

Decision Notice



Decision 074/2011 Ms Caroline Gerard and City of Edinburgh Council

Sums paid to Experian

Reference No: 201001883
Decision Date: 13 April 2011

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Summary

Ms Caroline Gerard (Ms Gerard) requested from the City of Edinburgh Council (the Council) how much money it paid to Experian. The Council responded by advising Ms Gerard that it considered the requested information exempt from disclosure in terms of section 33(1)(b) of FOISA. Following a review, Ms Gerard remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council also applied the exemption contained in section 33(2)(b) of FOISA to the withheld information, the Commissioner found that the Council had failed to deal with Ms Gerard's request for information in accordance with Part 1 of FOISA, by incorrectly withholding information in terms of section 33(1)(b) and 33(2)(b) of FOISA. He required the Council to disclose the requested information to Ms Gerard.

The Commissioner also found that the Council failed to respond to Ms Gerard's request for review within 20 working days, as required by section 21(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority) and 33(1)(b) and (2)(b) (Commercial interests and the economy).

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 24 May 2010, Ms Gerard wrote to the Council requesting the following information:

How much money has Experian been paid by the Council for its consultation?

The Commissioner understands that the "consultation" referred to in Ms Gerard's request was in relation to an analysis of Council Tax debt.

2. The Council responded to Ms Gerard on 31 May 2010 seeking clarification of her request, which she provided on 2 June 2010.



3. On 4 June 2010, the Council provided a response to Ms Gerard's information request. The Council notified Ms Gerard that it considered the information she had requested to be exempt from disclosure in terms of section 33(1)(b) of FOISA.
4. Ms Gerard wrote to the Council on the same date requesting a review of its decision. In particular, Ms Gerard queried whether the exemption contained in section 33(1)(b) was applicable in this case. She noted that Experian is a large global corporation, and that she could not see how disclosure of this information could possibly prejudice its commercial interests.
5. The Council acknowledged receipt of Ms Gerard's review on 9 June 2010, but failed to provide a response. Ms Gerard subsequently made an application for decision by the Scottish Information Commissioner in relation to this failure. After being contacted by the Commissioner, the Council notified Ms Gerard of the outcome of its review on 14 July 2010. The Council advised Ms Gerard that it upheld its previous decision to withhold the requested information in terms of section 33(1)(b) of FOISA.
6. On 1 October 2010, Ms Gerard wrote to the Commissioner, withdrawing her previous application concerning the Council's failure to respond to her request for review, and stating that she 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. Her application indicated that she was dissatisfied with the Council's refusal to supply the information she had requested, and that she remained dissatisfied with its failure to respond to her request for review within the appropriate timescale.
7. The application was validated by establishing that Ms Gerard 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

8. On 4 November 2010, the Council was notified in writing that an application had been received from Ms Gerard and was 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.
9. 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 (with particular reference to section 33(1)(b)). The Council responded with its submissions on 23 December 2010.



10. The submissions received from Ms Gerard and the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section 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 Gerard and the Council and is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – commercial interests of any person

12. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
13. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to 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. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
14. In this case, the Council submitted that disclosure of the withheld information would prejudice both the commercial interests of itself and Experian.
15. It is the Commissioner's view that commercial interests in their clearest sense will relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of revenue generation. Such activity will commonly take place within a competitive environment. That said, there is no requirement that these activities are profit making before this exemption can be engaged, although it would be normal.
16. In this context, it is quite clear that Experian has commercial interests that are relevant for the purposes of section 33(1)(b). Its website¹ describes it as "the leading global information services company, providing data and analytical tools to clients in more than 90 countries". Its activities are clearly commercial in nature and it operates in a competitive environment.

