

Decision Notice

Decision 031/2018: Mr Edward Rattray and Renfrewshire Council

Energy efficiency tender (Scotland Excel)

Reference No: 201701450

Decision Date: 7 March 2018



Scottish Information
Commissioner

Summary

The Council was asked about a tender organised by Scotland Excel. It withheld some of the information, on the basis that its disclosure would cause substantial prejudice to the commercial interests of Scotland Excel and the tenderers.

The Commissioner agreed the information was exempt from disclosure and properly withheld.

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. Scotland Excel is a joint committee of all Scottish local authorities, established under section 57 of the Local Government (Scotland) Act 1973, to carry out a number of purchasing-related functions jointly. The functions in question are specified in terms and conditions to which each member authority has subscribed. These designate Renfrewshire Council (the Council) as the lead authority, with responsibility for employing all staff required to discharge the specified functions.
2. Given the Council's status as lead authority, the Commissioner is satisfied that the Council is discharging the functions of Scotland Excel (and therefore should be considered to be Scotland Excel for the purposes of this decision).
3. On 26 June 2017, Mr Rattray made a request for information to the Council. He referred to a tendering exercise in relation to energy performance certificates (EPCs) for energy efficiency contractors (tender ref: 0913 – he had been involved in the submission of one of the tenders). The information he sought was:
 - 1) a list, in alphabetical order, of the company names of all tenderers who submitted a tender; and
 - 2) an anonymised list, in numerical order, of the rates submitted by all tenderers for each property archetype

For both parts of his request, he stated he wanted anonymised information, but only for sub-lots 1.1 and 1.2, and only in respect of three local authority areas, these being Aberdeenshire, Highland, and Moray.

4. The Council responded on 14 July 2017, addressing part 1 in full but withholding information in respect of part 2 under section 33(1)(b) of FOISA. The Council believed disclosing this information would be likely to prejudice substantially the commercial interests of Scotland Excel and the suppliers who submitted tenders.

5. On 15 July 2017, Mr Rattray wrote to the Council requesting a review of its decision to withhold information for part 2 of his request. He did not accept that the exemption under section 33(1)(b) was applied correctly here. In his view, anonymised price information was routinely provided to tenderers and it was a matter of public interest that the prices were disclosed under FOISA.
6. The Council notified Mr Rattray of the outcome of its review on 11 August 2017. The Council continued to withhold the information under section 33(1)(b) of FOISA and gave further explanations.
7. On 16 August 2017, Mr Rattray wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Rattray stated he was dissatisfied with the outcome of the Council's review because he did not accept that the anonymised pricing information was correctly withheld here, given that the tender involved spending from the public purse.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Rattray 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.
9. On 17 October 2017, the Council was notified in writing that Mr Rattray had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Rattray. The Council provided the information and the case was allocated to an investigating officer.
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 answer specific questions, focusing on its application of 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 Mr Rattray and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) of FOISA – Commercial interests and the economy

12. The exemption in section 33(1)(b) of FOISA applies to information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. "Person" must be interpreted widely, to include a legal person (such as a company) as well as an individual: specifically, in this context, it includes a Scottish public authority. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
13. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate 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. The prejudice must be substantial: in other words, of real and demonstrable significance.

14. The information withheld under this exemption is the pricing information contained in the tenders for lots 1.1 and 1.2 for three Council areas.
15. In his application, Mr Rattray indicated that, having participated in dozens of similar tender exercises, the requested information was routinely provided to all tenderers “without fail”. He contended that tenderers were fully aware that pricing information was routinely disclosed in tender feedback, submitting their prices with that knowledge.
16. The Council explained in its submissions that the tenders in question were part of a completely new framework. It was the first national collaborative agreement for energy suppliers. Given the timing of the request and requirement for review, it considered the information particularly commercially sensitive: at that time, there was no current spend under the framework. The Council stated that the number of suppliers in the areas Mr Rattray had specified was limited, so the market was highly competitive.
17. The Council contended that although the terms “commercial interests” is not defined in FOISA, it was mindful of “the Commissioner’s suggestion”¹ that this would relate specifically to any commercial trading activity. The Council submitted that the commercial interests in this case were of the member councils of Scotland Excel, the successful tenderers and Scotland Excel itself.
18. The Council believed that the commercial interests of member Councils were engaged in terms of the potential impact of disclosure on competition and future pricing in this area. Similarly, the Council stated that commercial interests of the successful contractors were also relevant in this respect. It argued that disclosure of this particular pricing information would undermine the work of both Scotland Excel and the successful contractors, for instance if a competitor became aware of them. The pricing information was detailed, the Council noted, and was not publicly available.
19. The Council argued that disclosure of this particular pricing information would reduce effective competition, during the lifetime of this framework at least. It submitted that this would give contractors not party to the current framework an unreasonable advantage in future exercises. “Mini competitions” (using sealed bids) might also be used in the current framework, and awareness of current prices would not be conducive to achieving best value in these. The Council also acknowledged that it may, in the future, be appropriate to disclose the information in question under second or third generation frameworks, but not under this one.
20. With regard to Mr Rattray’s suggestion that prices were routinely provided in the past, the Council refuted this, explaining that Mr Rattray might be thinking of smaller, local tenders, where smaller housing associations might indeed have chosen to share pricing information (although it did not know if this was the case). It was not the case here, however: it provided evidence of the limited basis on which pricing information was shared internally.
21. The Council also noted that unsuccessful tenderers were entitled to a debrief. It stated that Mr Rattray had declined to take the Council up on this offer. That said, the Council explained that Mr Rattray would not have been given the information he sought in his request at such a meeting, as he would only be able to discuss his own firm’s tender and not those of any other tenderers.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

