



Scottish Information
Commissioner

**Decision 013/2008 Millstream Associates Ltd. and
East Renfrewshire Council**

Price paid for provision of a procurement portal

**Applicant: Millstream Associates Ltd.
Authority: East Renfrewshire Council
Case No: 200701286
Decision Date: 28 January 2008**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 013/2008 Millstream Associates Ltd. and East Renfrewshire Council

Price paid by East Renfrewshire Council for provision of procurement portal software – withheld on the grounds that it was confidential information and disclosure would harm commercial interests.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 33(1)(b) (Commercial interests); and 36(2) (Confidentiality).

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

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code of Practice)

Facts

In August 2007, East Renfrewshire Council (the Council) was asked to provide information about the procurement of the East Renfrewshire Council Procurement Portal. The Council provided some of the information requested but withheld details of the payment made for the establishment of the portal, and any ongoing or annual charges. Initially, the Council argued that disclosure of this information would substantially prejudice the commercial interests of the company supplying the procurement portal, and was exempt under section 33(1)(b) of FOISA. At review, the Council upheld this argument and also found that the exemption in section 36(2) should apply, as the information had been provided in the expectation that it would remain confidential.

Following an investigation, the Commissioner found that the exemptions cited had been wrongly applied, and that the information should be disclosed.



Background

1. On 10 August 2007, Laura Mackie of Millstream Associates Ltd. asked the Council to provide answers to five questions about a procurement exercise for the East Renfrewshire Council Procurement Portal.
2. The Council replied on 21 August 2007, and provided information on four of the questions asked (those numbered two to five). However, the Council refused to provide the information in response to Millstream Associates' first question, which asked how much the Council had paid the supplying company to establish the procurement portal and sought details of any ongoing costs, such as annual charges, which were associated with the provision of the portal.
3. The Council advised Ms Mackie that the company had offered a reduction on the normal tariff because of the volume of work already commissioned by the Council. It was considered that disclosure of this financial arrangement could prejudice the company's relationship with other customers, and therefore details of the payment made to the supplier were exempt from disclosure under section 33(1)(b) of FOISA.
4. On 31 August 2007 Ms Mackie requested a review of the decision to withhold the payment details. She argued that the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) had established the principle that although the profit margin or the method by which the price was arrived at might be commercially sensitive information, the price paid is not. She acknowledged that the Public Contracts regulations did not cover the subject of her request because of its relatively low value, but took the view that that the principle established by the regulations would apply nevertheless.
5. On 27 September 2007, the Council wrote to Ms Mackie to advise her of the outcome of its review. The Council disputed her interpretation of the Public Contracts regulations. The Council advised Ms Mackie that in reaching its decision to withhold the price paid, it had considered the nature of the contract, the fact that it had been awarded only in late 2006, the way in which the price was agreed, and the fact that the supplier regarded the information as commercially sensitive. The Council upheld its view that disclosure of the information would or would be likely to prejudice substantially the commercial interests of the supplier, and that the information was therefore exempt from disclosure under section 33(1)(b) of FOISA.
6. The Council considered that although the information would be of interest to Millstream Associates from a commercial viewpoint, it was in the wider public interest that the commercial interests of a local authority's contractor were not prejudiced by the release of commercially sensitive information.



7. The Council advised Ms Mackie that the information was also exempt from disclosure under section 36(2), in that it was obtained by a Scottish public authority from another person; and its disclosure by that authority would constitute a breach of confidence actionable by that person or any other person. The Council noted that although section 36(2) is an absolute exemption, there may be a requirement to consider the public interest test in certain circumstances. Again, the Council considered that the wider public interest was served by maintaining the confidentiality of the information.
8. On 27 September 2007, Mr Tim Williams of Millstream Associates applied to me for a decision in terms of section 47(1) of FOISA. Mr Williams considered that the Council had failed to demonstrate that disclosure of the price paid for the procurement portal would, or would be likely to, prejudice substantially the commercial interests of the supplier, and therefore in withholding this information it had failed to comply with FOISA.
9. The application was validated by establishing that Millstream Associates had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

10. On 1 October 2007, the Council was notified in writing that an application had been received from Millstream Associates and was asked to provide my Office with copies of any information withheld from the applicants, for the purposes of the investigation. The Council confirmed that only the details of the price paid to the supplier had been withheld and all other information requested by the applicants had been provided. The case was then allocated to an investigating officer.
11. On 2 November 2007 the Council was asked for further information or comments on several issues relating to the case. In particular, the investigating officer asked the Council to consider Decision 088/2007¹, in which the Commissioner had found that VisitScotland should disclose contract information which included financial details. The Council was asked to explain whether there were different circumstances to consider in relation to the financial information in this case.

