

Decision Notice

Decision 218/2016: Mr A and the Scottish Prison Service

Supplier pack cost: Tobacco products

Reference No: 201600634

Decision Date: 10 October 2016



Scottish Information
Commissioner

Summary

On 19 January 2016, Mr A asked the Scottish Prison Service (the SPS) for details of tobacco products on sale to prisoners.

The SPS responded by providing all the information requested except for the supplier pack costs. Following a review, Mr A remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the SPS was entitled to withhold the supplier pack costs under section 33(1)(b) of FOISA (Commercial interests and the economy), but that the SPS failed to carry out the public interest test properly when corresponding with Mr A.

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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 19 January 2016, Mr A made a request for information to the SPS for the following information in relation to each of the 14 tobacco products listed under 'CIGARETTES ETC' on the local list [i.e. the prison canteen] coming into effect on 8 February 2016:
 - (i) national supplier;
 - (ii) number of individual units in supplier packs;
 - (iii) supplier pack cost
 - (iv) recommended retail price
2. The SPS's response, which was undated, appears to have been received by Mr A around 15 February 2016. The SPS disclosed all the information requested, except the supplier pack costs. This information was withheld under section 33(1)(b) of FOISA (Commercial interests and the economy).
3. On 25 March 2016, Mr A wrote to the SPS requesting a review of its decision. He complained that the SPS had not explained why the exemption applied to the supplier pack cost. He also commented that the SPS had not considered the public interest test, as required by section 2(1)(b) of FOISA.
4. The SPS notified Mr A of the outcome of its review on 5 April 2016. It upheld its original response, this time explaining why it considered the exemption applied. However, it again failed to consider the public interest test.
5. On 6 April 2016, Mr A wrote to the Commissioner. Mr A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr A stated he was dissatisfied with the outcome of the SPS's review. He considered that the SPS had failed to demonstrate why

the exemption in section 33(1) of FOISA applied to the supplier pack cost. He was also unhappy that the SPS failed to conduct a public interest test at review.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr A made a request for information to a Scottish public authority and asked the authority to review its response to that request requests before applying to her for a decision.
7. On 6 May 2016, the SPS was notified in writing that Mr A had made a valid application. The SPS was asked to send the Commissioner the information withheld from him. The SPS provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPS was invited to comment on this application and answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. On 22 June 2016, the SPS provided submissions which included public interest arguments. The investigating officer provided the public interest arguments to Mr A, inviting his comment should he wish to do so.
10. On 19 August 2016, Mr A wrote to the Commissioner with his submissions for this case which included his comments on the public interest test.

Commissioner's analysis and findings

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

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

12. The SPS relied on section 33(1)(b) of FOISA to withhold the supplier pack costs.
13. In his submissions (dated 19 August 2016) Mr A stated that he believed the SPS's reasons for seeking to withhold information under this exemption were "wholly inadequate" and "insufficient to outweigh the general entitlement" under section 1(1) of FOISA.
14. Section 33(1)(b) provides that information is exempt from disclosure under FOISA if it would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA.
15. There are a number of elements an authority must demonstrate are present when relying on this exemption. In particular, it must show:
 - (i) Whose commercial interests would, or would be likely to, be harmed by disclosure;
 - (ii) The nature of those commercial interests; and
 - (iii) How disclosure would, or would be likely to, prejudice substantially those interests. The prejudice must be substantial: in other words, of real and demonstrable significance.

16. Where the authority considers that the commercial interests of a third party would be (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.

Whose commercial interests?

17. The SPS argued that disclosure of the supplier pack cost would, or would be likely to, prejudice substantially the commercial interests of its supplier, J W Filshill Ltd.
18. J W Filshill Ltd was the successful tenderer in a national procurement exercise to supply goods for sale in prison shops, J W Filshill Ltd. therefore provides the SPS with packs of tobacco products to sell to prisoners in all its prisons. The aim of the tendering exercise was to introduce consistent pricing, for the first time, across the prison estate.

Nature of the commercial interests

19. "Commercial interests" are not defined in FOISA. The Commissioner's guidance on this exemption explains that an organisation's commercial interests will usually relate to the commercial trading activity they undertake, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.
20. In the circumstances, the Commissioner is satisfied that J W Filshill Ltd. has commercial interests.

Would disclosure cause, or be likely to cause, substantial prejudice?