¹ <http://www.experian.co.uk/about-us/index.html>



17. The Council has submitted that it also has commercial interests that are relevant to the exemption in section 33(1)(b) in this case. It has argued that all of the activities undertaken by Councils are for the benefit of the local populace or for public good rather than commercial gain. However, it has argued that commercial interests do not necessarily have to have any connection with commercial gain – the normal concept of commercial interests – nor do they have to have a direct connection with the actual undertaking of commercial activities.
18. The Council argued that commercial interests should be considered to encompass the interests of any party to a contract in obtaining the best deal available in the common marketplace, and so the Council can have commercial interests without engaging in what the Commissioner might perceive as commercial activities.
19. The Commissioner has considered the submissions made by the Council in this respect, and also noted the comments of the Information Tribunal in its decision on the case EA/2008/0092², in relation to a the exemption in section 43(2) of the Freedom of Information Act 2000 (FOIA). Section 43(2) contains an exemption from disclosure under FOIA which is expressed in very similar terms to that in section 33(1)(b) of FOISA. In that decision, the Information Tribunal said (at paragraph 42):

“Commercial” is an ordinary English word. While its meaning is well known, the boundaries of its meaning are not precise. It takes colour from the context in which it is used. In s43 it is used in a context where the commercial interests which are in view expressly include the commercial interests of public authorities. In this context we do not consider it appropriate to tie its meaning directly or indirectly to competitive participation in buying and selling goods or services and to exclude all other possibilities.”
20. Since the context in which the term “commercial” is used in section 33(1)(b) of FOISA is broadly the same as in section 43(2) of FOIA, the Commissioner considers these comments to be relevant to his consideration of this case also. Given that section 33(1)(b) clearly indicates that public authorities can have commercial interests, he accepts that its meaning should not be restricted to commercial activities (in the traditional sense) of a type that most public authorities will not undertake.
21. In the circumstances, the Commissioner accepts the Council's position that the commercial procurement of resources (including services) required for the purposes of undertaking its core (non-commercial) activities can be considered to be a commercial activity, and that it has commercial interests in this respect. Should the Council demonstrate that disclosure of information would substantially prejudice its commercial interests in this regard, then the exemption can be found to be applicable.
22. The Commissioner will now go on to consider how disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of the Council.

² [www.informationtribunal.gov.uk/DBFiles/Decision/i322/SLC%20v%20IC%20\(EA-2008-0092\)%20Decision%2017-07-09%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i322/SLC%20v%20IC%20(EA-2008-0092)%20Decision%2017-07-09%20(w).pdf)



Would disclosure prejudice substantially the Council's commercial interests?

23. The Council's submissions noted that the sums under consideration in this case are not particularly large, but the principle involved is the same irrespective of the level of payment involved. It maintained its commercial interests would be likely to be prejudiced by the release of information regarding payments made under ongoing contracts which have been won in a sealed bidding or other confidential tendering process.
24. The Council submitted that if the value of payments made to a contractor under a current contract, it would potentially influence bidders in the next round of bidding (leading to bids being made based on the price previously paid, rather than analysis of the bidders' own situation and knowledge of the marketplace). It maintained that this would be disadvantageous to best value principles, and that its negotiating powers would be compromised in future tenders and so its commercial interests would be prejudiced.
25. The Council explained why it considered that disclosure of the payments made to Experian might allow the overall value of its tender to be known. It stated that in order to ensure an even playing field, it provides very specific details in tender documents as to the nature and extent of the services to be provided by the tenderer. Accordingly, it maintained that it would not be difficult for an unsuccessful tenderer to calculate backwards from the analysis of payments made to the council within fixed periods, with reference to the tender documents and any exceptional service level reports, what was the pricing structure offered by the successful bidder.
26. The Council has submitted that it follows the sealed bid process in respect of contracts because there is a commercial interest to be supported by such confidentiality. It has argued that while it may be required to put contracts out to tender, there is no such obligation to keep the process confidential, but it does so for purely commercial reasons.
27. The Commissioner has considered the arguments put forward by the Council but he is not persuaded that the effect of disclosure would undermine its tendering processes, or (as a consequence) that it would be likely to prejudice substantially its commercial interests with respect to its ability to successfully procure the goods and services it requires at the best possible price. It is the Commissioner's view that the Council has not demonstrated that the disclosure of the information requested by Ms Gerard in this case would, or would be likely to have the detrimental effects it suggests.
28. In reaching this view, the Commissioner has recognised that there are good reasons for operating sealed bidding or confidential tendering processes. However, he does not accept that disclosure of payments made following the award of a contract following such a process would be likely to have the impact on future tendering processes that the Council suggests would occur to the detriment of its commercial interests. He notes, for example, that EU procurement rules require certain basic information to be published in contract award notices within the Official Journal of the EU following a tendering process conducted under those rules (which include blind bidding processes). The information to be contained in a contract award notice includes the name of the winning bidder and the price or range of prices paid.



