

Decision Notice



Decision 028/2014 Your Home Partners and North Lanarkshire Council

Information relating to a tender

Reference No: 201302587

Decision Date: 17 February 2014

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

On 17 August 2013, Your Home Partners (YHP) asked North Lanarkshire Council (the Council) for information concerning a tendering process. The Council withheld the information.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information in terms of section 33(1)(b) on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of the winning tenderer.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

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

Background

1. On 17 August 2013, YHP emailed the Council requesting information concerning the tendering process for a rendering programme at a specified street within the North Lanarkshire Council area. This included copies of quotes, estimates and communications relating to all work to be carried out by all companies invited to tender.
2. The Council responded on 13 September 2013. The Council informed YHP that some information relating to the tendering process was already in the public domain and provided a link to the relevant page on its website. The Council also provided a summary of costs from the bill of quantities included in the successful tender.
3. On 17 and 29 September 2013, YHP emailed the Council requesting a review of its decision. YHP stated that it had been provided with incomplete answers and had not been provided with copies of quotes relating to the works being carried out.



4. The Council notified YHP of the outcome of its review on 11 October 2013. The Council stated that it considered the information sought by YHP, in relation to copies of information concerning tenders, was exempt from disclosure in terms of section 33 of FOISA. This was on the basis that its disclosure would potentially prejudice the commercial concerns of the tenderers.
5. On 30 October 2013, YHP wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that YHP made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 18 November 2013, the Council was notified in writing that an application had been received from YHP and was asked to provide the Commissioner with any information withheld from YHP. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. During subsequent correspondence with the investigating officer, YHP clarified that the only information it was now seeking was the quote provided by the successful tenderer.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered the withheld information and the relevant submissions, or parts of submissions, made to her by both YHP and the Council. She is satisfied that no matter of relevance has been overlooked.

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

11. The Council submitted that the information sought by YHP was exempt from disclosure in terms of section 33(1)(b) of FOISA. This provides that 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). In this case, the Council submitted that disclosure would damage the commercial interests of the successful tenderer.



12. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
13. 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. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
14. Having considered the Council's submissions, the Commissioner is satisfied that those interests that have been identified are commercial interests for the purposes of this exemption. The information comprises the costs charged for each individual item of work detailed in the tender response. The tenderer is a contractor involved in the provision of services in a competitive and commercial environment and the withheld information relates to such provision.
15. Having reached this conclusion, the Commissioner must now go on to consider whether the commercial interests identified would, or would likely to, be prejudiced substantially by the disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
16. In its submissions, the Council stated that the withheld information detailed the specific costs charged by the contractor for completing each individual task required to carry out the work associated with the tender, within a schedule of rates to which the contractor had committed itself for a specified period. The Council argued that making the information public would significantly impede the contractor's ability to compete for similar contracts in future, given that competitors would then know the prices charged for specific tasks.
17. The Council also submitted that, as the withheld information was the unit prices charged for individual tasks within the project, it comprised the core financial terms of the agreement between it and the contractor. In the Council's view, disclosure of the information would provide competitors with an advantage, thereby being capable of causing substantial harm to both parties' commercial interests.
18. The Council pointed out that the contract in question is for a five year term ending in 2017, with the possibility that the contract will be re-tendered in 2017. In the Council's view, disclosing the information would place the contractor in a disadvantageous position in relation to other parties who may wish to tender in such an event.



19. The Council also explained that it had consulted with the contractor in relation to the potential disclosure of the information under FOISA. The Council provided a copy of a letter from the contractor which did not consent to disclosure of the information. The contractor had explained to the Council why it considered disclosure of the information was not appropriate. This was on the basis that disclosure would give its competitors an unfair advantage when bidding against it in open competition.
20. In its application to the Commissioner, YHP noted that the Council had provided it with a summary of costs from the contractor and saw no reason why the actual quotes from the contractor could not be disclosed.
21. The Commissioner has considered all of the arguments put forward by the Council and YHP. Having done so, she accepts that, if the details of the tender quote were to be disclosed, then it is likely that substantial prejudice would be caused to the commercial interests of the contractor. Given the detail within the withheld information, the Commissioner considers that its disclosure would be likely to have a significant detrimental effect on the contractor, thereby inhibiting its ongoing commercial activities.
22. The Commissioner also notes that the tender in question was conducted relatively recently and that the information in question comprises the basis upon which the contractor prices tenders for work of this nature. The Commissioner considers that this information – which would allow insight into the contractor's overall pricing strategy – would be of significant interest to the contractor's competitors.
23. For these reasons, the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of the contractor in this case and she accepts that the exemption in section 33(1)(b) was correctly applied on that basis.

The public interest test

24. As the Commissioner has found that the exemption in section 33(1)(b) is engaged, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
25. In its application to the Commissioner, YHP stated that it believed the costs quoted between the contractor and the Council may be lower than the costs being re-charged by the Council to homeowners to carry out the work in question.
26. The Council stated that the public interest in maintaining the exemption outweighed that in disclosure on the basis that disclosing the information would cause substantial prejudice to the commercial interests of the contractor.



27. The Council submitted that it was in the public interest for it to be able to procure services competitively, to best value for the public purse and for suppliers to remain commercially viable. The Council stated that, in this case, it had already disclosed information to YHP regarding the breakdown of costs within the tender concerning the overall costs of different activities and the total cost of carrying out the work in question. In the Council's view, this satisfied the public interest in disclosure as it ensured transparency and accountability regarding the expenditure of public money.
28. The Commissioner has noted all of the comments made by YHP and the Council regarding the public interest test.
29. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She also recognises a public interest in ensuring that value for money is seen to be obtained, particularly where this involves the public purse. She acknowledges that disclosure in this case would contribute to transparency and accountability and public scrutiny of the Council's tendering process.
30. The Commissioner believes that organisations which engage in commercial activities with public authorities should be aware that at times information relating to these activities will require to be released as a result of a request under FOISA.
31. The Commissioner has already acknowledged the risk of substantial commercial prejudice to the contractor in this case. The withheld information derived from the tender would constitute a core part of any tendering bid made by the contractor in relation to its trading activities. In the Commissioner's opinion, if this information were to be made available to the contractor's competitors, this would be likely to put it at a competitive disadvantage in any competitive tendering exercise it subsequently entered. The Commissioner considers there is a public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for tenders of this nature.
32. The Commissioner also agrees with the Council that the summary information already disclosed to YHP goes some way towards satisfying the public interest in disclosure of the withheld information. The Commissioner notes YHP's belief that the costs quoted by the contractor may be lower than the costs re-charged to homeowners by the Council. Having viewed the withheld information, the Commissioner does not agree that this was the case.
33. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice may result, the Commissioner does not believe that this is justified in this case. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration. The Commissioner therefore finds that the Council was entitled to withhold the information under consideration in this decision.



DECISION

The Commissioner finds that North Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Your Home Partners.

Appeal

Should either Your Home Partners or North Lanarkshire Council wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement
17 February 2014



Appendix

Relevant statutory

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

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

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

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

...