¹ Decision 088/2007 Mr Alan Keith, Chairman of the Association of Dumfries and Galloway Accommodation Providers and VisitScotland.



12. The Council provided a full reply on 19 November 2007, which included copies of correspondence with the supplier regarding the discounted price, and evidence of the supplier's reaction to the information request received from Millstream Associates.
13. In relation to the exemption in section 33(1)(b), the Council explained that it was the discount offered to the Council which was considered to be commercially sensitive, and provided an email from the supplier which confirmed that standard pricing information was already available on its website.
14. The supplier had also advised the Council that it believed a similar information request had been sent to all its customers (comprising a number of public authorities, listed on the supplier's website), and that these requests were being made not to serve the interests of the public but to serve the commercial objectives of the sender. The supplying company considered this to be an abuse of freedom of information legislation.
15. The Council accepted that there is a general public interest in knowing the costs incurred by a local authority in respect of various contracts, but argued that it is not in the public interest to release detailed pricing information where this would substantially prejudice the commercial interest of the Council's contractors. The Council considered that any benefit there may be in making the pricing information available would be outweighed by the substantial prejudice which would, or would be likely, to be caused to the supplier.
16. The Council warned that a decision to release this information may also seriously discourage a contractor from offering such discounts in the future, which would result in additional costs to the Council and its council tax payers; it stated that this could not be in the public interest.
17. In relation to the exemption in section 36(2) of FOISA (Confidentiality), the Council advised that the circumstances in which the information was provided were different from those which had led me to order disclosure of contract information held by VisitScotland (Decision 088/2007). The price paid for the procurement portal was not part of a negotiated contract, but was contained in the quote provided to the Council: the quote included the discount offered. The Council therefore took the view that the price was information which had been supplied to the Council by a third party.
18. The Council advised that although there was no explicit agreement that the price quoted should remain confidential, the expectation of confidentiality was reasonable and could be implied from the correspondence.



19. The investigating officer asked Millstream Associates Ltd whether similar information requests had been made to other public authority customers of the supplying company, and whether the information had been provided. Millstream Associates provided evidence showing that similar requests had been made, and that payment details had been provided by a number of the public authorities which had purchased procurement portal software from the supplying company.

The Commissioner's Analysis and Findings

20. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Millstream Associates Ltd. and the Council and am satisfied that no matter of relevance has been overlooked.

Information available and information withheld

21. There are two pieces of information withheld in this case: the total price paid by the Council for the establishment of the procurement portal software; and details of any ongoing costs such as annual charges. My understanding is that the price paid for establishing the portal was the set-up fee, while the ongoing costs consisted of maintenance charges, which included an annual licence fee.
22. At the time of Millstream Associates' request, a certain amount of information about the price of the procurement portal software purchased by the Council was already generally available from the supplier's website,. This listed a single standard set-up price and three annual licence price options for any potential customer. (I note that the company has told the Council that this information has now been removed from its website; however, it is not disputed that the information was been available online at the time of Millstream Associates' request, and in fact can still be found through an internet search.)

Section 36(2) – Actionable breach of confidence

23. The Council has argued that the information withheld is exempt from disclosure under section 36(2) of FOISA. This exemption applies where information has been supplied to a public authority by a third party, and where disclosure of the information would constitute a breach of confidence actionable by the third party or any other person.



