

Decision Notice 004/2021

Breakdown of costs paid to contract suppliers/sub-contractors

The Applicant

Public authority: Fife Council

Case Ref: 202000307



Scottish Information
Commissioner

Summary

The Council was asked for cost breakdowns by supplier/sub-contractor for a new “super-depot” at Halbeath.

The Council released some data but withheld some, disclosure of which, it believed, would prejudice its ongoing negotiations with suppliers and undermine its commercial interests. It also explained why some of the information was not held in the way the Applicant expected.

The Commissioner accepted that, by the end of the investigation, the Council had carried out thorough and adequate searches and had disclosed the information which fell within the scope of the request. However, he also found that the Council should not have applied an exemption to information which it did not in fact hold.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 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. In 2016, Fife Council (the Council) announced its aim to replace a number of existing depots with a single “super depot”, combining a number of functions, at Halbeath. In 2019, there were media reports of significant cost increases.
2. On 25 November 2019, the Applicant made a request for information to the Council. The information requested was a full financial breakdown, and the spend, on the new super depot at Halbeath, to include costing budget, overspend figures and the companies involved.
3. The Council responded on 31 December 2019, providing three total projected figures for (i) overall budget, (ii) projected spend and (iii) projected overspend, all as reported to the Council’s Asset Committee on 31 October 2019. A separate table listing suppliers/sub-contractors was also included.
4. On 31 December 2019, the Applicant wrote to the Council, requesting a review of its decision on the basis that the information supplied was not what was requested, i.e. actual costs and spend rather than projections.
5. The Council notified the Applicant of the outcome of its review on 30 January 2020. In respect of the breakdowns stipulated in the request, the Council stated this data was not held and it notified the Applicant accordingly, under the provisions of section 17(1) of FOISA. It provided a copy of a committee paper (Policy and Co-Ordination Committee meeting of 23 November 2017), which it believed explained increases in budget. For the supplier information, specifically the breakdowns, the Council informed the Applicant that it was now withholding this data under section 33(1)(b) of FOISA.
6. On 27 February 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome

of the Council's review because his focus was obtaining breakdown of payments to date, by supplier/sub-contractor. He believed money had already been paid out, so the information ought to be provided.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 17 March 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant (which was provided). The Council disclosed further updated information to the Applicant at this time.
9. The Applicant remained dissatisfied as he did not accept he had been given what was requested. He remained of this view during the investigation
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the searches and other steps taken to identify and locate any information held. Submissions were provided by the Council, in response to this request and during the investigation. It no longer claimed to be withholding information under section 33(1)(b) of FOISA.

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 him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Information held by the Council

12. Section 1(4) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

15. The Commissioner has noted the information disclosed to the Applicant (including updated information disclosed during the investigation, which does not strictly fall within the scope of the request).
16. In its submissions, the Council set out how it had established what information it held, including the services involved, the resources searched and the methodology and parameters used. Supporting evidence of the outcomes was provided. Aspects of these questions (including queries raised by the Applicant about apparent anomalies in the information disclosed) were the subject of further clarification during the investigation. The Council explained the extent to which the accounts in question remained incomplete when the request was received.

Commissioner's conclusions on section 17(1)

17. Having considered all relevant submissions, the Commissioner is satisfied that, by the end of the investigation, the Council had taken adequate and appropriate steps to establish what information was held and was capable of addressing the terms of the Applicant's request.
18. He accepts that proportionate searches for any information held and falling within the scope of the request have been conducted and that the Council was correct to notify the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested, except to the extent disclosed.
19. The Commissioner can only consider what relevant information is actually held by the Council (or was held, at the time it received the Applicant's request). He cannot consider what information it should hold, or what the Applicant believes it should hold.
20. The Commissioner notes that, at review, in respect of the supplier information (specifically the breakdowns), the Council informed the Applicant that it was withholding data under section 33(1)(b) of FOISA. For the reasons set out above, other than the information which was not strictly in scope (paragraph 15 above), there was no further information held which was capable of addressing this request, and therefore nothing which could properly be considered exempt.
21. Where no information is held, a Scottish public authority has no option but to apply the provisions of section 17(1) of FOISA. In seeking to apply an exemption to information it did not in fact hold, the Council failed to comply fully with section 17(1).

Decision

The Commissioner finds that Fife Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by carrying out adequate, proportionate searches in responding to the Applicant's request and requirement for review, and by disclosing the information it held which fell within the scope of the request, the Council complied with section 1(1) of FOISA.

However, he finds that the Council incorrectly applied the exemption in section 33(1)(b) of FOISA to information which was not, in fact, held, contrary to section 17(1) of FOISA.

The Commissioner does not require the Council to take any action in relation to this failure, in response to this application.

Appeal

Should either the Applicant 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.

Margaret Keyse
Head of Enforcement

7 January 2021

Appendix 1: 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.

...

- (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.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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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