29. While the Commissioner recognises the Council's comments may not have been intended to refer to tendering processes conducted under EU procurement rules, they were expressed in such a general manner as to imply that disclosing the value of *any* contract awarded following *any* blind bidding procedure would undermine those processes. The Commissioner considers that the existence and operation of the EU procurement rules provides evidence against such a claim.
30. Also, the Commissioner has recognised that the information under consideration would allow some insight into the total value of the contract awarded to Experian. However, he does not accept that such insights would be likely to have any significant impact on future tendering exercises, to the detriment of the Council's commercial interests.
31. Even if the Council were to tender for similar services to those delivered by Experian in future (and it has made no claim in its submissions that it either expects or intends to do so), disclosure of the information under consideration in this case would not necessarily have any relevance to a future tendering process. The Commissioner considers that each tendering process will proceed in the context defined by the needs specified by the contracting organisation, the ability of tendering organisation to meet those needs, and the prevailing economic environment at that time. Without knowing the details of tender submitted by Experian (including the specific service it offered, and details of its pricing structure) the value of the withheld information to a competitor seeking a similar contract in future would be limited.
32. Given that the Council has not identified any forthcoming tendering process in which it intends to purchase services of a similar nature, and to which the particular information under consideration might be relevant, the Commissioner is not persuaded that the disclosure of the information under consideration would be likely to prejudice substantially the Council's own commercial interests by negatively affecting the operation or outcome of such tendering processes.
33. Furthermore, the Commissioner has seen no evidence to persuade him that the Council should expect to receive fewer bids, that bidders would submit bids based on considerations other than the Council's specification, or that the Council's procedures would otherwise be undermined, as a result of disclosure in this case.
34. The arguments submitted by the Council simply suggest that disclosure of the information under consideration in this case will prevent it from being able to obtain best value in any future tendering bids (for any resource/service). It is not clear to the Commissioner (and it is not clarified by the Council) how or why this disclosure of the particular information in this case could lead to such a widespread negative impact on the Council's ability to obtain the best price in any tender exercise.
35. In the absence of persuasive arguments about the specific circumstances of this case (as opposed to very general arguments in principle regarding its tendering processes, which the Commissioner has been unable to accept) the Commissioner is not persuaded that disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of the Council.



Would disclosure prejudice substantially Experian's commercial interests?

36. With respect to Experian's commercial interests, the Council submitted that as soon as details of the specific payments made by a party to a contract become known publicly, the commercial interests of that party are prejudiced because their negotiating powers are compromised.
37. The Council submitted that disclosure of the requested information would give an unfair advantage to Experian's rivals in future tenders. The Council also argued that disclosure of the requested information may persuade other clients of Experian to consider their contractual arrangements with Experian (the Commissioner has understood this to imply that such clients may renegotiate or reconsider their contracts with Experian).
38. The Commissioner notes that the Council has not sought the views of Experian in relation to this information request, so he has only the Council's limited arguments (which were again expressed in very general terms) to inform his consideration of whether Experian's commercial interests, would or would be likely to be prejudiced substantially by disclosure in this case.
39. The Commissioner again notes that the Council's submissions have focused on the substantial prejudice that would occur if the full value of a current contract was made available, rather than the payments over a particular period as requested by Ms Gerard. However, as above, he accepts that disclosure of the information under consideration would allow some insight into the total value of the Council's contract with Experian. However, for the reasons set out above, he considers that such insights would be limited, as they would not reveal anything of the details of its pricing structure, or the content of its tender.
40. The Commissioner considers the value of these insights to any rival company in a future tendering process would therefore be limited. In reaching this conclusion, the Commissioner again notes that the Council has not highlighted any particular up-coming tendering process to which the particular information under consideration might be relevant.
41. The Commissioner has also again noted the requirement within EU procurement rules that the overall value of a contract awarded (following a tendering process conducted in their terms) be published within a contract award notice in the Official Journal of the EU. He again considers the routine publication of the value of contracts awarded via these rules (whether or not the relevant procurement followed by the Council was conducted within the framework) undermines the Council's claims.
42. The Commissioner is not aware of any evidence to suggest that this routine publication is harmful to the commercial interests of the companies concerned. He has also seen no evidence to suggest that such disclosures lead to other clients of winning tenderers seeking to renegotiate contracts based on the value of that awarded. The Council has provided the Commissioner with no evidence or reason to persuade him that such approaches would be likely made in the light of disclosure of the information under consideration in this case.



