed a large number of redacted documents to Mr Gordon, but withheld the remainder of the information under the exemptions in sections 26(a) and (b) (Prohibitions on disclosure), 30(c) (Prejudice to effective conduct of public affairs), 33(1)(a) and (b) (Commercial interests and the economy), 35(1)(a) (Law enforcement), 36(2) (Confidentiality) and 38(1)(b) (Personal information) of FOISA.

Following an investigation, the Commissioner found that CBG had largely failed to deal with Mr Gordon's request for information in accordance with Part 1 of FOISA, by incorrectly applying a number of exemptions to the withheld information. However, he found that the exemptions in sections 36(2) and 38(1)(b) had been correctly applied to limited parts of the information. He required CBG to provide the information it had withheld to Mr Gordon, subject to modifications to remove the information which he agreed was exempt from disclosure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4), (5) and (6) (General entitlement); 2(1) and 2(2)(b), (c) and (e)(ii) (Effect of exemptions); 26(a) and (b) (Prohibitions on disclosure); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(a) and (b) (Commercial interests and the economy); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b), (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions - definition of "personal data") and Schedules 1 (The data protection principles - the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data - condition 6(1))

Public Contracts (Scotland) Regulations 2006 (the Procurement Regulations) regulation 43 (Confidentiality of information)



Directive 2004/18/EC of the European Parliament and of the Council dated 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts Article 6 (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.

Scottish Public Sector Procurement & Freedom of Information Guidance, Scottish Procurement Directorate (December 2004): <http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>

Decision 104/2008 Streetwork UK and Glasgow City Council

Background

1. On 6 March 2009, Mr Gordon wrote to CBG requesting the following information:
"...all records held by City Building (Glasgow) LLP or its agents related to the award of a contract for vehicle fleet management services to [a named company]."
Mr Gordon qualified his request by stating that:
"The information supplied should include, but not be limited to, details of the unsuccessful bids, including bidder names and values, a copy of the tender evaluation matrix used to evaluate the bids, and details of the meetings which signed off the contract, such as board papers and minutes."
2. CBG responded on 2 April 2009. CBG stated the information requested by Mr Gordon was exempt from disclosure under sections 33(1)(a) and (b), 36(2) and 38 of FOISA.
3. On 7 April 2009, Mr Gordon wrote to CBG, requesting a review of its decision. Mr Gordon commented that the exemptions cited were inappropriate and that they had been applied in a blanket fashion.
4. CBG notified Mr Gordon of the outcome of its review on 8 May 2009. CBG upheld without modification its decision to withhold the requested information.
5. On 26 May 2009, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of CBG'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 Mr Gordon 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 16 June 2009, CBG was notified in writing that an application had been received from Mr Gordon and was asked to provide the Commissioner with any information withheld from him. CBG responded with what it considered to be the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted CBG, 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, CBG was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. CBG was also asked to comment on the manner in which it had handled Mr Gordon's request.
9. The investigating officer noted that the information supplied to the Commissioner related only to the evaluation of tenders, while Mr Gordon's information request sought a far wider range of information (and CBG's correspondence with Mr Gordon had suggested that a wider range of information had been identified and judged to be exempt from disclosure). CBG was therefore asked to supply all information that fell within the scope of Mr Gordon's request together with a schedule indicating which exemptions had been judged to apply to which information.
10. In its response dated 20 August 2009, CBG supplied all the documentation which fell within the scope of Mr Gordon's original request and stated that it wished to withhold all of the information identified on the basis that it was exempt from disclosure in terms of sections 30(b) and (c), 33(1)(a) and (b), 35(1)(a), 36(2) and 38(1)(b) of FOISA.
11. CBG noted that it held documents relating to the unsuccessful tenders and provided copies of these to the Commissioner. However, it asked the Commissioner to note that the unsuccessful tenders were held only as a result of an administrative error, since its standard practice was to destroy documentation regarding such tenders after a 14 day period, unless it is collected by the unsuccessful tenderers. CBG maintained that, given the unique circumstances, and for the reasons set out in relation to the successful tenderer's bid, these particular documents should not be disclosed.
12. In further correspondence on 7 October 2009, CBG highlighted to the Commissioner comments that it had received from the successful tenderer confirming that it objected to disclosure of information relating to its bid.
13. Further submissions were sought from CBG to identify more clearly which information it considered to be exempt under which exemption, and to explain more fully its reasoning in relation to particular types of documents under consideration. The investigating officer also asked CBG to take cognisance of the Commissioner's previous decisions relation to tendering processes.



14. On 10 February 2010, CBG made further submissions in respect of each group of documents referred to in the investigating officer's email. At this stage, CBG submitted that it now considered some of the information identified to fall outwith the scope of Mr Gordon's request. It also indicated that some of the withheld information was exempt in terms of section 25(1), because the information could be obtained from published sources and so was reasonably accessible to Mr Gordon.
15. On 24 March 2010, following a further review of the withheld information, CBG released some information to Mr Gordon in a redacted form.
16. On the same date, the Commissioner received comments from Mr Gordon on the information that had been disclosed to him. He commented that the information that he had been provided with was so heavily redacted that it was "next to useless".
17. Mr Gordon expressed disappointment with the extent of the redactions, including information that was already in the public domain. He indicated that he wished the Commissioner to require CBG to release the material with only "legitimate redactions", and to include any further information that had been withheld in full.
18. On 24 March 2010, CBG provided the Commissioner with a copy of the material supplied to Mr Gordon, together with further submissions setting out its position with respect to the remaining withheld information. At this stage, it sought to apply the exemptions in sections 26, 30(c), 33(1)(a) and (b), 35(1)(a), 36(2) and 38(1)(b) to the remaining withheld information. CBG also confirmed that it no longer wished to rely on any other exemptions within section 30 of FOISA.
19. In further correspondence, CBG confirmed that no information contained in the unsuccessful tenders was released to Mr Gordon because it remained of the view that this information was held in error and should not be disclosed into the public domain. However, CBG provided versions of these documents to the Commissioner, indicating the redactions it would wish to be made should the Commissioner judge that these items should be disclosed.
20. Mr Gordon subsequently confirmed that he had no objection to the withholding of bank details or signatures contained within the documentation. This information will therefore not be considered by the Commissioner in this decision. Since the exemption in section 35(1)(a) had been applied only to bank details, this exemption will not be considered in what follows.
21. Mr Gordon also indicated that he had no objection with the withholding of insurance details, provided these do not have a bearing on a bidder's suitability for the contract concerned. Having reviewed the information regarding insurance policies provided by tenderers, along with the instructions to bidders and the tender assessment criteria, the Commissioner is satisfied that the name of insurers and policy numbers can be excluded from consideration on this basis. This information has not been considered any further.



22. However, since the invitation to tender (ITT), which has been provided to Mr Gordon, makes clear that the winning bidder would be required to have certain types of insurance, providing cover to particular values, the Commissioner has continued to consider the extent of cover and expiry dates in what follows detailed within the tenderers' bids.

Commissioner's analysis and findings

23. 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 Gordon and CBG and is satisfied that no matter of relevance has been overlooked.

Background to request

24. CBG was set up on 6 October 2006, when the Building Services Department of Glasgow City Council was transferred almost in its entirety to the new external body. Two separate limited liability partnerships were established, City Building (Glasgow) LLP and City Building (Contracts). Both are wholly owned and controlled subsidiary companies of Glasgow City Council and Glasgow City Council Investments Limited, a company which is in turn wholly owned by Glasgow City Council.
25. Mr Gordon's request related to the tendering and award of the contract for vehicle fleet provision, support services and car leasing scheme (the contract). The tender was advertised on 9 February 2007 and the contract was awarded on 27 April 2007. The contract was initially for a period of one year with the option of extending annually for a period of four years with an estimated value of £11.2 million. Since CBG has withheld the identity of the company to which the contract was awarded from Mr Gordon, it will not be named in the decision, and will instead be referred to as "the winning bidder".
26. At this point, the Commissioner would note that he has considered (as he is required to do in any decision) the application of exemptions and the balance of the public interest in relation to the information under consideration in the circumstances that existed at the time when CBG notified Mr Gordon of the outcome of its review. The relevant point is May 2009, more than two years after the contract was awarded, and when the winning bidder remained the incumbent contractor. The Commissioner has disregarded the passage of time and any events after that point in what follows below.

Information under consideration

27. Mr Gordon's request was wide-ranging, encompassing any recorded information held by CBG regarding the award of contract. After CBG initially failed to supply all relevant information to the Commissioner, it identified and supplied a range of information including:
- an advert and notices relating to the tendering process
 - notifications of interest



- a tender document payment register
 - a blank copy of the Invitation to Tender (ITT)
 - tender clarification correspondence exchanged prior to submission of bids
 - decline to quote letters
 - information relating to a clarification meeting between the winning bidder and CBG
 - the winning bid and associated correspondence
 - unsuccessful bids and associated correspondence
 - tender evaluation documents, including scoring for each bid
 - an extract from a Board meeting minute
28. The Commissioner has concluded that all of the above information falls within the scope of Mr Gordon's request.
29. CBG also supplied copies of its Vehicle Fleet Transport Working Group minutes, but submitted during the investigation that these fell outwith the scope of Mr Gordon's request. Having considered the content of these documents, the Commissioner is satisfied that they do fall outwith the scope of the request. These documents record the meetings relating to the service provision following the award of the contract and do not relate to the tendering or the decision-making process in relation to the tendering process.
30. In addition, CBG supplied documentation that related to the extension of the contract period, and to credit checks conducted after the award of the contract. For the same reason, the Commissioner is satisfied that these documents also fall outwith the scope of Mr Gordon's request.
31. As stated above, CBG's initial responses to Mr Gordon sought to withhold all information held in relation to the request. However, following reconsideration during the investigation, CBG disclosed a substantial amount of information to Mr Gordon, albeit subject to significant redactions.
32. This decision will focus only on the remaining information withheld by CBG at the end of the investigation. This includes:
- the unsuccessful tenders and associated correspondence, and pricing or other information drawn from these tenders where it is included in other documents
 - all information that would identify the companies which submitted tenders (including the winning bidder) or which expressed an interest in the tendering process but did not go on to submit any bid (and correspondence from those which declined to tender)
 - information about staff members (generally their names, job titles and contact details) within these companies and within CBG