24. In order to rely on section 36(2), an authority must demonstrate that certain conditions apply. Firstly, the information must have been supplied by another person. In this case the Council has stated that the price of the procurement portal was information which was provided by the supplier in the form of a quote, rather than a figure which represented the outcome of negotiation between the two parties. The quote included a statement regarding the discount offered to the Council. The Council has provided a copy of the quotation it received from the supplier.
25. After considering the quotation, I am satisfied that the price quoted and subsequently paid for the establishment of the portal is information which was provided to the Council by the supplier, and was not a figure which was subject to a process of negotiation with the Council.
26. However, the quote provided to the Council does not indicate what maintenance charge would be levied. Although it lists three pricing options for the annual licence, the option ultimately chosen by the Council cannot be determined from the information in the quote, and the quote does not indicate what other maintenance charges would be levied. I therefore do not accept that the ongoing costs of the portal can be said to be information which was provided by a third party. Consequently, I find that the exemption in section 36(2) of FOISA cannot be applied to this part of the information withheld.
27. In relation to section 36(2), I will therefore consider only whether the Council was justified in withholding details of the total cost paid for the establishment of the procurement portal, that is, the set-up fee. Disclosure of this information would allow any discount provided by the supplier on the set up fee to be calculated, given that details of the standard set-up fee are already publicly available. The Council has confirmed that it is the discount which is considered to be commercially sensitive.



28. As noted above, I am satisfied that the total cost paid on the set up fee is information which was provided to the Council by a third party. The next point to establish is whether disclosure of the information by the Council would constitute a breach of confidence actionable either by the person from whom the authority obtained the information or by any other person. I take the view that 'actionable' means that the basic requirements for a successful action must appear to be fulfilled. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:
- a) The information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
 - b) The information must have been received by the public authority in circumstances from which an obligation on the authority to maintain confidentiality could be inferred. The obligation may be explicit (for example, expressed in a contract or other agreement), or implied from the circumstances or the nature of the agreement between the parties.
 - c) There must be a disclosure or use of the information which is not authorised by the person who communicated the information but which would cause detriment to that person.
29. The quote provided to the company contains no indication or request that the information should be treated as confidential. The Council has confirmed that there was no explicit agreement that the pricing information would be kept confidential, but advised that the discounted price within the quote was offered with the reasonable expectation that it would remain confidential.
30. After receiving Millstream Associates' information request, the Council had phoned the supplier to ask for its views on disclosure. In its response (which was provided to me), the supplier stated that although the specification and costing information was in the public domain, it considered other questions on pricing to be commercially sensitive and not information which should be disclosed under FOISA. The Council considered that an expectation of confidentiality could be inferred from this correspondence.



31. The procurement of the software took place towards the end of 2006, well after FOISA had come into force. The Section 60 Code of Practice (paragraph 42) states:

“Public authorities should, ideally before accepting information regarded by the company as commercially sensitive, take steps to ensure that the company understands the possible implications of the Act.”

It may be that, at the time the purchase was made, the Council overlooked the possibility that information relating to the purchase might later be requested under FOISA, and consequently failed to ensure that the company understood this, or to discuss with the company whether certain information should be treated confidentially. However, once the information request from Millstream Associates was received, the Council contacted the supplier to seek its views in relation to potential disclosure under FOISA.

32. In its letter to Millstream Associates of 27 September 2007, the Council stated that following receipt of the request, the Council had asked the supplier whether the pricing information requested was considered to be “commercially confidential”. I have not confirmed with the Council whether this was the exact phrase used: as noted previously, this contact was made by phone. However, I think it is reasonable to expect that that supplier would have taken the opportunity to state explicitly that the information had been provided in confidence, if that were its view, when responding to the Council’s enquiry, and significantly it did not choose to do so. Nowhere has the supplier indicated that it would view disclosure as a breach of confidence.
33. Although it is possible for the exemption in section 36(2) to apply where an explicit statement of confidentiality does not exist, in this case I am not persuaded that there is sufficient evidence that the pricing information was received by the Council in circumstances from which an obligation on the authority to maintain confidentiality could be inferred, or that disclosure would have constituted an actionable breach of confidence. I therefore find that the Council was not justified in withholding information about the price paid for the establishment of the procurement portal under section 36(2) of FOISA.

Section 33(1)(b) – Commercial Interests

34. Section 33(1)(b) of FOISA exempts information from disclosure where this would, or would be likely to, prejudice substantially the commercial interests of any person. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.



