

Decision Notice

Decision 077/2017: Mr A and Aberdeen City Council

Pension fund investments

Reference No: 201700308

Decision Date: 17 May 2017



Scottish Information
Commissioner

Summary

The Council was asked for information about its Pension Fund investments. The Council refused the request on the basis that disclosure would prejudice to the commercial interests of the firms specified and substantially prejudice the Council's ongoing working relationships with top quartile managers.

The Commissioner investigated and found that the Council incorrectly withheld information under section 33(1)(b) (Commercial Interests and the economy) of FOISA. She required the Council to disclose the withheld information to 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 3 November 2016, Mr A made a request for information to the Council. Mr A, who had previously been provided with details of the sale by the Council of two pension funds, requested the following information:

Part A - In relation to the two sales, please disclose:

- (i) The name of the funds you sold;
- (ii) The names of the buyers who you sold to;
- (iii) The PSA for the sale.

Part B

- (i) Any documents pertaining to whether you have ever bought or sold any private equity interests in the private equity secondaries market in the past;
- (ii) If so, any documents pertaining to the price in relation to NAV that the interest or interests were transacted at;
- (iii) If so, any documents pertaining to the identity of the counterparty with whom the interest(s) were transacted (i.e. who was the buyer or seller);
- (iv) If so, any documents pertaining to the identity of any intermediary involved in the process;

- (v) If so, any documents pertaining to any fees paid to any intermediaries involved in the process;
 - (vi) In the case of a sale, any documents pertaining to any other (e.g. possibly lower offers) that were received for the same interest(s) either from an intermediary or directly from a buyer or the GP;
 - (vii) Irrespective of whether you have sold, any documents pertaining to solicited or unsolicited in-bound offers from buyers, sellers or intermediaries seeking to transact funds with you.
2. Mr A later clarified that the reference to PSA within part A of his request should be taken as Purchase and Sale Agreement. He also restricted his request to the preceding five years.
 3. The Council responded on 5 December 2016. It explained that it was withholding information in terms of section 33(1)(b) of FOISA, as disclosure would prejudice the commercial interests of the firms specified. It further stated that disclosure could potentially damage the Council's reputation with such third parties, dissuading them from engaging with the Council.
 4. On 23 January 2017, Mr A wrote to the Council, requesting a review of its decision on the basis that he did not believe the response gave proper consideration to the request. He submitted that each part should have been treated as severable. He expressed surprise that the Council would not disclose the names of the funds sold, when it had already disclosed the price they had been sold for. He drew attention to other UK pension funds disclosing the information requested.
 5. The Council notified Mr A of the outcome of its review on 9 February 2017. The Council stated that it upheld the application of section 33(1)(b) of FOISA, on the view that to release the information would substantially prejudice the Council's ongoing working relationships with top quartile managers and that confidentiality was essential in a highly competitive marketplace.
 6. On 16 February 2017, 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 did not agree with the application of section 33(1)(b) and submitted that it was in the public interest for the information requested to be disclosed. He also made reference to two previous decisions by the United Kingdom's Information Commissioner's Office (the ICO), where the ICO found that similar information to that requested from the Council was incorrectly withheld under the equivalent section of the Freedom of Information Act 2000 (FOIA).

Investigation

7. 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 before applying to her for a decision.
8. On 13 March 2017, the Council was notified in writing that Mr A had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr A. The Council provided the Commissioner with two documents and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 7 April 2017, the investigating officer

invited the Council to comment on Mr A's application and answer specific questions, with specific reference to the requirements of the exemptions in section 33(1)(b) of FOISA.

10. The Council's attention was drawn to Mr A's application to the Commissioner, where he submitted that previous decisions by the ICO, FS50086121¹ and FS50083667², should be considered relevant to his current application.
11. The Council was also asked to explain the steps it had taken to establish which information it held which fell within the scope of Mr A's request, and to confirm that the Commissioner had been provided with all of the relevant information.
12. The Council responded on 21 April 2017. It provided the Commissioner with a further document, which the Commissioner accepts falls within the scope of Mr A's request. The Council submitted that it wished to maintain the application of section 33(1)(b) of FOISA, and to rely upon the arguments made previously.

Commissioner's analysis and findings

13. 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 Council. She is satisfied that no matter of relevance has been overlooked.

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

14. The Council submitted that it was withholding information under 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). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
15. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - 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.
16. 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.
17. Despite being advised that if substantial prejudice was being claimed to the interests of a third party, the views of that third party were likely to be relevant, the Council made no submissions to the Commissioner as to whether third party consultation had taken place.

¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2007/391832/DECISION_NOTICE_FS50086121.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notice/2007/389088/DECISION_NOTICE_FS50083667.pdf

18. Similarly, while the Council acknowledged Mr A's reference to the two ICO decisions, mentioned above, it submitted that its previous arguments were relevant and wished to maintain the application of section 33(1)(b) of FOISA. It did not provide any specific comments as to the relevance of these ICO decisions (both of which declined to uphold the exemption in relation to requests for similar information).
19. In its submissions to the Commissioner, the Council stated that it wished to rely upon the arguments made previously. Therefore, the Commissioner will consider the arguments the Council set out in its initial response, as confirmed in its review outcome.
20. "Commercial interests" are not defined in FOISA, but the Commissioner's guidance³ on this exemption states 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.
21. In its initial response to Mr A, the Council stated that commercial interests existed in relation to the information requested as it would allow identification of the pricing schedules and business practices of the firms specified.
22. Despite being asked to do so, the Council made no further submissions as to the nature of the commercial interests which would (or would be likely to) be harmed by disclosure. In the circumstances, however, the Commissioner accepts the information relates to what can be considered as a commercial trading activity and that both the Council and the third parties referred to would have relevant commercial interests in the information requested.
23. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests she has identified would be, or would be likely to be, prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 16 above: such prejudice must be at least likely before the exemption can apply, and therefore the Commissioner will expect to be satisfied that there is a significant probability of its occurrence.
24. In its initial response to Mr A's request for information, the Council informed him that disclosure of this information into the public domain under FOISA would prejudice the commercial interests of the firms specified.
25. The Council argued that the information was not publicly available and that disclosure would be likely to weaken the firms' business position in a competitive environment by revealing sensitive information of potential usefulness to competitors. It also stated that the Council must maintain good working relationships with reputable companies to enable it to obtain value for money: releasing commercially sensitive information could potentially damage the Council's reputation with such third parties, dissuading the third parties from engaging with the Council.
26. Within its initial response, the Council also informed Mr A why it considered it was in the public interest not to disclose the information. While these comments were made in relation to the public interest test, the Commissioner will give them cognisance in considering whether disclosure would cause the harm required for section 33(1)(b) to be engaged. The Council stated that disclosure would prejudice the Council's commercial relationships and future contractual negotiations with suppliers. It further stated that there was a strong public

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

interest in allowing normal market forces to operate in a competitive environment and engage in a fair and transparent process: disclosure, in the Council's view, would jeopardise its ability to invest with top quartile managers in a very competitive market, any knowledge a rival could obtain having a severe impact on their business. That could result in a negative impact on the Pension Fund's investment return, which might lead to higher employer contribution rates.

27. In his application to the Commissioner, Mr A argued that it was not sufficient for the Council to allege the mere possibility of detriment to commercial interests, it must prove it was likely to occur. He submitted that the Council had failed to meet the standard of proof threshold for section 33(1)(b) of FOISA to be engaged. He provided a link to a database containing data on some 6,000 private equity secondary transactions, which he believed demonstrated that no such commercial harm was likely to occur from disclosure.
28. The Commissioner has considered all of the information withheld, along with the submissions received.
29. On the question of harm, the Commissioner must be persuaded by the submissions she has received from the Council. In her view, these do not explain how the disclosure of the requested information would have had, or would have been likely to have (at the time the Council responded to Mr A's request or his requirement for review), a substantially prejudicial impact on the commercial interests of the third parties. The submissions by the Council are speculative in nature, with no evidence to explain how the prejudice required would be manifested should the information be disclosed.
30. Despite being asked whether it had obtained any evidence of harm from affected third parties, or whether it considered it appropriate (during the investigation) to obtain such evidence of harm, the Council made no response on this point. The Commissioner would note that where an authority is claiming disclosure would substantially prejudice the commercial interests of a third party, she would expect that the third party is consulted and their views obtained.
31. Similarly, the Commissioner is not satisfied that the Council has provided any evidence explaining how disclosure of this information would prejudice its own commercial interests, beyond expressing concern that disclosure could potentially damage its reputation with such third parties, and its ability to invest with top quartile managers. The Commissioner is not satisfied that the Council has demonstrated a link between disclosure and this happening.
32. Based on the submissions received from the Council, and in the absence anything more focussed, therefore, the Commissioner does not believe she has any option but to find that disclosure of the information would not have the substantially prejudicial impact required for section 33(1)(b) of FOISA to be engaged. It is for the Council to provide the required evidence of harm, not for the Commissioner to go out and find it. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under this exemption.
33. In conclusion, therefore, the Commissioner has not been persuaded by the Council that the exemption in section 33(1)(b) of FOISA is applicable to the withheld information. Having reached that conclusion, she is not required to consider the public interest test in section 2(1)(b) of FOISA and must require that the information be disclosed.

Decision

The Commissioner finds that the Aberdeen City Council failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr A. The Council was not entitled to withhold the information under the exemption in section 33(1)(b) of FOISA.

The Commissioner therefore requires the Council to provide Mr A with the information requested, by **3 July 2017**.

Appeal

Should either Mr A or the 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

17 May 2017

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).

...

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