- information within or drawn from the winning bid (including pricing, details of experience and resources, identity of referees and contracts with these, banking and insurance details, turnover, profit figures and pricing schedules)
 - information about the evaluation of the bids, including the evaluation criteria and weighting used by CBG, cost savings-analyses and scores assigned to each bid
 - details of points for clarification identified for discussion at a meeting between CBG and the winning bidder, minutes of that meeting and information supplied by CBG in advance of that meeting
 - the Board minute extract
33. The Commissioner considers each of the exemptions cited by CBG in withholding this information (excluding the signatures and bank and insurance details referred to in paragraphs 20 and 21 above) in what follows.
34. However, he would first note that, with respect to the extract from the Board minute, CBG has only sought to apply exemptions to certain information regarding the winning bid (under section 33(1)(b) and 30(c)) and the name of a staff member (under section 38(1)(b)). It has confirmed that it erroneously omitted to provide the remaining parts to Mr Gordon when disclosing information during the investigation.
35. At a late stage in the investigation, the investigating officer highlighted to CBG that its position with respect to the letters from companies indicating that they had decided not to tender had not been made clear. She asked CBG to confirm whether it was correct to assume that it would consider certain information therein to be exempt in line with the redactions made to documents that were released to Mr Gordon. CBG confirmed that this was correct. It did not seek to apply any exemptions to these documents in their entirety.
36. Since CBG has not maintained that any exemption applies to parts of the board extract or the decline to quote letters, but they have not provided these to Mr Gordon, the Commissioner must conclude that CBG breached Part 1 and, in particular, section 1(1) of FOISA by failing to disclose these parts to Mr Gordon. The parts of these documents that CBG do consider to be exempt will be considered under the heading of the relevant exemptions below.
37. Before turning to the individual exemptions, the Commissioner also noted that CBG has not disclosed any parts of the tenders submitted by losing bidders or associated correspondence. While it has disclosed the winning tender, subject to redaction of much of its content (including the name of the winning tender), it has indicated that it believes the losing tenders should not be disclosed because they were held in error, and should have been destroyed in the weeks following the completion of the tendering exercise. However, CBG has also provided copies of these documents redacted in line with its approach to the winning tender and submitted that, if the Commissioner is minded to require disclosure of these documents, it would wish them to be subject to redaction.



38. The Commissioner has noted CBG's comments about it still holding this information as a result of an administrative error. However, he finds that this does not affect the status of this information for the purposes of FOISA.
39. The unsuccessful tenders and associated correspondence is information held by CBG for the purposes of FOISA and the Commissioner will therefore go on to consider whether the information falls into one of the categories of exempt information set out in Part 2 of FOISA.
40. In what follows, when considering any exemption applied to the unsuccessful tenders and associated correspondence, the Commissioner has first considered whether the exemption was applicable to these documents in their entirety. If he concludes that an exemption does not apply to all information within the relevant documents, he will go on to consider the particular information highlighted by CBG.
41. Although the redactions to the unsuccessful bid documents did not indicate which exemption was judged to apply in each instance, the Commissioner has considered these in line with CBG's approach to the winning bid. His understanding of CBG's position is that:
 - where the redacted information relates to a living individual, it is exempt under section 38(1)(b)
 - all other redacted information is exempt in terms of sections 33(1)(b) and 30(c)

Section 33(1)(a) – Trade secrets

42. CBG applied section 33(1)(a) to the evaluation matrix used to evaluate the bids. Section 33(1)(a) of FOISA provides that information is exempt from disclosure if it constitutes a trade secret. This is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
43. There is no definition of a trade secret in FOISA. In his briefing on *Commercial interests and the economy*,¹ the Commissioner advises public authorities to consider matters including the following when determining whether something is a trade secret:
 - Is the information of commercial value? If not, it is unlikely that it will be a trade secret.
 - Is the information used for the purpose of trade?
 - Would the release of the information harm trade?
 - Is the information common knowledge? The more people who know the information, the less likely it is to be a trade secret.
 - How easy would it be for competitors to discover or reproduce the information for themselves? The easier it would be for competitors to copy, the less likely it is that the information is a trade secret.

¹ This guidance was published in April 2008, when it superseded the Commissioner's previous guidance on the exemptions in section 33 of FOISA. The Council's submissions to the Commissioner pre-dated this publication and referred to the guidance available at that time. The references above reflect the current guidance, and the Commissioner is satisfied that there are no differences between the two documents that would affect his consideration of this case.



- Has the value of the information diminished over time? Information which constitutes a trade secret at the time of its creation may lose its commercial value as time passes.
44. The Commissioner considered the definition of trade secrets in some detail in *Decision 104/2008 Streetwork UK and Glasgow City Council* (the Streetwork decision) and the background information set out in paragraphs 22 to 24 of that decision is also relevant here.
 45. The main issue under consideration in the Streetwork decision was whether a tenderer's bid documents constituted or contained a trade secret. Although the Commissioner did not accept that the tender documents under consideration contained or constituted a trade secret, he did not dismiss the possibility that such documents would on occasion include information falling within the definition of a trade secret, or that the way in which a tender was presented as a whole might constitute a trade secret.
 46. In this case, however, CBG has argued that its tools and methods for evaluating those bids constitute a trade secret. Examples of trade secrets discussed by the Courts have, for obvious reasons, tended to focus on secrets associated with the production or provision of goods or services by a supplier. However, the Commissioner recognises that this does not preclude other types of information being demonstrated to be trade secrets.
 47. CBG submitted that the lay out and presentation of the tender evaluation matrix is novel and unique to CBG. It stated that in order to produce and refine the tender evaluation process it had invested considerable resources. CBG stated that it uses this matrix regularly in the course of business and is therefore of the view that the sensitivity of this information will be retained on an ongoing basis.
 48. CBG argued that, should the tender evaluation matrix be released, it would cause real harm to its ability to effectively and efficiently evaluate tenders and have a negative effect on the tenders which may be submitted by prospective contractors. CBG highlighted that only certain officers within CBG are made aware of the terms of the evaluation tool; in total only six officers, including board members, have knowledge of the matrix.
 49. The position of CBG is that whilst the criteria for awarding the contract were set out in the Official Journal of the European Union (OJEU), the matrix that CBG uses means that other aspects of the tenderer's submissions are taken into account. (Contracts which are subject to EU procurement rules, such as this one, must be the subject of a call for competition by publishing a Contract Notice in the OJEU. The notice must specify, amongst other things, what criteria will be used for awarding the contract.)
 50. Following the submission of these arguments, CBG disclosed to Mr Gordon the evaluation matrix, with only the weightings awarded to each evaluation criterion, and the scores awarded to each bid, redacted. Following this disclosure, it therefore appears that CBG only considered this remaining information to constitute a trade secret.



51. This later disclosure (which was, so far as the Commissioner is aware, not prompted by any significant change in the circumstances surrounding this case) appears to the Commissioner to have seriously undermined the previous claim that the evaluation matrix constituted a trade secret. However, CBG has confirmed that it considers the exemption in section 33(1)(a) to be applicable to the remaining withheld parts of the evaluation matrix.
52. The Commissioner has considered CBG's arguments carefully and acknowledges that CBG's tender evaluation matrix is used in the context of trade (to assist its procurement decision making) and purchasing processes which involve competition between commercial organisations.
53. The Commissioner accepts that the success of its procurement processes (in securing high quality services at a competitive price) might contribute to its ability to compete effectively as a provider of services within a competitive market. However, the connection between CBG's evaluation matrix and its commercial activities is indirect, and insufficiently strong to persuade the Commissioner that this matrix itself has commercial value. It is not clear as to how or why it would be harmful to CBG's ability to trade effectively if it fell into the hands of a company competing with it as a provider of building services.
54. Furthermore, the Commissioner can identify nothing particularly novel or unique about either the content or layout of the matrix, or the process followed by CBG in evaluating the tenders submitted to it. The matrix appears to incorporate a relatively standard set of evaluation criteria, which, in a more detailed matrix, have been tailored to the specifics of this particular contract.
55. The Commissioner also notes that the main evaluation criteria and weightings set out within the matrix were included within the tender document that was completed by all bidders. The Commissioner cannot therefore accept that these evaluation criteria and weightings constituted a secret at the time of Mr Gordon's request for information. However, the assessments of each criterion given by CBG are not well known, although the overall score for the winning bid was communicated to the each bidder along with its own score. It might therefore be accepted that the scores assigned to each bid under each criterion were a secret at the relevant time (and still are at the time of writing).
56. Even if it could be accepted that parts of the content and layout of the evaluation matrix were effectively a secret at the time of CBG's review of its handling of Mr Gordon's information request, the Commissioner is unable to accept that any sensitivity of the information at that time was such that the information was a trade secret. It is clear that much of the content of the matrix is specific to the particular contract for which it was used, which had been awarded some time previously. If it is possible to draw inferences from the content and layout of the matrix as to CBG's general approach to evaluation of tenders, the insights and benefits allowed would be minimal. CBG has argued that, should tenderers become aware of the evaluation matrix, the tenders which CBG receive in the future may be or could be likely to be prepared by prospective tenderers in such a way as to distort the contents of the bid. However, CBG has not explained how this would happen and the Commissioner is unable to see how future tenderers could use this information in a way that would distort a bid or which would be detrimental to CBG's business.



57. Having considered all of CBG's arguments, the Commissioner has concluded that, even if some parts of the matrix can be demonstrated to have been secret at the relevant time, that CBG has not demonstrated that either (a) the matrix and its content has a *commercial* value to CBG, or (b) that its disclosure would be harmful to CBG's *trade*.
58. In this context, the Commissioner does not accept that the matrix (or any of its content, or the wider information generated within CBG's tender evaluation process more generally) constitutes a trade secret. The Commissioner therefore concludes that the exemption in section 33(1)(a) was incorrectly applied by CBG in this case.

Section 30(c) – Prejudice to effective conduct of public affairs

59. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b) of FOISA. This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release. This is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
60. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
61. CBG stated that it applied this exemption to "...bidders' names, details of bidder's [sic] supply chain, lead times for delivery/production, pricing information, points in bids which are subject to clarifications and other unique or commercial aspects of any tenderer's bids. Brand names, email/website addresses and other features included in a bid or other documentation which would allow identification of a tenderer." It also applied this exemption to evaluation reports/matrices, agendas and minutes of bid clarification meetings, weighting of award criteria, cost savings and the scoring details of the various tenderers.
62. Given CBG's comments on the unsuccessful tenders and associated correspondence, the Commissioner has proceeded on the understanding that it has applied this exemption to all of the information within those documents. Should he conclude that the exemption does not apply to all of the information within these documents, he will go on to consider whether the exemption applies to those parts of these documents marked with redactions in line with CBG's approach to the winning tender.