The Commissioner's conclusions

22. Having considered the Council's submissions, the Commissioner is satisfied that the interests identified by the Council are commercial interests for the purposes of this exemption. The information sought comprises the unit pricing details, within a national framework obtained during a competitive tendering process. The unit prices requested clearly have the capability to inform competitors, including those who were unsuccessful in their bids.
23. Having accepted that these commercial interests are engaged, the Commissioner must now go on to consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information. As described above, such prejudice must be at least likely before the exemption can apply.
24. The Commissioner has considered the Council's submissions carefully. As in any case, he must consider the position as it stood when the Council notified Mr Rattray of the outcome of its review, on 11 August 2017.
25. The Commissioner observes that the contract in question commenced 1 May 2017 and that Mr Rattray's request was made relatively soon after, within two months of it starting. As noted above, there had been no spend under the framework at the time of the request and the requirement for review. It is clear from this timeline that the pricing data Mr Rattray sought would be extremely current, and would certainly be highly relevant to the trading activities in this particular market place, at that point.
26. Taking into account all of the Council's submissions, the Commissioner accepts that disclosing such specific detail as the unit prices for the specified sublots, in only three localised Council areas, would have caused, or would have been likely to cause, to Scotland Excel's member councils at that time of the request and requirement for review. The harm would be to their ability to secure best value, given that disclosure of such specific price detail would serve to "prime" suppliers as to what levels to set, rather than having truly "blind" bidding.
27. The Commissioner also holds the view that this would likely to be the case for the duration of this first generation framework. He has decided that such disclosure would inhibit substantially the ability for competitive bids to be made for any further tendering exercises under the existing framework, thus undermining its commercial viability and the commercial interests of the contractors involved.
28. Accordingly, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA is engaged in relation to this information.

The public interest test

29. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the information under consideration, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. 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).
30. Given the tender involved spending from the public purse, Mr Rattray submitted that (in the interests of transparency and accountability) it was in the public interest for the information he sought to be disclosed under FOISA.

31. The Council submitted that the public interest favoured maintaining the exemption in this case. The Council argued that the timing and context here, as narrated above, prevented the information being disclosed to the public. In its submissions, it also explained that there was transparency in relation to the overall scores and successful bidders, which formed part of a report to Scotland Excel Executive Sub-Committee. This Committee comprised Elected Members of each member authority and, as such, this data (although not the prices) was publicly available. The Council disclosed this data when responding to Mr Rattray. It indicated in its submissions that its intention was to better inform Mr Rattray, given he had not accepted the offer of a debrief.
32. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the scrutiny of public finances, and notes that the data which is already in the public domain (outlined above) goes some way towards this.
33. That said, it is important to the public purse that the framework is viable and that best value can be achieved by means of the tendering processes involved. It is also in the public interest that there is fair competition. The Commissioner is satisfied that the mechanisms for feedback to tenderers described by the Council, coupled with the reporting of overall scores to Scotland Excel, contributes adequately to ensuring there is scrutiny of this particular procurement process, without the need for individual unit prices to be revealed.
34. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice might result, the Commissioner recognises that it would be contrary to the public interest in this case to undermine the effectiveness of the new framework.
35. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration.
36. The Commissioner therefore finds that the Council was entitled to withhold the information under section 33(1)(b) of FOISA.

Decision

The Commissioner finds that Renfrewshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Rattray.

Appeal

Should either Mr Rattray 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 March 2018

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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