43. In the absence of any submissions or evidence from the Council that have persuaded him of how or why disclosure of the value of the payments to Experian (allowing insight into the value of the Council's contract with Experian) would or would be likely to harm Experian's commercial interests, the Commissioner is not persuaded that disclosure would do so.
44. In reaching this conclusion, the Commissioner has noted that Experian is a large organisation with global reach and a large turnover, and that the sums involved in this case are comparatively small (and do not by themselves reveal the content of any tender or Experian's pricing structure for the relevant contract).
45. Consequently, the Commissioner does not accept that disclosure of the information withheld from Ms Gerard would, or would be likely to, prejudice substantially Experian's commercial interests. He therefore concludes that the Council incorrectly applied the exemption in section 33(1)(b) of FOISA in this case.
46. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, he is not required to go on to consider the public interest contained in section 2(1)(b) of FOISA in relation to this exemption.

Section 33(2)(b) – financial interests of an administration in the UK

47. During the investigation, the Council also argued that the information was exempt under section 33(2)(b) of FOISA which states that information is exempt if its disclosure would, or would be likely to, prejudice substantially the financial interests of an administration in the United Kingdom. Again, this is a qualified exemption and therefore subject to the public interest test.
48. The Council argued that the release of financial information pertaining to specific contracts between the Council and a third party provider should be exempt from release, on the basis that disclosure would, or would be likely to, prejudice substantially the financial interests of an administration in the UK. The Council maintained that if it is unable to obtain the best value from the marketplace (when tendering for goods and services) then the financial shortfall must be made up by either the Government of the United Kingdom or the Scottish Government. In either scenario, the Council argued that this would adversely prejudice the financial interests of one or other of these administrations.
49. The Commissioner has considered the arguments put forward by the Council in relation to this exemption, and he finds them to be without merit and highly implausible as to the extent of harm which could be envisaged from the release of the information in this case.. As indicated above, in relation to section 33(1)(b) the Commissioner has not accepted that the information under consideration in this case would harm the Council's commercial interests in the way it suggests. Consequently he does not accept that disclosure of the information requested by Ms Gerard would harm its ability to achieve best value through its procurement processes. The notion that disclosure would so dislocate the Council's ability to control its budget such that it would have significant consequences for the financial interests of the UK or Scottish Governments is not credible.



50. Therefore, he cannot accept that the disclosure would, or would be likely to, have an effect that would prejudice substantially the financial interests of any UK administration.
51. The Commissioner has therefore found that the withheld information is not exempt in terms of section 33(2)(b) of FOISA and he is not required to consider the public interest test. As he has not upheld either of the exemptions claimed, he requires the Council to disclose the withheld information to Ms Gerard.

Timescale for review

52. 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.
53. In this case, the Council failed to respond to Ms Gerard's request for review within the timescale required by section 21(1) and in so doing it breached Part 1 of FOISA. Since the Council provided its response to Ms Gerard on 14 July 2010, the Commissioner does not require the Council to take any further action in response to this particular breach.

DECISION

The Commissioner finds that City of Edinburgh 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 Ms Gerard. Specifically, the Commissioner finds that the Council incorrectly withheld information under the exemptions contained in section 33(1)(b) and 33(2)(b) of FOISA, and in so doing it breached the requirements of section 1(1) of FOISA. The Commissioner also finds that the Council failed to respond to Ms Gerard's request for review within 20 working days, as required by section 21(1) of FOISA.

The Commissioner therefore requires the Council to disclose the requested information to Ms Gerard, by 30 May 2011.

Appeal

Should either Ms Gerard 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.

Decision 074/2011
Ms Caroline Gerard
and City of Edinburgh Council



Kevin Dunion
Scottish Information Commissioner
13 April 2011



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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.

...

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).



(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

(b) the financial interests of an administration in the United Kingdom.

...