63. CBG argued that disclosure of this information would adversely affect the effectiveness of its procurement exercises and its ability to secure “best value”. It submitted that any reduction in the effectiveness of its procurement exercises would diminish the strength of CBG’s supply chain, thereby endangering the operational aspects of its business. It maintained that CBG’s overall competitiveness, particularly against private sector commercial organisations, would decrease, as would its ability to perform to the high performance standards required in many of its contracts.
64. CBG argued that the identity of the various tenderers is kept secret along with details of the various bids and the evaluation mechanisms because of the need to prevent collusion in and distortion of the competitive market from which CBG seeks suppliers. CBG argued that the disclosure of the details of those companies which tendered for the contracts, their bids and the scoring system used to evaluate those bids, increases the risk:
- of collusion between the tenderers for similar contracts
 - that bidders would skew their response to better meet the scoring system (thereby reducing the variations in bids, leaving less room for CBG to get a broad picture of the supplier’s business, procedures and ability)
 - that bidders would become more circumspect in the information they submit, providing fewer commercial details in their bid, or not bidding at all; this, CBG argued, would decrease competition and/or make any assessment of which tender is the lowest price or most economically advantageous much more difficult
 - that bidders may be less innovative (or less likely to put forward innovative solutions) where the commercial elements of those solutions would become public knowledge.
65. In its final submissions on this exemption, CBG indicated that it believed that significant harm has already been occasioned to its ability to conduct its affairs. It noted that the successful tenderer for this contract had publicly announced that it would not be tendering again for public contracts. CBG indicated that it expected many organisations would reach the same conclusion if the information withheld in terms of this exemption was released.
66. When considering these final points, the Commissioner has noted that the winning bidder’s comments were made in 2010, some time after CBG’s review of Mr Gordon’s information request. The Commissioner understands that these comments followed publicity and commentary surrounding its work with CBG, prompted by events unrelated to Mr Gordon’s information request.
67. Since the specific events referred to by CBG occurred after May 2009, they must be disregarded in this decision. Nonetheless, the Commissioner has considered more generally CBG’s argument that disclosure of the withheld information might discourage companies from bidding for future contracts offered by CBG.



Comments and conclusions on section 30(c)

68. The Commissioner has considered all of CBG's comments on this exemption, and notes that it has described a chain of harmful events that it claims would be likely to follow from disclosure. It has argued in effect that in order for its procurement processes (and CBG's services more generally) to function effectively, it is necessary to withhold any information identifying bidders, the substance of their bids, and the evaluation of their bids.
69. However, CBG's submissions on this exemption have been expressed in very general terms, and CBG has supplied little, if any, evidence as to the likelihood of these consequences, or how disclosure at the relevant time in 2009 would have led to these consequences.
70. In considering this exemption, the Commissioner has also had regard to *Scottish Procurement Directorate's Freedom of Information Guidance*² (the Procurement Guidance). While this guidance is not legally binding, and does not remove the need to consider particular information in all the circumstances of the case, it provides a helpful overview of the procurement process and the issues raised by requests for information about tendering at various stages in the process.

Identities of the tenderers and other interested companies

71. The Guidance highlights (at page 14) that EU procurement law requires certain basic information to be published in contract award notices within the OJEU. This includes the name of the winning bidder and the price or range of prices paid.
72. Such notification was given in this case. The Commissioner is therefore unable to accept that disclosure of information identifying the winning bidder in response to Mr Gordon's request would have had the effects described by CBG. The identity of the winning bidder was in the public domain when Mr Gordon made his request. Indeed, Mr Gordon's request referred specifically to the company, and provided the reference number for the OJEU contract award notice in which it was named. In these circumstances, the Commissioner finds it entirely contrary to the spirit and letter of FOISA that CBG has sought to apply any exemption to this particular information. He can only conclude that section 30(c) was incorrectly applied to information identifying the winning bidder.
73. Turning to the identity of other companies that made unsuccessful bids, or which expressed an interest in the tendering process, the Commissioner acknowledges that there may have been some increased risk of collusion had their identities been revealed while the tendering process was ongoing. However, the relevant contract was awarded more than two years before CBG reviewed its handling of Mr Gordon's information request. The risk of harm to that procurement process had therefore passed.

² <http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>



74. The Procurement Guidance includes at Annex A a list of information types and suggestions of a typical decision in response to a request for information. For the identity of unsuccessful tenderers, the suggested response is “generally withhold if [tendering is] in phase”, suggesting that this information could generally be disclosed once a contract is awarded. The Commissioner has considered numerous cases where public authorities have disclosed the identity of unsuccessful tenderers in response to information requests.
75. Such practice elsewhere within the public sector suggests that disclosure of the identities of companies submitting unsuccessful bids will in general not be harmful (or, indeed, substantially prejudicial) to the effective conduct of public affairs after the relevant tendering process is complete.
76. CBG highlighted that the relevant contract would be re-tendered in 2010, and indicated that the harm it envisaged was in relation to that process. However, the Commissioner notes that retendering to seek similar or even identical services as the period of an existing contract ends is not unusual. CBG’s circumstances do not appear to be unique, and its submissions have not elaborated on why it considers these or the particular tendering process to be of such sensitivity that the identities of all bidders and parties expressing interest in the contract awarded in 2007 need to be withheld to protect the retendering process. Furthermore, it did not seek the views of these parties (other than the winning bidder) and CBG has provided no evidence to support its claim that disclosure of the identities of these companies would lead to potential bidders either declining to bid for future contracts or providing less detailed information within their tenders.
77. CBG’s submissions have also not elaborated on why the risk of collusion would be heightened as a result of the identification of unsuccessful bidders or other interested parties. It has not, for example, highlighted evidence of collusion that has followed disclosure of the identities of bidders in other tendering processes, or highlighted concerns given the particular circumstances surrounding its own tendering processes.
78. In the absence of evidence to support CBG’s claims, the Commissioner is unable to accept that disclosure of the identities of the bidders and other interested parties would, or would be likely to, prompt collusion between bidders in future tendering processes, or that it would lead bidders to be less circumspect in future bids or to decline to tender in future tendering process.
79. In the light of the above, the Commissioner is unable to accept CBG’s claims that disclosing the identities of bidders and other parties expressing an interest in the relevant tendering process would, or would be likely to, prejudice substantially the effective conduct of public affairs, and so the exemption in section 30(c) was wrongly applied to information identifying these companies.



Unsuccessful tenders and associated correspondence

80. Since the Commissioner has concluded that the identities of bidders are not exempt under section 30(c), he also concludes that this exemption cannot be applied to all information contained in the tenders submitted by unsuccessful bidders, and associated correspondence. While this information was only held at the time of Mr Gordon's information request as a result of CBG's administrative failure, none of CBG's comments have persuaded the Commissioner that disclosure of *any* information within these documents would have, or would have been likely to have had, at the relevant time the effects set out in paragraphs 63 and 64 above, or in turn prejudiced substantially the effective conduct of public affairs.

Redacted information within tenders

81. The Commissioner next considered CBG's submissions on section 30(c) in relation to the pricing and other information supplied by the tenderers within their bids, and in the winning bidder's case, within the supplementary information provided in advance of the clarification meeting. However, he again concluded that he is not persuaded CBG's claims that disclosure of this more detailed information about the bids would, or would be likely to have, the consequences it has described.
82. The Commissioner acknowledges that disclosure of the redacted content of the bids would enable companies to learn more about the form and content of the successful bid, and compare this with those that had failed to win the contract. Analysis of the content of these bids could inform potential bidders' approaches to a future tendering process for a similar contract.
83. This does not in itself appear to the Commissioner to prejudice, or be likely to prejudice (substantially or otherwise), the effective conduct of public affairs by CBG. Indeed, it could arguably be beneficial; enabling and encouraging competitors to develop high quality bids at competitive cost, and to provide public authorities with increased value for money increasing the overall quality of bids.
84. In the absence of evidence to persuade him of the likelihood of this outcome occurring, the Commissioner is again unable to accept that disclosure would either prompt or increase the risk of collusion among tenderers to the detriment of future tendering processes, or lead tenderers to skew their responses to the detriment of CBG's ability to adequately assess the bids to achieve best value.
85. In reaching this conclusion, the Commissioner has again noted that these bids relate to a completed tendering process. Any future retendering will take into consideration the particular needs of CBG in the economic and other circumstances of the time. Even if the same or a similar specification is used in retendering processes, the Commissioner considers that the tendering process will be materially different as a result of the unique set of circumstances in which it would be conducted. Assessment of the bids in any future process would take into consideration the unique offering of a bidder given its experience, resources and service design and the extent to which these met the requirements specified within the invitation to tender.



86. The Commissioner has noted that the winning bidder (the only third party consulted by CBG) indicated that it considered disclosure of individually focussed information and pricing details would be likely to substantially prejudice its commercial interests – a matter considered in relation to the exemption in section 33(1)(b) below. It was not claimed in response to this consultation that disclosure of this or any other information provided to CBG in the course of the tendering process would lead it to decline to tender for future contracts.
87. Public sector contracts are a significant source of business for private companies. After six years of FOI being in force, companies seeking such work will do so knowing that they are working with organisations that are subject to FOISA and expected to account for their use of public funds. The Commissioner has not been provided with any evidence by CBG to suggest that companies have ceased to seek valuable contracts as a result of disclosures of information about pricing or other aspects of tenders in response to requests for information under FOISA.
88. In all the circumstances, the Commissioner is not persuaded that disclosure of the information redacted by CBG within the tender documents or other information supplied by bidding companies would, or would be likely to have, the consequences described by CBG in its submissions regarding the exemption in section 30(c) of FOISA.

Evaluation of the tenders

89. The Commissioner next considered the information relating to the evaluation of the tenders. The evaluation reports and matrices include details drawn from the tenders themselves, which was considered above. Here, having already considered the content of tenders submitted to CBG (key parts of which is set out also in the evaluation documents also), the Commissioner focussed on the weightings given the evaluation criteria, and CBG's method of analysing and evaluating these bids.
90. With respect to the scoring system used, CBG has maintained that bidders would skew their response to better meet the scoring system, thereby reducing the variations in bids, and leaving less room for CBG to get a broad picture of the supplier's business, procedures and ability.
91. As noted in the discussion of section 33(1)(a) above, the Commissioner can identify nothing particularly novel or unique about either the content or layout of CBG's evaluation matrix or the process followed by CBG in evaluating the tenders submitted to it. The invitation to tender made bidders aware of the evaluation criteria and their weightings, enabling them to take these into consideration when preparing their bids.



