

Decision Notice



Decision 040/2012 Ms Nichola Rutherford, Press and Journal and Highland Council

Contractual delay payments claimed

Reference No: 201101642
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Margaret Keyse

Acting Scottish Information Commissioner

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Summary

Ms Rutherford requested from Highland Council (the Council) information relating to payments claimed for delays in the provision of computer equipment to schools by a supplier. Following a reminder, the Council disclosed some elements of the requested information, but withheld others under section 33(1)(b) of FOISA (on the basis that disclosure would be likely to prejudice substantially the contractor's commercial interests). Following a review, which upheld the application of section 33(1)(b) and also applied the exemption in section 36(2) (confidentiality) of FOISA in relation to the same information, Ms Rutherford remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Ms Rutherford's request for information in accordance with Part 1 of FOISA, by releasing certain information relating to Ms Rutherford's request while correctly applying the exemption in section 36(2) in respect of the withheld information.

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); 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.

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 5 June 2011, Ms Rutherford wrote to the Council requesting the following information relating to payments by Fujitsu Services Ltd (Fujitsu) to the Council in connection with delays in the provision of computer equipment to schools:
 1. how many delay payments had been claimed up until that day;
 2. how much each payment cost;



3. why each payment had been claimed;
 4. how many of these payments had actually been made;
 5. that part of the relevant contract setting out how the delay payments worked;
 6. how much money the Council had withheld from paying Fujitsu as part of its ICT Transformation Programme up until that day.
2. Ms Rutherford sent a reminder email to the Council on 17 July 2011, indicating that she had received no response to her request. On 18 July 2011, the Council wrote to Ms Rutherford, apologising for the failure to respond and explaining that it had failed to send a response prepared earlier.
 3. The Council issued the previously prepared response on the same day (18 July 2011). It provided a link to the relevant part of the contract (point 5) and also provided information in response to points 1 and 6. It went on to explain that it was withholding information on the amounts due to Fujitsu under section 33(1)(b) of FOISA, on the grounds that disclosure would be likely to prejudice substantially Fujitsu's commercial interests. On the same day, Ms Rutherford requested a review as she did not agree with the withholding of information under section 33(1)(b).
 4. The Council notified Ms Rutherford of the outcome of its review on 29 August 2011. It provided additional information in response to points 3 and 4. In relation to the amounts due, the Council amending its initial decision, indicating that it now considered the information to have been provided in confidence: consequently, it considered that it should be withheld under section 36(2) of FOISA as well as section 33(1)(b).
 5. On 30 August 2011, Ms Rutherford wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review in respect of points 2 and 4 and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 6. The application was validated by establishing that Ms Rutherford 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 21 September 2011, the Council was notified in writing that an application had been received from Ms Rutherford and asked to provide the Commissioner with any information withheld from her. 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 explain further how the disclosure of the withheld information would lead to an actionable breach of confidence.
9. During the investigation, Ms Rutherford confirmed by email that she accepted point 4 had been answered. Consequently, she only required a decision in respect of point 2 (which will therefore be the focus of this decision).
10. The submissions the Commissioner has received from both parties, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. 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 Ms Rutherford and the Council and is satisfied that no matter of relevance has been overlooked.

Section 36(2) - confidentiality

12. The exemption (which is set out in full in the Appendix) contains a two-stage test, both parts of which must be fulfilled before it 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.
13. The Council explained the circumstances in which the information had been obtained from another person (Fujitsu). Basically, the Commissioner understands the Council's argument to be that the payments are determined applying a process provided by Fujitsu, in accordance with the terms of the contract. While the Commissioner would not consider it to follow in every case that information produced by such means would necessarily be found to have been obtained from another person, in this case he accepts the Council's argument that the information was so obtained. Consequently, she is satisfied that the first part of the section 36(2) test has been fulfilled.
14. 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 who gave the information to the public authority 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.
15. 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 and
- unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

16. Having considered the Council's submissions, the Commissioner is satisfied in the circumstances that the withheld information is not common knowledge and could not readily be obtained by Ms Rutherford through any other means. Consequently, she is satisfied that it has the necessary quality of confidence.

Obligation to maintain confidentiality

17. The Council submitted that its confidentiality obligations in relation to the withheld information were set out in Part 21 of the Schedule to the relevant contract, which also states the timeframe (six years from expiry or termination of the contract) during which Fujitsu expects this information to remain confidential. Having considered these provisions, the Commissioner is satisfied that the withheld information was received in circumstances which imposed upon the Council an obligation to maintain confidentiality. The Commissioner would also acknowledge a reasonable expectation that confidentiality would be maintained for the period specified in Part 21 of the Schedule. She would, however, ask the Council to consider whether, in line with Section 4 of Part 2 of the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004, a similar obligation of confidentiality would be appropriate in a similar future contract.

Unauthorised disclosure which would cause detriment

18. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In its submissions, the Council indicated that Fujitsu had indicated that disclosure of the withheld information (in response to Ms Rutherford's request) would affect its ability to negotiate other contracts, because either the organisation contracting services or competitors for contracts would be informed of the level of payments agreed for this contract (and the basis of their calculation). The Council had accepted these arguments and agreed to abide by the confidentiality agreement within its contract with Fujitsu.
19. Ms Rutherford argued in her application that Fujitsu's failure to meet deadlines had been well documented in the press and highlighted in a series of Council meetings, the minutes of which could be viewed on the Council's website. She submitted that any harm to Fujitsu in terms of its attractiveness to future clients was already done, and that knowing details of the delay payments could do little further harm.



20. In the circumstances, having considered all relevant submissions, the Commissioner accepts in this case that the Council has established the degree of harm required for an actionable breach of confidence in relation to disclosure of the withheld information. While she accepts that there may *already* have been some harm to Fujitsu's reputation by the mere fact that it is public knowledge that there have been certain delays with the contract, she is satisfied that disclosure of the actual payments would be detrimental to Fujitsu in relation to its ability to negotiate with other contractors.

Public interest

21. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence have been met in this case. However, there may still be circumstances in which the disclosure of confidential information is required in the public interest. 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. In such cases the courts are required to balance the competing interests in disclosure and in maintaining confidentiality, but the public interest in confidentiality remains strong and there is no presumption in favour of disclosure.
22. The Commissioner notes the arguments presented by both Ms Rutherford and the Council in this case and has taken these into account in considering the public interest. She has also taken into account the information disclosed to the applicant in response to her request. While acknowledging that there is a clear public interest in transparency and effective scrutiny in relation to the contracts involving expenditure from the public purse, she is not persuaded in this case that any of the arguments advanced in support of disclosure are sufficiently compelling to outweigh the strong public interest in the maintenance of confidentiality in relation to the withheld information.
23. Having considered all the arguments, therefore, the Commissioner does not consider there to be any basis for the disclosure of confidential information on public interest grounds, and consequently she is satisfied that the Council was entitled to withhold the information under section 36(2) of FOISA.
24. As the Commissioner has found that section 36(2) has been correctly applied, it is not necessary for her to go on to consider the application of section 33(1)(b) of FOISA to the withheld information.



DECISION

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

Appeal

Should either Ms Rutherford or Highland 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
Acting Scottish Information Commissioner
1 March 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);

...

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.

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Ms Nichola Rutherford, Press and Journal,
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