35. The Council has submitted that this exemption applies because disclosure of the information requested would be likely to prejudice substantially the commercial interests of the company supplying the procurement portal, by revealing the level of discount offered to the Council. The Council stated that this could prejudice the supplier's relationship with other clients with whom they had negotiated similar agreements.
36. In reaching its decision that the information should be withheld under section 33(1)(b) the Council also had regard to the nature of the contract, the fact that it had been quite recently awarded (within the last year), the way in which the price was agreed and the fact that the supplier considered the information to be commercially sensitive.
37. The Council also asked me to take into consideration the supplier's concern that similar information requests had been made to its other public authority customers, which (in the supplier's view) were made not to serve the interests of the public but for commercial objectives. The supplier considered this to be an abuse of the Freedom of Information legislation.
38. Section 33(1)(b) of FOISA can only apply where disclosure would, or would be likely to, cause substantial prejudice to commercial interests. The question to consider in this case is whether disclosure of the information withheld would have such consequences.
39. In my briefing on 'Section 33: Commercial interests and the economy' I said: "...in order to claim these exemptions, the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time. Authorities should therefore consider disclosing the information asked for unless it would cause real, actual and significant harm."
40. The Council has confirmed that the information considered to be commercially sensitive in this case is the level of discount provided by the supplier. However, I do not consider that the authority has successfully demonstrated that disclosure of the information requested in this case (which would allow the level of discount to be determined) would cause significant harm to the supplier. It is known that the contract was of low value and the discount offered would accordingly be for a relatively small amount. The Council has argued that disclosure could harm the supplier's relations with its other customers. No evidence has been provided to support this assertion; for example, evidence that the other public authorities purchasing a similar service from the supplier have been offered different levels of discount on any of the charges.



41. Nor has the Council provided me with any evidence to show that disclosure of the ongoing costs of the portal, that is, the maintenance and licence charges, would cause significant harm to the supplier's commercial interests. As noted previously, information relating to the standard licence fee options is already in the public domain, although I accept that it is not known which option was chosen by the Council. However, the range of charges imposed by the supplier in relation to the annual licence is public knowledge, and I cannot see that the supplier's commercial interests would be damaged if it was known which of the three licence options the Council had chosen.
42. This leaves me to consider the other, unspecified part of the maintenance charges which, together with the licence fee, make up the "ongoing costs". The Council has not provided any arguments to show what harm disclosure of this information would cause to the supplier's commercial interests, apart from putting forward the supplier's concerns that a commercial competitor has been collecting information about its charges.
43. I accept that there is evidence that Millstream Associates has made similar information requests to other public authorities who had purchased the same software from the supplier, and that it is reasonable to assume that this information has been gathered in the expectation that it may be of commercial value. Information released under FOISA is considered to be released into the public domain, and applicants are not required to explain their reasons for requesting information. It may be relevant to take into account the circumstances of the applicant when considering the likely implications of disclosure, in relation to the exemptions in FOISA, where this is clearly relevant in terms of the harm test in the exemption cited. However, in this case the applicants have not given a reason for requiring the information, and the Council has not explained exactly what commercial harm is anticipated if the applicants succeed in building up a picture of prices charged by the company supplying the procurement software.
44. I find that although the Council has claimed that disclosure of the information withheld would substantially prejudice the commercial interests of the supplier, it has not provided me with any evidence to show that such damage is likely to occur. I am not satisfied that disclosure would result in a level of harm so significant that it would constitute "substantial prejudice" to the supplier's commercial interests. I therefore find that the Council was wrong to withhold the information about the discount under section 33(1)(b) of FOISA.
45. As I have found that the exemption in section 33(1)(b) has been incorrectly applied, it is not necessary for me to consider the public interest as it relates to this exemption.



Decision

I find that East Renfrewshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Millstream Associates. In withholding information under section 36(2) and section 33(1)(b), the Council failed to comply with Part 1 (and in particular section 1(1)) of FOISA.

I therefore require the Council to provide Millstream Associates with details of the total price paid by the Council for the establishment of the procurement software package; and details of the ongoing maintenance fee, within 45 days of the date of intimation of this decision notice.

Appeal

Should either Millstream Associates or East Renfrewshire 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
28 January 2008



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.

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).

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.