92. The Commissioner cannot accept that future tendering processes would, or would be likely to be, harmed by disclosure of this information. Given that the bidders in the 2007 tendering process may well bid again for any future contract, they are (and have been since 2007) in a position to draw upon knowledge of the evaluation of the previous contract when tendering for future similar contracts. However, the Commissioner can see no benefit to those companies in doing so. The chances of success in any future tendering process would be greatest where an organisation designs a bid to meet the requirements specified in the invitation to tender for that contract, based on an understanding of the evaluation criteria and weightings specified therein.
93. Similarly, the more detailed information within the evaluation matrices and report, would not, to the Commissioner's mind, add significant insights into CBG's evaluation process to those already made available to bidders within the invitation to tender.
94. For these reasons, the Commissioner is not persuaded that disclosure of information set out in the evaluation documents (or indeed any of the other information under consideration in this case) would, or would be likely to, lead to bidders in future tendering processes to "skew" their bids in order to achieve greater success within the evaluation process. Indeed, he is unable to see how this information could be used in this way, and CBG has provided no elaboration on how a bidder might do so.
95. Consequently, the Commissioner does not accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs in any of the ways suggested by CBG.

Clarification meeting agenda and minutes

96. Under this final heading, the Commissioner has considered the information redacted within these documents, which includes a series of points identified by CBG for discussion with the winning bidder, and the minute of the discussions on these points.
97. The Commissioner has noted that this information was generated at a stage in the tendering process after the bids had been submitted and evaluated, prompting the identification of the winning bidder as the preferred supplier. The questions raised at this stage relate to the specific proposals made by the winning bidder.
98. Disclosure of this information would offer some insight into the matters that were of particular interest to CBG when considering how the winning bidder's proposals would be implemented. The records of the discussion of these points at the meeting would provide some insight into how these points were clarified to the satisfaction of CBG.
99. The Commissioner recognises that this information would have held considerable sensitivity in the period prior to the award of the contract. However, for similar reasons to those set out in relation to the other types of information discussed above, he cannot accept that disclosure of this information in response to Mr Gordon's information request would in 2009 have been likely to cause harm of the types suggested by CBG.



100. The Commissioner is unable to see how disclosure of this information would be likely to increase the risk of collusion, or prompt bidders to skew their bids for future similar contracts. The questions and discussion are very specifically focussed on the winning bidder's tender, and its operations. As such, it undoubtedly offers insights into the contract award and implementation, and the details of the winning bidder's proposals and operational arrangements. However, the Commissioner cannot see (and has not been supplied with evidence to explain) why or how this information might be used to "skew" a bid from a different company with its own unique set of circumstances and working practices, for a different contract at a different time.
101. For the reasons set out in paragraphs 86 and 87 above when considering the redacted parts of tender documents, the Commissioner is also unable to accept that disclosure would make potential bidders less likely to bid for future contracts.

Conclusion on section 30(c)

102. Having considered all of the relevant information alongside CBG's submissions on this exemption, the Commissioner has been unable to accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs in the ways CBG has maintained. The Commissioner has therefore found in all instances that the exemption in section 30(c) was incorrectly applied by CBG.
103. As such, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to this exemption.

Section 36(2) - Confidentiality

104. The Commissioner understands that CBG applied the exemption in section 36(2) of FOISA to the following types of information:
 - the blank invitation to tender (ITT)
 - correspondence concerning tenderers' enquiries
 - unsuccessful tenders
 - the winning tender
 - information supplied by the winning bidder in advance of a clarification meeting with CBG
 - information drawn from the tender documents, where this appears in evaluation documents
105. After initially indicating that the exemption in section 36(2) applied to all information within these groups, CBG disclosed to Mr Gordon redacted versions of
 - the blank ITT, with information about evaluation of bids removed and contact details
 - correspondence concerning tenderers' enquiries, with details of the companies sending these enquiries removed



- the winning bid, with information identifying the bidder and the majority of the details of its bid removed
106. It is the redacted information within these documents, along with the other types of information listed in paragraph 104 that is considered in what follows.
107. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it 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.
108. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. 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 from whom the public authority obtained the information or by any other person.
109. Having reviewed the information withheld under this exemption, the Commissioner is satisfied in most cases that the information has been supplied to CBG by a third party, generally within tender documents or associated correspondence submitted by tendering companies to CBG. For this information, the initial test is met and the Commissioner has gone on to consider the second stage of the test for the application of section 36(2).
110. However, the blank ITT comprises information generated by CBG rather than supplied by a third party. The Commissioner has therefore concluded that CBG incorrectly applied the exemption in section 36(2) of FOISA to the information contained in the ITT and has not considered it further in the following sections on section 36(2).
111. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person from whom the public authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
112. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- the information must have the necessary quality of confidence
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality



- there must be a disclosure which has not been authorised by the person who communicated the information but which would cause detriment

Necessary quality of confidence

113. Having considered the information provided by the tendering companies, the Commissioner is for the most part satisfied that it fulfils the criteria of having the necessary quality of confidence. For the unsuccessful bidders, the Commissioner understands that neither the fact nor content of their bids is generally known or could be obtained by Mr Gordon through alternative means.
114. Where requests for clarification were sent to CBG by a (potential) bidder in advance of submission of their tender, the Commissioner does not consider that the content of their enquiry would hold the quality of confidence. He understands that normal practice under EU tendering rules, in order to ensure equality of treatment and not to provide information in a manner which may give some participants an advantage over others, would be for the purchasing body to share any responses with all tenderers. This was done in this case and the substance of each enquiry was communicated to all tenderers along with CBG's responses, and subsequently disclosed to Mr Gordon.
115. The Commissioner recognises that it could be maintained that the information identifying the company sending these enquiries holds the necessary quality of confidence. While the content and responses to such requests within a tendering process would normally be shared, the Commissioner recognises that the identity of the tenderer making the request would not usually be circulated amongst the bidders, and it was not in this case.
116. With respect to the winning bidder, the Commissioner cannot accept that the identity of this company (or other information that would identify it) held the necessary quality of confidence at the time of Mr Gordon's request, since the award of the contract to that company was publicly noted in the OJEU. Once the name of the company is known, other general information about its address, the identity of its directors and annual accounts are publicly available on the Companies House website. Therefore, the Commissioner is unable to accept that basic information about the company, its activities, its finances and the identity of its directors holds (or held at the time of Mr Gordon's information request), the necessary quality of confidence.
117. However, the remaining content of the winning bidder's tender is not generally known and so has the quality of confidence, as does information provided to CBG by the winning bidder in advance of their clarification meeting.
118. Since the Commissioner does not accept that the identity of the winning bidder, or general information about that company which is easily publicly accessible once the identity of that company is known, holds the necessary quality of confidence, the Commissioner has concluded that disclosure of this information cannot constitute an actionable breach of confidence. The Commissioner has therefore concluded that the exemption in section 36(2) was wrongly applied to this particular information, and it will not be considered further in the remaining tests looking at the application of section 36(2).



119. The Commissioner will go on to consider the remaining tests with respect to the information for which he has found that the necessary quality of confidence is held.

Obligation to maintain confidentiality

120. With regard to the circumstances in which the information was provided to CBG, the Commissioner has first of all noted that the tender documents supplied by the tendering parties and associated correspondence contain no general and explicit indication from either party that the information should or would be treated in confidence.
121. However, in the circumstances of this particular case (in line with a number of previous decisions) the Commissioner accepts that the inherent nature of the tendering process implies an obligation of confidentiality with respect to certain types of information, at the time of submission of tenders and their evaluation by the procuring organisation. The Commissioner accepts that this is the case for all of the remaining information to which section 36(2) has been applied.
122. Having accepted that the information received from the tenderers would have been confidential at the time of submission and evaluation, the question is whether such an obligation remained in force at the time that CBG considered Mr Gordon's request for information and his request for review. In previous decisions, the Commissioner has noted that the obligation of confidentiality will not remain in place in perpetuity following the award of a contract, and that bidding companies will be aware that details of their bids might be the subject of requests under FOISA, and the commercial sensitivity of the information therein will diminish over time.
123. In this case, the Commissioner considers that the bidders' expectations would have been shaped to an extent by the content of the ITT under the heading "Freedom of Information". Paragraph 1.6 of the ITT states:

Tenderers should note City Building (Glasgow) LLP is bound by the provision of the Freedom of Information (Scotland) Act 2002. All information submitted to City Building (Glasgow) LLP may therefore need to be disclosed and/or published by City Building (Glasgow) LLP in compliance with the Act (the decisions of City Building (Glasgow) LLP in the interpretation shall be final and conclusive in any dispute, difference or question arising in respect of disclosure under its terms), any other law, or, as a consequence of judicial order, or by any court, tribunal or body with authority to order disclosure (including the Scottish Information Commissioner).

Accordingly, if tenderers consider that any of the information included in their tenders should not be disclosed by City Building (Glasgow) LLP please identify it and explain (in broad terms) why the information should not be disclosed. Please also indicate for how long you think the information should be covered by a non-disclosure provision.

124. This section ends by noting:

"In all cases, City Building (Glasgow) LLP may publish (either proactively or in response to a request) the following information:



- (1) *the identity of all tenderers;*
- (2) *the overall value of the contract awarded;*
- (3) *the value of all tenders received (not necessarily correlated to the identity of the tenderers);*
- (4) *general performance standards to be achieved under the contract;*
- (5) *performance and progress monitoring arrangements; and*
- (6) *early completion incentives and penalties for failure to meet targets.*

When completing the Freedom of Information Certificate, therefore, Tenderers should avoid flagging any item that falls into the above categories as a non-disclosure item material. “

125. In this case, three of the eight bidders highlighted information that they considered to be exempt from disclosure within the freedom of information certificate. The Commissioner recognises that the identification or otherwise of information in response to a request of this type cannot be taken as conclusive of the (non-)application of an exemption. However, as noted by the Court of Session in the case of *Healthcare at Home Ltd. v Common Services Agency [2011] CSOH 22*, while not conclusive, it is a relevant factor to be taken into account.
126. The Commissioner has taken the content of the freedom of information certificates into consideration when determining whether the obligation to maintain confidentiality remained in place at the time of CBG's review of its handling of Mr Gordon's information request. He has also noted that the winning bidder, although having made no entry on this certificate, continued to consider information relating to its bid to be exempt from disclosure under FOISA.
127. CBG has argued that the extension of the contract and retendering (which was upcoming at the relevant time) meant that the sensitivity of the information within the tenders was increased in advance of the upcoming tendering process. It has also argued that the unsuccessful tenders should be considered to be particularly sensitive since these were only held at the time of Mr Gordon's request as a result of an administrative error.
128. The Commissioner has noted these arguments. In general, he considers that tenderers could not reasonably expect that all information about their bids would be held in confidence in perpetuity, and that the sensitivity of their contents will diminish significantly over time. In the circumstances of this case, however, he has concluded that the obligation of confidence with respect to the information supplied by tenderers remained in place at the time of CBG's review of its handling of Mr Gordon's request.
129. He recognises that the contract for fleet management services was awarded for a relatively short period, and that fleet management services is an area in which products and mode of delivery would not vary significantly between providers or change significantly over time. For these reasons, the Commissioner considers that the extent to which the sensitivity of the contents of the bid would have diminished was less than would be expected in relation to other types of contract. For this reason, he considers that the obligation of confidence remained in place in relation to the information supplied within the tenders.



