

Decision Notice



Decision 104/2009 UNISON Scotland and the Scottish Prison Service

Financial model and final business case for PFI contract

Reference No: 200701446

Decision Date: 28 August 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Unison Scotland (Unison) requested information relating to the PFI contract for Kilmarnock Prison from the Scottish Prison Service (the SPS). The SPS subsequently published much of the information on its website, but withheld the financial model which it considered exempt from disclosure in terms of section 33(1)(b) of FOISA, on the basis that disclosure of the information would, or would be likely to, prejudice substantially the contractor's commercial interests. The SPS also advised Unison that it did not hold some of the information which it had asked for.

Following an investigation, the Commissioner found that the SPS was wrong to withhold the financial model under the exemption in section 33(1)(b) and required it to release this information to Unison. However, the Commissioner also found that the SPS correctly informed Unison in terms of section 17(1) of FOISA that some of the information requested was not held by it.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 17(1) (Notice that information is not held); 33(1)(b) (Commercial interests and the economy) and 47(1)(a), (4)(a) and (5) (Application for decision by Commissioner)

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 19 July 2006, Unison wrote to the Scottish Ministers requesting a copy of both the Full Business Case (FBC) and the final contract for all of the PFI/PPP contracts undertaken in Scotland, dating back to the start of the Private Finance Initiative.



2. In relation to the part of the request concerning prison contracts, a response was sent to Unison by the SPS on 15 August 2006. The response related to the contracts for Kilmarnock and Addiewell prisons. In its response, the SPS advised Unison that the FBC for Kilmarnock was not held by it, but that the contract for Kilmarnock was available on the SPS website. The SPS also advised Unison that the FBC for Addiewell could be viewed on the SPS website but that the entire contract for Addiewell was considered exempt from disclosure in terms of section 33(1)(b) of FOISA.
3. On 9 October 2006, Unison wrote to the SPS requesting a review of its decision. In particular, Unison pointed out that, although the Kilmarnock contract had been published on the SPS website, considerable redactions had been made without an explanation of why this had been done. Additionally, Unison stated it did not consider that the entire Addiewell contract could be withheld on the grounds cited by the SPS. In relation to the FBCs, whilst Unison requested a review of the SPS's decision regarding the Kilmarnock FBC, it did not seek any review in relation to the Addiewell FBC.
4. The SPS notified Unison of the outcome of its review on 7 November 2006. The SPS upheld its previous decision that it did not hold the Kilmarnock FBC. The SPS also stated that it required some clarification from Unison regarding the information being sought in relation to the Kilmarnock contract. Finally, the SPS advised Unison that it intended publishing the Addiewell contract on its website in the very near future.
5. Following further correspondence, the SPS provided some additional information to Unison on 8 January 2007.
6. On 31 October 2007, Unison wrote to the Commissioner, stating that it was dissatisfied with the outcome of the SPS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. In terms of section 47(4)(a) of FOISA, an application to the Commissioner made under section 47(1)(a) must be made within six months of the applicant receiving the response to their request for review. In this case, the application made by Unison was submitted to the Commissioner outwith the six month period.
8. The Commissioner may, however, (by virtue of section 47(5) of FOISA) consider an application after the expiry of the six month period if he considers it appropriate to do so. In this case, and after having considered representations made by Unison, the Commissioner applied the discretion granted to him under section 47(5) of FOISA and agreed to consider Unison's application on the basis that the SPS had extended the process of review by engaging in further correspondence with Unison about its request, which gave the impression that the formal process set out in FOISA was still ongoing.
9. The application was then validated by establishing that Unison 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