Submissions from Mr A

21. In his application, Mr A submitted that the SPS had not sufficiently "established likely substantial prejudice to the commercial interests of its current national supplier". He commented that the national supplier offers several hundred "lines" or items whose prices are likely to fluctuate throughout the contract period. This, and the fact that there is no imminent tendering process, meant that it was less likely that substantial prejudice would occur should the supplier pack cost be disclosed.
22. Mr A commented that J W Filshill Ltd. already publishes a catalogue of current prices (see below) and that the SPS has previously provided supplier cost of goods, such as packs of pasta, purchased by it in relation to another request. Given that historic price data for other products was already in the public domain, Mr A believed that there would be no harm in disclosing tobacco pricing data. Mr A also commented that he had asked for only 14 items (all tobacco products) in his request (and not for the prices of all of the products supplied by J W Filshill Ltd.).
23. In terms of pricing strategy, Mr A noted that the prison canteen is prevented from returning an overall surplus (i.e. profit) in excess of 10% on all items. Mr A thought it should be possible for anyone to estimate margins, and hence supplier prices, with some degree of accuracy in this context, unless the SPS is applying greater or lesser margins on some items as a matter of policy, thereby effectively promoting (in his view) some kinds of goods over others.

Submissions from the SPS

24. The SPS stated that disclosing supplier pack costs would, or would be likely to, prejudice substantially J W Filshill Ltd.'s commercial interests as disclosure would alert its competitors to its pricing strategy and to the individual prices used to sell to the SPS. This, the SPS

argued, would give competitors of J W Filshill Ltd. an “unfair advantage” in competing with other contracts of this nature. J W Filshill Ltd. commented to the SPS that:

“wholesalers tend to buy product from manufacturers at the same cost price, so it is not difficult to work out what margins we are working on for different product categories.”

25. The SPS commented that this contract is “a fundamental operating function” of the supplier, i.e. J W Filshill Ltd. It submitted that the market for tobacco products was more tightly controlled in terms of pricing and accessibility than for other products, and that tobacco products had to be treated differently to other items on sale under this contract.
26. In its submissions, the SPS also stated that tobacco products accounted for 40% of the total products purchased in its prisons. This was one reason why it considered that disclosure would cause substantial prejudice to J W Filshill Ltd.’s commercial interests.
27. When asked by the investigator how disclosure would cause substantial prejudice, given that Mr A had only asked about 14 products, the SPS noted that J W Filshill Ltd. were concerned, given the standardisation of costs in prisons, and what it described as the “transparency” in this industry [i.e. tobacco wholesales], it would not be difficult for J W Filshill Ltd.’s competitors to calculate its margins and to undercut it if the supplier pack costs were made public.
28. The SPS also contended that the same calculation could be made regardless of whether the price is historical or current. All tobacco products come from the same key producers, so J W Filshill Ltd. and its competitors would pay the same prices for tobacco products. SPS submitted that J W Filshill Ltd. would, therefore, be disadvantaged “massively” in the market in which it operates.

Commissioner’s conclusions

29. The information which has been withheld in this case relates to prices agreed under a contract (as distinct from retail prices). The catalogue to which Mr A referred in his submissions is indeed available on request from J W Filshill Ltd.’s website, but a catalogue is not the same as prices negotiated under contract.
30. Although some aspects of the arguments the SPS makes about negative impact on future tendering exercises and “competitiveness” are somewhat theoretical, it is not unreasonable to assume that competitors wishing to win the contract might successfully match or better the price currently secured. If competitors were able to obtain the supplier pack costs, that would enable them to undercut J W Filshill Ltd. in a future tendering exercise.
31. It is clear that both Mr A and the SPS understand how the withheld information might be used: both sets of submissions highlight the use of the supplier pack costs in a calculation of margins. Both Mr A and the SPS agree that this would be possible with a degree of accuracy – and the Commissioner agrees. However, the question for the Commissioner is how substantial any prejudice would, or would be likely to be (if at all), once this calculation is made.
32. Mr A submitted that there would be little, if any, prejudice in disclosing the supplier pack costs. He submitted that the prices of packs of pasta and other goods had been disclosed in the past without any harm occurring. In support of this argument, he stated that the SPS had already disclosed the supplier catalogue which contained price information.
33. Mr A also set out his understanding of the rules under which the SPS operates when selling products to prisoners. He explained that the SPS must operate without exceeding a certain

level of surplus. The Commissioner understands that, in effect, the SPS must approach sales of products to prisoners on a “not for profit” basis and operate within strict rules which do not apply outside prison. Clearly, this is not what would be regarded as a normal retail transaction to the general public in an open market place. The SPS does not have the same flexibility in its “retail” pricing to prisoners that exists outside prisons.