130. He also accepts that, given routine practice and expectations regarding clarification requests prior to tendering, an obligation of confidentiality also remained in place at the relevant time with respect to the identities of the companies submitting questions to CBG prior to their tender submissions.
131. However, the Commissioner does not accept that an obligation to maintain confidentiality remained in place in relation to the information provided by the winning bidder prior to the clarification meeting. He considers this information to be of a different nature from that contained in its tender document, providing clarification on certain operational matters and additional information regarding vehicle types to inform discussion of how the contract would be put into effect, if awarded. The Commissioner considers that any sensitivity surrounding this information would have diminished significantly in the period following the award of the contract, and any obligation to maintain confidentiality that was implied prior to the contract award would have fallen away by the time when CBG reviewed its handling of Mr Gordon's information request. The Commissioner has therefore concluded that the exemption in section 36(2) of FOISA was incorrectly applied to this information.
132. The Commissioner therefore has gone on to consider the test of detriment only in relation to the information discussed in paragraphs 129 and 130.

Unauthorised disclosure which would cause detriment

133. The final requirement is that unauthorised disclosure of the information would be to the detriment of the party that provided the information to CBG. Since none of the relevant parties have authorised disclosure in this case, the key question for the Commissioner is whether disclosure would cause detriment to the companies concerned.
134. 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)).
135. CBG has argued that disclosure of information supplied by the tenderers would be to the detriment of the parties concerned. It maintained that the main detriment in disclosure in this case would be in relation to the release of commercially sensitive information, allowing such information as daily rates, methods of work, etc to be viewed by competitors. It maintained that the market for fleet services is a competitive market, and disclosure of documents submitted as part of a tendering process would have an adverse effect, removing tenderers' commercial advantage. CBG noted also that the tender process is one where organisations submitting bids will be using styles and formats which they spent time developing so that they are unique to them, and which CBG also considered to be confidential.



136. In considering the detriment test, the Commissioner has also had regard to CBG's submissions in relation to section 33(1)(b), with respect to the harm to the commercial interests of the tenderers that it considered would follow from disclosure. It noted that the content of bids included details of (and not limited to) working practices, quality and specification of services provided, deployment of staff, IT solutions, method statements, financial models, pricing structures and profit margins. CBG submitted that such information is commercially sensitive and its release into the public domain would significantly hamper the commercial interests of the bidders.
137. As noted above, CBG sought the views of the winning bidder regarding the disclosure of information regarding its tender in response to Mr Gordon's information request. CBG informed the Commissioner that this company submitted in writing that the disclosure of "specific individually focused information and prices" would prejudice substantially its commercial interests "both indefinitely and for the maximum period of the optional extension of the contract for total period of four years".
138. In the absence of any further explanation of these comments, either from the company or from CBG, the Commissioner has had to proceed on the basis that the winning bidder wished all content of its bid that was specific to it to be withheld indefinitely and certainly for no shorter period than the maximum duration of the contract. However, it is not clear from these comments that the winning bidder expected CBG to withhold information naming it as such (as opposed to the substance of its bid).
139. CBG argued that the release of the information into the public domain would, or would be likely to, significantly hamper the winning bidder in being able to compete for future contracts. Essentially, CBG states that other tenderers/competitors would be able to access all aspects of the winner's bid, including those aspects which gave the winner a competitive advantage, thus reducing the competitiveness of the winner.
140. The Commissioner has considered these submissions carefully. He recognises that the content of a company's bid, and information which identified which company provided each bid would, at the time of the tendering process, have held a significant degree of commercial sensitivity, since each bid highlights features of a company distinguishing it from its competitors, and its strategy and costs for delivering the contract offered by CBG. Disclosure of this information while the tendering was ongoing would have seriously undermined a company's chance of success, and provided advantage to competitors.
141. However, the Commissioner has made clear that the sensitivity of such information, and so the risk of disclosure being detrimental to the company supplying such information will diminish with the passage of time. His briefing on the exemption in section 33 indicates:

"...[I]nformation relating to a tendering process may well cause harm to the commercial interests of those submitting tenders during or immediately following that process, but as time passes the likelihood of this harm will diminish as prices, service delivery methods and market conditions change."



142. In this case, the Commissioner is not persuaded by CBG's submissions that disclosure of the pricing and other information within the tenders (where it appears within those documents, or where it has been extracted and included within CBG's evaluation documents) would be detrimental to the companies concerned two years after the award of the relevant contract.
143. While CBG has highlighted the upcoming retendering as a reason for the continued sensitivity of the information, the Commissioner considers (in the absence of evidence to support claims to the contrary) the relevance of this information to subsequent tendering processes (either for CBG or other organisations) would have diminished with the passage of time, changing economic conditions and the circumstances of all parties involved. Any retendering process would take place in the unique set of circumstances of its time.
144. The Commissioner has noted the comments of the winning bidder (in response to CBG's consultation), maintaining that disclosure of such information would prejudice substantially its commercial interests. However, these comments provided no explanation of how or why the disclosure of "specific and individually focused, and prices" (which would seem to include all information supplied by that company within its bid) would cause harm, or the nature or extent of that harm. The Commissioner's view is that the winning bidder's assertion does not provide any additional evidence in support of CBG's submissions.
145. Further evidence with respect to the possibility of detriment to the bidding companies might have been contained within the freedom of information certificates within the bids themselves. While (as noted above), the presence or absence of any indication that the company considered information to be exempt is not conclusive as to whether any exemption applies, or whether disclosure would cause detriment, the Commissioner considers it significant that only three of the eight bidders highlighted any information that they considered to be exempt from disclosure within the freedom of information certificate. For one of these, the period for which it had indicated the information would remain sensitive had passed by the time CBG reviewed its handling of Mr Gordon's information request.
146. The remaining five companies (which included the winning bidder), after being given a very clear indication that any information within their bids might be subject to an information request under FOISA, did not highlight any information considered to be exempt from disclosure.
147. The Commissioner has given careful consideration to the information that was highlighted in the freedom of information certificates of the remaining two bidders. Their comments indicated that they would still consider the information to be exempt at the point where CBG conducted its review of Mr Gordon's information request.
148. In these circumstances, it would have been good practice for CBG to consult with the bidders concerned to establish whether they still considered the information to be exempt from disclosure, or would cause detriment to them. It did not seek the views of these companies, however. The Commissioner has consequently proceeded on the assumption that they would still consider the information to be commercially sensitive and that disclosure would be detrimental to them.



149. Having considered this information carefully, the Commissioner has noted that this particular information is of a very similar nature to that provided by the other bidding companies. For the reasons set out above, given the passage of time and the diminution of the relevance and sensitivity of the information contained within the bids, he is unable to accept that disclosure of the information highlighted in the freedom of information certificates would at the relevant point in May 2009 have been detrimental to the companies concerned.
150. The Commissioner has therefore concluded that disclosing the details of the costs and service proposed by the bidders (both successful and unsuccessful) would not have caused detriment to them by the time when CBG notified Mr Gordon of the outcome of its review.
151. However, having considered the particular nature of the tendering process under consideration in this case, the Commissioner finds that some sensitivity could remain in relation to the content of the tenders, particularly where the information is presented in the context in which it is made clear which company submitted each bid.
152. The Commissioner recognises that there is a distinction between the disclosure of the content of each bid (in terms of the pricing, the service offered, etc.) in isolation from other information which identifies that bid with the company submitting it, and disclosure of the content of the bid along with the information identifying the company which made that submission.
153. With respect to the unsuccessful tenders, the Commissioner considers that disclosure of the content of the bid alongside the information which identifies the bidder which submitted it would (at the relevant time) have caused detriment to the companies concerned, by allowing identification of the particular strengths and weaknesses that were revealed within an unsuccessful bid with a particular company, potentially negatively affecting existing or potential customers' perceptions of them, and allowing competitors to compete more effectively against those companies.
154. The Commissioner does not consider that similar detriment would arise in relation to the winning bidder, since its identity as the successful bidder is already publicly known, and the vehicles it has supplied (and so the nature of its services) are visible to the public. Having concluded that disclosure of the substance of all bids (in isolation) would not be detrimental to the bidders which submitted them, the Commissioner does not consider that disclosure of the winning bid, along with the information identifying that it was submitted by the winning bidder, would cause detriment to that company.
155. The Commissioner therefore accepts that the detriment test is not met in relation to any of the information supplied to CBG by the winning bidder. He therefore concludes that the exemption in section 36(2) was incorrectly applied to that information.



156. The Commissioner has also concluded that disclosure of the identities of the bidders submitting clarification requests to CBG would not be detrimental to those companies. He notes that disclosure of this information around the time of the relevant tendering process could have offered insights into the strategies of the companies concerned when preparing their bids. However, the Commissioner considers that the period in which any detriment to those companies would follow from disclosure of their identities along with their request for clarification had passed by the time when CBG reviewed its handling of Mr Gordon's request.
157. He also concludes that the exemption in section 36(2) was incorrectly applied to that information.
158. As noted in paragraph 153, he accepts, however, that disclosure of the information submitted by the unsuccessful tenderers would cause detriment to those companies, where the content of a bid is presented in a context that associates the substance of a tender with the identity of the company making that bid.
159. Nonetheless, the Commissioner does not consider that this conclusion precludes the disclosure of information about the content of the unsuccessful tenders in a modified form. He has noted the comments of Lord Roger in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47* (the Collie judgement). In paragraph 73 of that judgement, Lord Roger expressed the opinion that, even if information was exempt from disclosure in one form, section 1(1) of FOISA obliged a public authority to consider whether it could comply with its duty by giving the information in another form. The Commissioner considers that similar considerations apply in this case, and so he has considered whether the information which associates the unsuccessful tenderers with the content of their bid could nonetheless be disclosed without the detriment he has identified.
160. The Commissioner considers that this detriment can be avoided if the content of the unsuccessful tenders were presented in a manner that did not reveal which company submitted that bid. The Commissioner considers therefore, that the tests for an actionable breach of confidence are met, but only in relation to:
- the contents of unsuccessful tenders which either directly or indirectly identify the company submitting the relevant tender, and
 - references to the unsuccessful tendering companies within CBG's evaluation documents where these are associated with particular aspects of the companies' bids.
161. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2)(c) 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 the 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 generally known as the public interest defence.



