

Decision Notice



Decision 004/2012 Mr Sam Cairns and City of Edinburgh Council

Identities of bidders tendering for advocacy service contracts

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Summary

Mr Sam Cairns requested from the City of Edinburgh Council (the Council) the names of bidders for independent advocacy services and which parts of the service they bid for. The Council withheld the information under sections 33 and 36 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Cairns remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council disclosed the requested information to Mr Cairns, having judged that the exemptions were no longer applicable after the relevant contracts had been awarded.

Following an investigation, the Commissioner found that, in relation to the matters raised by Mr Cairns, the Council had dealt with Mr Cairns' request for information in accordance with Part 1 of FOISA. He concluded that the Council was entitled to withhold the requested information on the basis that it was exempt from disclosure under section 36(2) of FOISA at the time when it responded to Mr Cairns' request for information and subsequent request for review.

The Commissioner also noted the Council's failure to comply with the timescale for conducting a review required by section 21(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 21(1) (Review by Scottish public authority) and 36(2) (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.

Background

1. On 26 May 2011, Mr Cairns emailed the Council requesting the names of those organisations which had submitted bids in relation to the recent tender for independent advocacy services, and whether these bids were for all or part of the contract.



2. The Council responded on 6 June 2011. It advised Mr Cairns that, as the tendering process was ongoing, it considered that the information was exempt from disclosure under sections 33 and 36 of FOISA. Although the Council did not indicate precisely which of the exemptions contained in these sections was considered to be applicable, it explained that section 33 provides an exemption to protect the commercial interests of the Council, and section 36 provides an exemption to avoid breaching the confidentiality of the tendering process before the successful tender has been chosen.
3. On 7 June 2011, Mr Cairns emailed the Council requesting a review of its decision. Mr Cairns maintained that the public interest in disclosure overrode the potential confidentiality issues in relation to the information. He also commented that he could not see how the names of the bidders could be regarded as confidential information.
4. The Council notified Mr Cairns of the outcome of its review on 18 August 2011. The Council upheld its previous decision. At this stage, the Council made clear that it was applying the exemption in section 33(1)(b) of FOISA and provided further details of its reasoning with respect to that exemption. The Council provided no further comments or clarification on the application of section 36 of FOISA.
5. On 23 August 2011, Mr Cairns emailed the Commissioner, stating that he 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 Mr Cairns 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 September 2011, the Council was notified in writing that an application had been received from Mr Cairns and was asked to provide the Commissioner with the information withheld from him. 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. On 18 October 2011, the Council disclosed the requested information to Mr Cairns, noting that contracts were awarded on 30 August 2011 by its Finance and Resources Committee.



10. Mr Cairns was subsequently asked by the investigating officer whether he wanted to continue with his application to the Commissioner. Mr Cairns confirmed that he still required a decision from the Commissioner.
11. The Council was advised that the investigation was being continued, and the investigating officer reiterated the previous invitation to provide submissions as to whether and why it considered the previously withheld information was exempt from disclosure at the time when it dealt with Mr Cairns' request for review.
12. The Council provided comments on 7 November 2011. It maintained that the exemptions in sections 33(1)(b) and 36(2) of FOISA applied to the information requested by Mr Cairns at the point where it notified him of the outcome of its review.
13. Mr Cairns was also requested to provide his public interest arguments in support of the disclosure of the information. He did so on 8 November 2011.

Commissioner's analysis and findings

14. 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 Cairns and the Council and is satisfied that no matter of relevance has been overlooked.

Timing

15. Although the Council disclosed the requested (and previously withheld) information to Mr Cairns during the investigation, Mr Cairns confirmed that he still required the Commissioner to issue a decision.
16. In every case he considers, the Commissioner's decision must be based on the circumstances that held when the Council responded to Mr Cairns' requirement for review. In this case, therefore, the Commissioner must consider whether the exemptions cited by the Council applied at that date. The relevant date is 18 August 2011; approximately 2 weeks before the contracts for advocacy services in which Mr Cairns was interested were awarded.

Section 36(2) - confidentiality

17. Information is exempt under section 36(2) of FOISA if the information was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person.
18. The exemption in section 36(2) is absolute, in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is justified in the public interest (this is commonly known as "the public interest defence").



19. 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.
20. The withheld information in this case is the identities of bidders tendering for three contracts awarded by the Council for the provision of independent advocacy services, and for each bidder, whether they bid for part or all of the advocacy services.
21. Given that the bidders submitted their tenders to the Council, the Commissioner is satisfied that the identities of the bidders, and the scope of each bid is information supplied to the Council by the bidders in the context of the tendering process. The Commissioner is therefore satisfied that this initial test is met and the Commissioner will go on to consider the second stage of the test for the application of section 36(2).
22. 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.
23. 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

24. For information to have 'the necessary quality of confidence', it must not be common knowledge, and a member of the public would have to apply skill and labour to produce the information. It could be said that the information must have the basic attribute of inaccessibility.
25. Having considered the withheld information, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence as none of the organisations which had bid for the contract or which parts they had bid for was generally known, nor could be obtained through alternative means.