34. The Commissioner notes the evidence provided by J W Filshill Ltd. to the SPS, which indicates why tobacco products are more sensitive, in terms of pricing strategy, than most of its other products (such as pasta). In essence, this stems from the pricing methods of tobacco wholesalers. In other words, it would be easier to calculate the profit margin for tobacco products than for other products, and with a higher degree of accuracy.
35. In the circumstances, the Commissioner considers that supplier pack costs of tobacco products cannot be treated in the same way as packs of pasta, or many other products for that matter. She is satisfied that disclosing the supplier pack costs would allow competitors of J W Filshill Ltd. to estimate, with accuracy, its profit margins on tobacco products and to undercut J W Filshill Ltd in a future tendering exercise. As a result, and given that the 14 tobacco products caught by Mr A’ request equate to a substantial component (40%) of the overall contract, she is satisfied that disclosure would, or would be likely to, prejudice substantially the commercial interests of J W Filshill Ltd.
36. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, she has gone on to consider the public interest test in section 2(1)(b) of FOISA.

Public interest test

37. 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).

The duty to consider the public interest test

38. In his application, Mr A stated that the SPS had failed to carry out public interest test, both in its initial response and in its review decision. The SPS acknowledged that it failed to consider the public interest when corresponding with Mr A.
39. Consequently, the Commissioner finds that the SPS failed to comply with section 2(1)(b) of FOISA.
40. During the investigation, the SPS indicated it wished to rectify this matter. The SPS provided public interest arguments to Mr A. Mr A was invited during the investigation to comment on these arguments, and did so.

Submissions from the SPS

41. In favour of disclosure, the SPS recognised a general public interest existed in disclosing the information in question, for transparency reasons and to contribute to the public’s understanding of the contract negotiated by the SPS. More specifically, the SPS recognised the importance of any such contract involving public funds and of ensuring their effective oversight, acknowledging that the disclosure of the supplier pack costs would enable such scrutiny here.
42. However, the SPS also submitted there were strong reasons in favour of maintaining the exemption here. The SPS submitted that there is a public interest in ensuring value for money is achieved (and seen to be achieved) by Scottish public authorities. Where a public

authority is recently engaged in negotiating or concluding an agreement, it contended it is in the public interest that it is able to do so without its status as a public body impacting significantly on its ability to participate effectively; in particular, by securing the best value for the authority.

43. Lastly, the SPS contended there is a substantial public interest in avoiding significant harm to the supplier's commercial interest by disclosing information which is likely to prejudice the company's ability to compete in future procurement exercises and to affect its ability to secure the best price from its own suppliers. The SPS also asserted that there is a strong public interest in ensuring that companies which tender for public work are able to compete on an equal footing with their competitors. On balance, the SPS contended that these arguments outweighed those in favour of disclosure and that the public interest was best served by maintaining the exemption.

Submissions from Mr A

44. Mr A noted that the SPS recognised a public interest existed in ensuring "value for money". He contended the SPS failed to explain why this principle militates against disclosure of the withheld information.
45. Mr A contended that prisoners, as the "ultimate purchasers" of tobacco goods in prisons are most concerned to ensure that value for money is achieved. He could not envisage how this could be seen to be achieved without disclosure of supplier cost prices and submitted that this strand of the SPS's argument actually favours disclosure.
46. Mr A also suggested that prisoners, as ultimate purchasers in this context, should be the ones scrutinising the SPS's negotiations or concluding agreements with suppliers. He contended that it was prisoners who required assurance on best value: to ensure the SPS was not seeking to profiteer from its arrangements with its suppliers, to ensure that the SPS's current arrangements were not unlawful under EU law and to ensure there was no contravention of prison rules.

Commissioner's conclusions

47. In considering the public interest test, the Commissioner recognises the general public interest (not solely that of prisoners) in disclosing information held by Scottish public authorities. She also accepts that disclosure in this case would contribute to the public's (and prisoners') understanding of this contract and how public funds were being used. However, the Commissioner has already acknowledged the risk of substantial prejudice to commercial interests in this case, if the withheld information is disclosed, and accepts that there is a public interest in avoiding such prejudice.
48. The Commissioner has considered the arguments by both the SPS and Mr A. While there will be circumstances in which the public interest requires the disclosure of information, even if substantial prejudice to commercial interests may result, the Commissioner does not believe that this would be justified on public interest grounds in this case.
49. In conclusion, the Commissioner takes the view that, on balance, the public interest in this case favours maintaining the exemption, as the public interest in disclosure is outweighed by the public interest in avoiding substantial prejudice to the commercial interests identified by the SPS.
50. The Commissioner finds that the SPS was correct to withhold information under section 33(1)(b) of FOISA.

Decision

The Commissioner finds that the Scottish Prison Service (the SPS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr A.

She finds that the SPS was entitled to withhold information under the exemption in section 33(1)(b) of FOISA.

However, the Commissioner also finds that the SPS failed to comply with section 2(1)(b) of FOISA by not undertaking a public interest test.

Given the SPS conducted a public interest test during this investigation; the Commissioner does not require the SPS to take further action.

Appeal

Should either Mr A or the SPS 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

10 October 2016

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).

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info