162. 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.
163. In this case, the Commissioner has considered Mr Gordon's comments regarding the public interest. Mr Gordon has, in particular, highlighted that the contract involves the expenditure of significant amounts of public funds. While there is a significant public interest in accountability with respect to the expenditure of such funds, the disclosure of the particular information identified in paragraph 160 would not contribute significantly to understanding of CBG's expenditure and decision making with respect to the award of the contract.
164. The Commissioner notes in particular that he has not concluded that the disclosure of the identities of the unsuccessful tenders would be an actionable breach of confidence in all contexts where they appear within the documents under consideration in this case. He has found that disclosure would be an actionable breach of confidence where the identity of a bidding company is present in contexts where it would allow the content of a bid being associated with a particular company.
165. Subject to the consideration of further exemptions below where they have been applied to the names of bidding companies and the content of any tenders, the Commissioner's conclusions in the paragraphs above will not prevent the disclosure of either the identities of the bidders, or the content of the bids and CBG's evaluation of these bids. The Commissioner therefore considers that the public interest in understanding CBG's expenditure and decision making can be met without the particular information detailed in paragraph 160 being made available.
166. On balance, the Commissioner does not consider there to be a reasonable argument in this case for the release of this confidential information on public interest grounds and consequently is satisfied that the exemption in section 36(2) was correctly applied to the information identified in paragraph 160.
167. Having reached this conclusion, the Commissioner has concluded that the unsuccessful tender documents should not be disclosed to Mr Gordon, and he has not considered these particular documents any further in what follows. This is because information which could be used to identify the company submitting each unsuccessful tender appears throughout these documents, and redaction of this content would lead to disclosure of tender documents that were redacted to an extent that would provide little information beyond that contained in the blank ITT already supplied to Mr Gordon.
168. The key pricing and other information from the unsuccessful tender documents which details the substance of each tender has been extracted and set out within CBG's evaluation documents in a manner which is easier to present and which does not identify each bidder, and so the Commissioner has restricted his consideration of this information to its presentation within these documents.



169. The Commissioner has gone on to consider all of the remaining withheld documents in what follows, although the conclusions in relation to section 36(2) require that (subject to the further consideration of other exemptions below) certain documents would require to be modified prior to disclosure. These are:
- The names of unsuccessful tenderers should be removed from the evaluation documents wherever they appear in contexts that associate the bidding company with content of their bids. To allow the content of each bid and CBG's evaluation of the bids to be understood properly, however, the names should be systematically be replaced with labels (e.g. Company A, Company B etc) to ensure it is clear which bid is being referred to at each point.
 - Letters informing companies of the outcome of the tendering process and their score should be modified to remove information identifying the company receiving it, instead replacing this information with the label assigned within the evaluation documents.

Section 26 – Prohibitions on disclosure

170. CBG applied the exemptions in section 26(a) and (b) of FOISA to the pricing information within the winning bidder's tender.
171. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure is prohibited by or under any other enactment. This is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
172. Section 26(b) of FOISA exempts information if its disclosure, otherwise than under FOISA, is incompatible with a Community obligation. This is also an absolute exemption.
173. In citing these exemptions, CBG referred to the fact that the tender exercise was governed by the provisions of the Public Contracts (Scotland) Regulations 2006 (the Procurement Regulations) by which the Scottish Ministers implement EU Directive 2004/18/EC (the Directive). The Procurement Regulations set out the rules for public procurement exercises and they and the Directive are both aimed at ensuring effective competition for public sector contracts and, by implication, the attainment for value for money for authorities letting those contracts.
174. CBG submitted that regulation 43 of the Procurement Regulations represents a prohibition on disclosure under section 26 of FOISA. The text of regulation 43 is set out in full in the Appendix. Under regulation 43, a contracting authority (such as CBG) shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential. Confidential information includes technical or trade secrets and the confidential aspects of tenders.
175. Regulation 43 brings into effect Article 6 of the Directive (set out in full in the Appendix).
176. CBG argued that the protection of effective competition lies behind this obligation and that, due to its mandatory wording, regulation 43 is a prohibition on disclosure rather than a power to withhold information in the stated circumstances.



177. The Commissioner has considered the arguments made by CBG. In order for information to fall within regulation 43 it must:
- be forwarded to the public authority by the tenderer
 - be reasonably designated by the tenderer as being confidential

The inclusion of the word “reasonably” in regulation 43 means that the tenderer cannot simply designate anything it chooses as confidential, there must be some legitimacy to the claim of confidentiality.

178. The Procurement Regulations do not define “reasonably” and therefore it is appropriate to make reference to Article 6 of the Directive, on which the Regulations are based, for guidance on the intention behind regulation 43.
179. The presence of the words “in accordance with the law” in Article 6 of the Directive makes it clear that the way in which confidentiality should be determined in these circumstances is by reference to the national law to which the contracting authority is subject.
180. It is therefore necessary to apply the law of confidence (as already considered in terms of section 36(2)) in order to determine whether the relevant information would fall within the scope of the regulation.
181. Therefore, it is necessary to establish that the information was imparted in confidential circumstances, that the information has the necessary quality of confidence, that unauthorised disclosure would be detrimental to the winning bidder, and that there is some overriding public interest which negates the duty of confidence.
182. The Commissioner has already determined that the information in question does not meet the requirements of an actionable breach of confidence, in particular because some of this information did not possess the necessary quality of confidence, and, for information which did have the necessary quality of confidence, and for which an obligation remained in place at the relevant time, disclosure would not cause detriment to the winning bidder. As a result, the Commissioner must therefore conclude that disclosure of the information would not breach regulation 43 of the Procurement Regulations and that the exemptions in section 26(a) and (b) do not apply to the information in question.

Section 33(1)(b) – commercial interests

183. CBG applied section 33(1)(b) of FOISA to:
- information that would identify bidders or other companies which expressed an interest in tendering but did not go on to bid
 - pricing and other information provided by the bidders within their tenders
 - weightings for award criteria
 - CBG’s operational vehicle requirements and assumptions/calculations with respect to off-hire days



- points for clarification between CBG and the winning bidder, and minutes and agenda of the clarification meeting
- supplementary information provided by the winning bidder in advance of the clarification meeting
- scoring of bids (both total scores and breakdowns) and analysis of price and other aspects of bids within evaluation reports/matrices

184. Given the Commissioner's considerations and conclusions with respect to section 36(2) above (particularly as set out in paragraphs 158-169), the Commissioner has not considered the unsuccessful tender documents in what follows. However, he has continued to consider the information extracted from these where it appears in CBG's evaluation documents, and the correspondence and other documents which refer or relate to the unsuccessful tenders and the companies submitting these.
185. In terms of section 33(1)(b) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
186. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would, or would be likely to, 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. The prejudice must be substantial, in other words of real and demonstrable significance. It would have to be at least likely, so there would require to be a significant probability of it occurring, in the near (and certainly the foreseeable) future.
187. In this case, CBG has maintained that disclosure would prejudice substantially its own commercial interests and those of the companies submitting bids or expressing an interest in the tendering process. However, its submissions have not clearly identified which party's interests it considers would be harmed by disclosure of each of the types of information detailed above. In the circumstances, the Commissioner has considered all of this information in relation to CBG's commercial interests and then in relation to the commercial interests of the relevant companies.

CBG's commercial interests

188. With respect to its own commercial interests, CBG indicated that, for the reasons it had maintained that the exemption in section 30(c) applied, its ability to secure best value from its supply chain would be substantially diminished as a result of disclosure. It indicated that many contracts under which CBG operates have demanding performance standards, and to meet those standards it needs to work in partnership with its supply chain.



189. It indicated that if it received less detailed bids, which were more difficult to (or impossible to) evaluate effectively, it would be significantly disadvantaged in meeting its own performance standards. This would in turn place it at a significant commercial disadvantage to private sector commercial organisations.
190. It maintained that, as a commercial entity, it would be subject to substantial commercial prejudice should tender documents be released into the public domain. It submitted that this would prejudice CBG in that it might not benefit from such good bids in future, which would prejudice its ability to obtain value for money, in turn impacting upon public funds.
191. With respect to its tender evaluation matrix, CBG indicated that disclosure would prejudice substantially its ability to carry out and conduct commercial activities both in evaluating tender submissions received, and in submitting its own tender submissions to organisations that are letting contracts.

Conclusions with respect to CBG's commercial interests

192. The Commissioner accepts that CBG has commercial interests. Commercial interests will generally (but not solely) relate to any commercial trading activity a company undertakes, such as the sale and purchase of products or services, commonly for the purpose of generating revenue. Such activity will normally take place within a competitive environment. CBG is a company established to offer building services to both public and private sector clients and it does so in a competitive environment.
193. The Commissioner has first considered CBG's claim that disclosure of the information to which section 33(1)(b) has been applied would harm its commercial interests when acting as a purchaser of services from other companies. Harm to its ability to gain best value through its tendering exercises would, CBG maintains, in turn harm its ability to perform effectively as a provider of services operating in a commercial environment.
194. The Commissioner has considered these arguments carefully, but notes that the proposed harm to CBG's commercial interests would only occur if disclosure harmed the effectiveness of its tendering processes, in terms of its ability to attract high quality bids, or to evaluate these robustly. CBG's arguments with respect to the harm to tendering process were discussed in detail and in relation to each type of information under consideration within his analysis and findings with respect to the exemption in section 30(c) of FOISA, set out above. The Commissioner found that CBG had failed to demonstrate how or why such harm was likely to follow from disclosure of the information under consideration there.
195. The exemption in section 33(1)(b) has been applied to all of the information to which section 30(c) was applied, and additionally to information about CBG's fleet requirements and calculations regarding "off-hire" days. The Commissioner has separately considered the additional information that was not considered in relation to section 30(c) and, also for the reasons set out in relation to the application of section 30(c), he is unable to accept that disclosure of this information would harm future tendering by CBG.



196. Since the Commissioner does not accept that CBG has shown that disclosure of the information to which this exemption has been applied would be likely to prejudice (substantially or otherwise) the effectiveness of its tendering processes and ability to achieve best value, he is also unable to accept that this would in turn harm CBG's ability to trade or meet its performance targets successfully.
197. Therefore, the Commissioner is unable to accept that disclosure of the information to which section 33(1)(b) has been applied would, or would be likely to, prejudice substantially CBG's commercial interests.