Obligation to maintain confidentiality

26. With regard to the circumstances in which the information was provided to the Council, the Council commented that the tendering process implies an obligation of confidentiality.
27. In line with a number of previous decisions, the Commissioner accepts the Council's argument that the inherent nature of the tendering process implies an obligation of confidentiality with respect to certain types of information while a tendering process is ongoing.
28. The Commissioner is satisfied that there would have been a reasonable expectation on the part of the bidders that their involvement with the tendering process (and the extent of that involvement) would not be disclosed prior to its completion. He considers that the inherent confidentiality that he has recognised to be associated with blind bidding procurement process would extend to the identities of the bidders and the extent of their interest in the contracts being tendered. He considers that the nature of such procurement exercises creates an expectation on all sides that the identities of those bidding would not be disclosed prior to the award of the contracts.
29. Having considered the withheld information and the circumstances in which it was imparted, the Commissioner is accordingly satisfied that it was provided to the Council in circumstances which imposed an obligation to maintain confidentiality.
30. Since the contracts were not awarded until after the Council had reviewed its decision in relation to Mr Cairns' request for information, he is satisfied that the obligation to maintain confidentiality remained in place at the time that is relevant for the purposes of this decision.

Unauthorised disclosure which would cause detriment

31. The final requirement is that unauthorised disclosure of the information would be to the detriment of the parties that provided the information to the Council.
32. 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)).
33. The Council has argued that if the information was disclosed prior to contract award the public could draw incorrect views and conclusions which would damage the bidders' reputations.
34. The Council noted also that after the tender process is closed there is a standstill period where all unsuccessful bidders receive details of the merits and deficits of their bid, and details of the aspects of the successful bid that resulted in the successful bidder's award. The unsuccessful bidders have a chance to challenge the process at this stage.



35. The Commissioner considers that disclosure of the information requested by Mr Cairns would have been detrimental to the bidding companies. As noted in previous decisions, the Commissioner considers that when bidders submit their tenders to a public authority, they do so in the expectation that the details of their bids will not be disclosed into the public domain, at least not before the supplier(s) are awarded the contract. This principle is paramount in the tendering process, ensuring that both the bidders and the contracting party are able to operate in an impartial environment without any undue influence that could affect the quality and scope of the tender submissions.
36. Public disclosure of the identities of organisations that had bid at the time relevant to this decision could have affected the perceived impartiality of the tendering process, to the detriment of all parties involved. It could also prompt speculation and discussion of the merits of the bidders and bids which, at that particular point, could be detrimental to their interests in the tendering process. In particular, the Commissioner recognises that the parties have the opportunity to gain feedback and to challenge the outcome of the tendering process before it is complete. Public disclosure of the identities of bidders before this stage has completed could have the effect of limiting the opportunity for companies to do so.
37. Having considered the submissions from the Council and from Mr Cairns, the Commissioner is satisfied that there would have been detriment to those who submitted the tenders if the information requested by Mr Cairns had been disclosed at the time that is relevant to this decision.
38. In reaching this conclusion, the Commissioner has recognised the importance of the timing of Mr Cairns' request for information. He considers that the sensitivity surrounding this information would have been short lived, but that it remained until the tendering process had completed and the relevant contracts had been awarded.
39. Having considered each of the relevant tests, the Commissioner is therefore satisfied that disclosure at the relevant time would have constituted an actionable breach of confidence.

Public interest defence

40. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) 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.
41. 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.



42. In coming to a decision on this matter, the Commissioner has taken account of the submissions made by Mr Cairns on the public interest. He maintained that knowing the identity and number of bidders before the contract awarded would allow the public to understand better how effectively the tender was marketed and which organisations were attracted by the tender specification. Mr Cairns considered that if the tender was poorly advertised or the specification was unattractive and there was a single bidder, then the Council could pull the contract and re-advertise it.
43. There is clearly a general public interest in economy, efficiency and effectiveness in the expenditure of public funds, and more particularly in transparency and effective scrutiny in relation to contract awards. However, the Commissioner considers that the public interest identified by Mr Cairns could be met equally via disclosure of the information he has requested after the tendering process has been completed.
44. The public interest in maintaining confidences, where they are found to apply, is weighty. In all the circumstances of this case, the Commissioner does not consider there to be a reasonable argument for the release of this confidential information on public interest grounds at the time when the Council notified Mr Cairns of the outcome of its review.
45. Therefore having considered all the arguments the Commissioner is satisfied that the Council was correct to withhold this information under section 36(2) of FOISA.
46. Given that the Commissioner is satisfied that the Council was entitled to withhold the information under section 36(2) of FOISA, he is not required to (and will not) go on to consider the application of section 33(1)(b) of FOISA.

Comment on timescale for the Council's review

47. Although Mr Cairns did not raise this matter within his application for a decision, the Commissioner considers it appropriate to note that the Council failed to meet the required timescale when conducting a review in relation to Mr Cairns' information request.
48. Section 21(1) of FOISA gives a Scottish public authority a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
49. Mr Cairns submitted his request for review on 7 June 2011 and the Council provided its response on 18 August 2011. The Commissioner notes that this was well outside the required timescale, although he has made no formal finding on this point.
50. In its submissions, the Council apologised for the delayed response, explained that work pressures within the division had resulted in the delay and that staff resources had now been adjusted and redirected to avoid a recurrence of the problem.
51. The Commissioner notes the explanation provided by the Council and welcomes the changes made to avoid such problems in the future.



DECISION

In relation to the matters specified in the application to him, the Commissioner finds that the City of Edinburgh Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sam Cairns. In particular, the Commissioner finds that the information requested by Mr Cairns was exempt from disclosure under section 36(2) of FOISA at the time when the Council notified Mr Cairns of the outcome of its review.

Appeal

Should either Mr Sam Cairns or the Council 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.

Margaret Keyse
Head of Enforcement
5 January 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and

...

- (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 –

...

- (c) section 36(2);

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...



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.