Other companies' commercial interests

198. As noted above, with respect to third parties' commercial interests, CBG noted that the tender submissions were received as part of a competitive tendering process, from companies which were/are in competition with each other. It noted that the content of bids included details of (and not limited to) working practices, quality and specification of services provided, deployment of staff, IT solutions, method statements, financial models, pricing structures and profit margins. CBG submitted that such information is commercially sensitive and its release into the public domain would significantly hamper the commercial interests of the bidders.
199. CBG's submissions have, to a significant extent, focused on the risk of harm to the winning bidder, although the Commissioner understands that CBG also wishes these submissions to be considered in relation to the commercial interests of unsuccessful bidders and other interested parties.
200. CBG sought the views of the winning bidder regarding the disclosure of information regarding its tender in response to Mr Gordon's information request. CBG informed the Commissioner that this company submitted in writing that the disclosure of "specific individually focused information and prices" would prejudice substantially its commercial interests "both indefinitely and for the maximum period of the optional extension of the contract for total period of four years".
201. CBG argued that the release of the information into the public domain would, or would be likely to, significantly hamper the winning bidder in being able to compete for future contracts. Essentially, CBG states that other tenderers/competitors would be able to access all aspects of the winner's bid, including those aspects which gave the winner a competitive advantage, thus reducing the competitiveness of the winner.

Conclusions with respect to other companies' commercial interests

202. The Commissioner has considered whether the companies either bidding in or expressing an interest in the tendering process have commercial interests capable of being prejudiced by disclosure of the information under consideration, and he is satisfied that they do. Their interest or participation in a competitive tendering process demonstrates that these organisations all engage in trading activity within a competitive environment.



203. The Commissioner next considered the various types of information to which this exemption has been applied.

Identities of the tenderers and other interested companies

204. The Commissioner is unable to accept that disclosure of information simply identifying the bidders involved in a tendering process (i.e. in contexts other than those where this information was found to be exempt in terms of section 36(2)) would, or would be likely to, prejudice substantially those companies' commercial interests two years after that process had ended. This is particularly the case with respect to the winning bidder, which is named as a matter of course as the winning bidder in the OJEU. The harm (if any) that would follow the simple identification of that company would occur as a result of that publication and not as a result of a disclosure under FOISA.
205. With respect to other bidders, their simple identification reveals nothing about their strategies, pricing or operations. All identification would reveal is that they expressed an interest in, and in some cases submitted an unsuccessful tender for, a particular contract. While the Commissioner recognises that a company may prefer for it not to be known that it had participated unsuccessfully with a particular tendering process, the Commissioner is unable to accept, particularly in the absence of supporting evidence, that identification would, or would be likely to, prejudice substantially any of the companies' commercial interests.

Information redacted within winning tender or provided in advance of the clarification meeting

206. Turning to the information redacted within the winning tender and the supplementary information provided in advance of the clarification meeting, the Commissioner notes that CBG appears to have applied the exemption in section 33(1)(b) to all information supplied by the bidder, without any differentiation between the information. Its arguments have been applied equally to information about the winning bidder that is easily publicly accessible, and which sets out their pricing in relation to the relevant contract. In taking such a broad approach to the application of the exemption, CBG has failed to provide any compelling evidence as to likelihood of the harm that it claims would follow from disclosure of the specific information under consideration.
207. The Commissioner has noted that some of the information is easily publicly accessible, once the identity of the winning bidder is known, such as its company registration number, turnover and profit figures, which are available from Companies House. Where information which has been redacted within the winning tender is publicly available, the Commissioner is unable to accept that its disclosure in response to Mr Gordon's information request would, or would be likely to, prejudice substantially the relevant company's commercial interests.
208. With respect to the insurance details under consideration in this decision (extent of cover and date of expiry), the Commissioner cannot see (and has been given no submissions that would explain) how disclosure of this information would, or would be likely to, prejudice substantially the commercial interests of the winning bidder.



209. The remaining information redacted from the tender and the additional information supplied by the winning bidder is the detailed pricing information and proposals for the delivery of the contract along with company-specific details provided to support a bid – information about its experience and resources, operations and capacity, along with the identity of referees and work undertaken for them.
210. The Commissioner recognises that this type of information would, at the time of the tendering process, have held a significant degree of commercial sensitivity. This information highlights features of that company distinguishing it from its competitors, and its strategy and costs for delivering the contract offered by CBG. Disclosure of this information while the tendering was ongoing would have seriously undermined its chance of success, and provided advantage to competitors.
211. However, as noted above, the Commissioner has made clear that the commercial sensitivity of such information will diminish with the passage of time. In this case, (and for the reasons set out also in relation to the detriment test when considering the exemption in section 36(2)) the Commissioner is not persuaded by CBG's submissions that disclosure of the pricing and other remaining information redacted within the winning tender, or within the supplementary information supplied by the winning bidder, would, or would have been likely to, prejudice substantially the commercial interests of the companies concerned two years after the award of the relevant contract.

Information drawn from the tenders contained within the evaluation documents

212. The Commissioner next considered the information drawn from the tenders which appears within CBG's evaluation documents. For the reasons set out in relation to the detriment test when considering the exemption in section 36(2) of FOISA, the Commissioner does not consider that disclosure of this information (subject to the modifications to these documents discussed in paragraph 169 above to avoid identification of which of the unsuccessful bidders submitted which bid) would or would be likely to prejudice substantially the commercial interests of the companies concerned.
213. Again, the Commissioner considers that the passage of time in the period since the tendering process was completed would have reduced the relevance of that information to upcoming tenders, and so the sensitivity once held by that information would have diminished by the time when CBG reviewed its handling of Mr Gordon's information request.

Other information to which section 33(1)(b) has been applied

214. The remaining information to which section 33(1)(b) has been applied is the evaluation criteria, and other information contained in CBG's evaluation documents, the agenda/points for discussion and minutes of the clarification meeting between CBG and the winning bidder, and CBG's operational vehicle requirements and calculations regarding "off-hire" days.



215. CBG's vehicle requirements and calculations regarding off-hire days provide no information about the bidding companies, their strategies or commercial activities. The Commissioner can not envisage any scenario where disclosure of this information, which is internal information generated by CBG, would, or would be likely to, prejudice substantially the commercial interests of any third party. Similarly, the Commissioner can see no likelihood that disclosure of the evaluation criteria used by CBG (which were made available to all bidders within the ITT) would, or would be likely to, prejudice substantially the commercial interests of these companies.
216. The information relating to the clarification meeting does provide some additional insight into the detail of the proposals made by the winning bidder, the areas where CBG considered further information was required, and the discussions between CBG and the winning bidder that addressed CBG's questions. Again, however, the Commissioner has noted that this information is specific to the particular contract and its delivery in 2007. For the reasons set out above in relation to the information supplied within the tenders, the Commissioner is unable to accept that disclosure of this information in May 2009 would, or would have been likely to, prejudice substantially the winning bidder's commercial interests.
217. The Commissioner finally considered the information relating to the evaluation of the tenders, which provides details of CBG's assessment of each bid, cost comparisons and rankings. Disclosure of this information would provide insight into CBG's perceptions of the quality of different aspects of each company's bid. This would allow insight into the reasons for the success or failure of particular bids.
218. However, the Commissioner considers that the passage of time since the tendering process means that the relevance and value of the analysis for a company considering participating in any future tendering process would be limited. The ability of any company to replicate the success of aspects of other bids would be limited by its own structure, operations, facilities and capacity. He is therefore not persuaded that disclosure of the information withheld under section 33(1)(b) within the evaluation documents at the relevant time would, or would be likely to, prejudice substantially the commercial interests of any of the companies concerned.

Conclusion with respect to section 33(1)(b)

219. In the light of all of the above, the Commissioner has concluded in relation to all information considered in this decision (i.e. excluding the information already found to be exempt from disclosure under section 36(2) of FOISA) that CBG incorrectly applied the exemption in section 33(1)(b) of FOISA to the information withheld from Mr Gordon.
220. As such, he is not required to go on to consider the public interest test contained in section 2(1)(b) of FOISA in relation to this exemption.



Section 38(1)(b) – Personal information

221. The exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, where appropriate, section 38(2)(b)) exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles set out in Schedule 1 to the DPA. This exemption is absolute in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
222. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
223. CBG applied the exemption in section 38(1)(b) of FOISA to a range of information within the documents falling within the scope of Mr Gordon's information request. This included the names, job titles, contact details, and details of the experience of any staff of CBG or other companies mentioned within the documents. As noted above, following the Commissioner's conclusions with respect to the exemption in section 36(2) of FOISA (and for the reasons set out in paragraphs 158-169 above), the Commissioner has not considered the unsuccessful tender documents any further in this decision. He has therefore not considered the application of the exemption in section 38(1)(b) relation to the information in the unsuccessful tender documents in what follows.
224. As noted in paragraph 20 above, Mr Gordon confirmed, during the investigation, that he was not concerned with any signatures which had been redacted. Signatures will not therefore be considered in this decision notice.

Is the information personal data?

225. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).
226. The Commissioner is satisfied that the information to which CBG has applied the exemption in section 38(1)(b) is personal data. It is information relating to living individuals who can be identified from those data alone.

Would disclosure contravene the first data protection principle?

227. CBG argued that disclosure of the personal data would breach the first data protection principle. This requires that personal data be processed fairly and lawfully and, in particular, that it shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) (and, in the case of sensitive personal data, at least one on the conditions in Schedule 3 (to the DPA)) is met.



228. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data under consideration in this case do not fall into any of the categories set out in that definition. Therefore, it is not necessary to consider the conditions in Schedule 3 to the DPA in this case.
229. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in the schedules which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
230. When considering the conditions in Schedule 2 to the DPA, the Commissioner has noted Lord Hope's comment in the Collie judgement, that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.

Can any condition in Schedule 2 be met?

231. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he will then go on to consider whether the disclosure of this personal data would otherwise be fair and lawful.
232. In line with CBG's submissions on this point, the Commissioner considers condition 6 to be the only condition in Schedule 2 which might permit disclosure in this case.
233. Condition 6 permits personal data to be processed if the processing (which in this case would be by disclosure into the public domain in response to Mr Gordon's information request) is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects (the individuals to whom the withheld information relates).
234. There are, therefore, a number of different tests which must be considered before condition 6 can be met. These are:
- Does Mr Gordon have a legitimate interest in obtaining the personal data?
 - If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the individual in question?



- Even if the processing is necessary for Mr Gordon's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individuals concerned? As noted by Lord Hope in the Collie judgement, there is no presumption in favour the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr Gordon must outweigh the rights, freedoms or legitimate interests of the individuals before condition 6(1) will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that CBG was correct to refuse to disclose the personal data to Mr Gordon.

Does Mr Gordon have a legitimate interest in obtaining the withheld personal data?

235. When invited to comment on his legitimate interests in accessing the personal data under consideration, Mr Gordon indicated that the material released to date had been so voluminous, and so heavily redacted, that it was impossible for him to tell which items CBG regarded as covered by section 38(1)(b).
236. However, he noted that his request relates to the expenditure of a large sum of money by a company whose profits and losses have a direct bearing on public funds, namely those of Glasgow City Council. He noted that the contract tenders were issued with a reference to FOISA and the possible future release of information under it, and that FOISA has been a standard part of the business environment in Scotland for many years.
237. He maintained that his was therefore an entirely legitimate interest as a journalist, but any member of the public concerned about the use of public money would have an equal claim to accessing the material requested.
238. The Commissioner considers that Mr Gordon (like any member of the public) has a legitimate interest in understanding the process followed by CBG in tendering for the fleet management contract, which resulted in the expenditure of significant public funds. Without access to the personal data which CBG has withheld within the relevant documents, it is not possible to fully understand the tendering process, or the roles played by the various individuals concerned within that process and CBG's decision making.
239. The Commissioner is therefore satisfied that Mr Gordon has a legitimate interest in accessing the personal data under consideration.

Is disclosure of the information necessary to achieve those legitimate interests?

240. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so he must consider whether these interests might reasonably be met by any alternative means.
241. When considering this test, the Commissioner has focused on the particular legitimate interest identified by Mr Gordon, which is to fully understand the relevant tendering process.



242. Having reviewed the personal data which has been withheld, the Commissioner considers that a distinction can be drawn between that identifying (by name and job titles, and in some cases, other information about their experience) data subjects who had substantial roles within the tendering process and those who were not directly involved in that process.
243. Those individuals with a substantive role within CBG are those who were responsible for the administration of the tendering process and evaluated the tenders, the signatories of the award letter, and the staff who attended the meeting to discuss and clarify the winning bid, and the board meeting where the contract award was noted. The Commissioner accepts that Mr Gordon's legitimate interests cannot be met without knowing which staff from CBG played these key roles in the tendering process. The Commissioner therefore considers it is necessary for Mr Gordon's legitimate interests that both the names and job titles of these staff are disclosed to him.
244. However, where other staff in CBG have been involved in more limited ways in the tendering process (e.g. by offering administrative support), the Commissioner considers that disclosure of their names would contribute little to Mr Gordon's understanding of the tendering process. He has concluded that disclosure of the names of the individuals with only incidental roles within the tendering process would be disproportionate, and that the legitimate ends identified by Mr Gordon can be met by less intrusive means by disclosing the job titles for these staff. For these staff, the Commissioner therefore concludes that disclosure of their names is not necessary for the purposes of the legitimate interests identified by Mr Gordon.
245. The Commissioner has drawn a similar distinction when considering personal data relating to individuals employed by the winning bidder and unsuccessful tenderers. The Commissioner considers that it is necessary for the purposes of Mr Gordon's legitimate interests that the name and job title of the authorised signatory who signed the tender on behalf of the winning bidder be revealed. The Commissioner also considers that disclosure of the identities of attendees representing the winning bidder at the clarification meeting with CBG is necessary for Mr Gordon to fully understand the tendering process, and so pursue his legitimate interests. Finally, the Commissioner considers the necessity test is met in relation to the names of directors of the winning bidder, where they are named within the tender or associated documents. Since company directors are publicly identified as such, the Commissioner does not accept that it would be disproportionate or an unnecessary intrusion to identify them via disclosure in this case.
246. For other employees of the winning bidder, and employees of other companies that bid or expressed an interest in doing so, the Commissioner considers that Mr Gordon's legitimate interests can be met by less intrusive means, via the disclosure only of their job title.
247. The Commissioner has therefore concluded that it is not necessary for the purposes of Mr Gordon's legitimate interests to disclose the names of staff in organisations other than CBG, other than those discussed in paragraph 245 above.



248. Turning to the contact details of individuals, the Commissioner considers that the presence of job titles, and in some cases names, along with the information identifying the company a person represents is sufficient to allow understanding of who was involved in the tendering process what role they played. The Commissioner considers that Mr Gordon's legitimate interest can be met without disclosing individuals contact details such as telephone numbers and fax numbers. Where an email address includes the name of the sender, the part revealing the name of the sender could be removed, leave the part identifying the organisation they represent.
249. Since Mr Gordon's legitimate interests can be met by less intrusive means than fully disclosing all of the personal data under consideration, the Commissioner he has concluded that the test of necessity cannot be met for the individuals' telephone and fax contact details. He also accepts that the necessity test is not met for the names contained within email addresses, although he considers that the remaining parts of an address (e.g. @company.co.uk) should be retained in order to allow Mr Gordon to understand the origin of any communication.
250. With respect to the information for which the Commissioner has found disclosure is not necessary for the purposes of Mr Gordon's legitimate interests, he has consequently found that condition 6 cannot be met in this case and so disclosure would breach the first data protection principles.
251. The Commissioner therefore finds that this information (the names of individuals other than those specified in paragraphs 243 and 245 above, individual telephone and fax numbers, and the portion of any email address that incorporates the sender/recipient's name) is exempt from disclosure under section 38(1)(b) of FOISA.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?

252. The Commissioner must now go on to consider the required balancing exercise in relation to the personal data for which the Commissioner has concluded disclosure is necessary for Mr Gordon's legitimate interests. This is:
- name and job titles of individuals in CBG and the winning bidder who had substantial roles in the tendering process (as described in paragraphs 243 and 245 above)
 - job titles of any other employee of either CBG or other companies
 - job titles and length of service of key employees referred to within the relevant section in the winning bidder's tender document.
253. The Commissioner must consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individuals whose personal data is detailed above. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Gordon and those of the individuals in question. Only if the legitimate interests of Mr Gordon outweigh those identified above can the information be disclosed without breaching the first data protection principle.
254. In the Commissioner's briefing on section 38 of FOISA, he notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:



- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that may be caused by the disclosure
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information would be disclosed.
255. CBG concluded that Mr Gordon's legitimate interests were outweighed by the legitimate interests of the data subjects in that they would have no expectation their personal data would be released into the public domain following a request under FOISA.
256. Given the limitations of the information which remains under consideration at this stage, the Commissioner does not believe its disclosure would greatly diminish the privacy of the data subjects, particularly since it has been found that the names of most and contact details of all individuals concerned should not be disclosed. Revealing only the job title of the individual concerned significantly limits any intrusion into their private lives, and makes it considerably less likely that they would be identifiable from the information that would be disclosed to Mr Gordon.
257. The Commissioner notes also that the information under consideration in this decision does not relate to the individuals' personal lives but to work done in performing a professional role.
258. While the information relating to staff with a substantial role in the tendering process reveals more about them, since they would be named, the Commissioner considers that the individuals concerned are generally employed at a senior level, and would have some expectation that their involvement in such a tendering process might be revealed. This should be the case particularly for employees of CBG, which is a public authority familiar with the obligations imposed by FOISA.
259. Furthermore, the Commissioner's view, as expressed, for example, in *Decision 050/2008 Mr Q and the University of Glasgow*, is that it is generally unreasonable for senior professional employees of private firms who are involved in providing public authorities with services such as this, involving significant public expenditure, to expect that their identities and key information relating to their skills and experience will remain outwith the public domain. It appears to him only reasonable in circumstances such as this for key senior employees of the tendering companies to have an expectation, particularly following the advent of FOISA, that their information might be released as a result of seeking a public sector contract of this kind.
260. Equally, the Commissioner does not find it reasonable for senior employees and employees of CBG, who are key to the tendering process, to expect their identities to remain private. In the interests of accountability, it is not reasonable for the senior employees of CBG responsible for the delivery of this tender, resulting in the expenditure of significant sums of public funds, to expect their job titles and names to remain out of the public domain.



261. The Commissioner has therefore concluded that it would not, in this particular case, cause unwarranted prejudice to the rights and freedoms or legitimate interests of this group of data subjects to disclose information the information as set out in paragraph 252. He is satisfied in the circumstances that any prejudice to their data subjects' rights and freedoms and legitimate interests is not unwarranted and is outweighed by the legitimate interests of Mr Gordon.
262. Having balanced the two competing sets of interests in this case in relation to the information specified in paragraph 252, therefore, the Commissioner concludes that any prejudice to the rights, freedoms and legitimate interests of the data subjects is outweighed in this instance by the legitimate interest in disclosure of the withheld information. Consequently, he is satisfied that disclosure is permitted by condition 6 in Schedule 2 to the DPA. However, he must go on to consider whether disclosure would be otherwise fair and lawful.

Otherwise fair and lawful

263. The Commissioner considers that disclosure of the information specified in paragraph 252 would be fair, for the reasons already outlined in relation to condition 6. CBG has not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles) and, in any event, the Commissioner can identify no reason why disclosure should be considered unlawful.
264. The Commissioner therefore finds that CBG was wrong to withhold the information under consideration as described in paragraph 252 under the exemption in section 38(1)(b) of FOISA.



DECISION

The Commissioner finds that City Building (Glasgow) LLP (CBG) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tom Gordon of the Herald.

The Commissioner finds that the exemption in section 36(2) was applied correctly by CBG to the identity of the unsuccessful tenderers in contexts where this would enable identification of a bidder with a particular bid. The Commissioner also finds that by, withholding certain limited information on the grounds that it was exempt under section 38(1)(b) of FOISA, as specified above, CBG complied with Part 1.

However, the Commissioner finds that by withholding other information under these exemptions, and those in sections 26, 30(c), and 33(1)(a) and (b), CBG failed to comply with Part 1 and in particular section 1(1) of FOISA.

Given that redaction of the unsuccessful tender documents to avoid identification of the bidder with the content of a particular tender would not provide further information beyond that already provided to Mr Gordon or under consideration within other documents withheld by CBG, the Commissioner does not require CBG to disclose any part of the unsuccessful tender documents.

The Commissioner requires CBG to disclose the remaining information requested by Mr Gordon, subject to:

- (a) the redaction only of information found in this decision to be exempt from disclosure under section 38(1)(b) of FOISA and
- (b) the modification of the evaluation documents and letters notifying unsuccessful tenderers of the outcome of the tendering exercise in line with paragraph 169 above

By 11 July 2011.

Decision 102/2011
Mr Tom Gordon
and City Building (Glasgow) LLP



Appeal

Should either Mr Gordon or City Building (Glasgow) LLP 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
26 May 2011



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.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- (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 –
...
 - (b) section 26;
 - (c) section 36(2);...



(e) in subsection (1) of section 38 –

...

(ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;
- (b) is incompatible with a Community obligation; or

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

33 Commercial interests and the economy

(1) Information is exempt information if-

- (a) it constitutes a trade secret; or
- (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).

...

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.

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or

...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...



The Public Contracts (Scotland) Regulations 2006

43 Confidentiality of information

- (1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.
- (2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

Directive 2004/18/EC of the European Parliament and of the Council dated 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

6 Confidentiality

Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.