10. The SPS is an Executive Agency of the Scottish Ministers (the Ministers) and a letter was sent to the Ministers' Freedom of Information Unit on 24 January 2008 in line with agreed procedures giving notice that an application had been received and that an investigation into the matter had commenced. The Ministers were asked to provide copies of any information that had been withheld from Unison.
11. The Ministers responded on 20 February 2008 by advising the Commissioner that no information had been withheld from Unison. The Ministers pointed out that the FBC for Kilmarnock was not held by the SPS. The Ministers also pointed out that, in its request for review, Unison had made no mention of the Addiewell FBC. The Ministers also considered that, in relation to the contracts for Kilmarnock and Addiewell, having sought clarification of the nature of the information being sought by Unison, the SPS had provided adequate information to meet the terms of the request.
12. The case was then allocated to an investigating officer, who contacted the Ministers regarding their interpretation of the scope of the request and the information which had been provided to Unison. The investigating officer disagreed with the Ministers that Unison had narrowed the scope of its request regarding the Kilmarnock and Addiewell contracts and asked the Ministers to provide the Commissioner with both full and redacted copies of the contracts for Kilmarnock and Addiewell.
13. On 20 March 2008, the SPS contacted the Commissioner to advise that the contracts for Kilmarnock and Addiewell had now been published on the SPS website with some limited redactions. Following further discussions with the investigating officer, Unison agreed to withdraw its application in relation to the Addiewell contract. In relation to the Kilmarnock contract, Unison wished the investigation to focus specifically on the withholding of the financial model. Unison also wished the investigation to encompass the Kilmarnock FBC.
14. Having established the scope of the investigation, the investigating officer subsequently contacted the Ministers requiring a copy of the relevant information which had been withheld from Unison, providing them with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA which they considered applicable to the information requested.
15. The Ministers responded on 30 May 2008. They provided detailed submissions on the application and stated that the information regarding the financial model was considered exempt from disclosure under section 33(1)(b) of FOISA and that the public interest favoured withholding the information. The Ministers also reiterated that the Kilmarnock FBC was not held by the SPS.
16. The withheld information was provided to the Commissioner by the SPS on a CD-Rom on 3 June 2008.



Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Unison and the Ministers and is satisfied that no matter of relevance has been overlooked.

Background

18. The Ministers helpfully provided some background details in relation to the case. The Ministers stated that the contract between the Scottish Ministers and Kilmarnock Prison Services Limited (KPSL) was signed in November 1997 following a procurement process carried out in accordance with UK and EU legislation. KPSL is a subsidiary of Premier Custodial Group Limited which is entirely owned by Serco Group plc (Serco). The contract provided for the design, construction, management and financing of a new prison with the contractor being responsible for the operation of the prison for a period of 25 years, after which the prison becomes the property of the SPS.
19. The Ministers explained that the financial model (i.e. the Financial Projection which forms Schedule P of the contract) was provided to the SPS during the contract negotiation stage of the procurement process. The Ministers further explained that the model gives banking and funding assumptions as well as projected expenditure and income items, in detail, for each 6 month period during the 25 years of the contract. The Ministers stated that the figures, as well as the format of the model, are unique to the contractor. The Ministers advised that this model is effectively the contractor's working paper which provides an analysis of their expenditure and income assumptions and does not, therefore, impact on the payments due by the SPS as these were set at the time of the contract signature.
20. The Commissioner has approached this case on the basis of his understanding that Unison is seeking a copy of the financial model, although not in an electronic format which could thereafter be manipulated by it. Unison's original request was for a copy of the Kilmarnock Prison contract and the only relevant part of that contract appears to be the Financial Projection forming Schedule P. This exists in the form of a computer diskette annexed to the final contract, in which the figures are not capable of manipulation to disclose any underlying information (in other words, the equivalent of a hard copy document).

Consideration of section 33(1)(b)

21. 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, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test required by section 2(1)(b) of FOISA.



22. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might 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. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
23. Where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
24. In their submissions to the Commissioner, the Ministers argued that the release of the financial model would substantially prejudice the commercial interests of the contractor (KPSL) given that such disclosure would reveal detailed information about how the price was calculated in this contract and how the company constructed its business and financial model which is unique to it. The Ministers further argued that disclosure would provide the contractor's competitors with information about the structure of the price and of the business and financial model. The Ministers suggested that this would be to the advantage of the contractor's competitors and to the contractor's disadvantage in bidding for future contracts. The Ministers considered this to be particularly pertinent as the contractor was active in the market and currently bidding for contracts in a related field within correctional services.
25. The Ministers noted that the SPS had contacted the contractor to ascertain the contractor's own views on the release of the information. In response, the contractor had reaffirmed its view that it would be strongly averse to disclosure of its financial model in relation to this contract, on the grounds that it would be of use to its business competitors and would give those competitors an unfair advantage over it as well as impacting on the value of the company and Serco.
26. Serco's position (endorsed by the Ministers) remains that the disclosure of the financial model would be highly commercially prejudicial to it, its interests and its shareholders. Serco states that it is particularly sensitive about long term forecasts of its business as a) it could be used to forecast its business performance and, as a FTSE listed company, it is very careful not to give detailed future information as this is subject to change and it would be exposed to misrepresentation claims, and b) its competitors would benefit from understanding its metrics and cost bases, therefore putting at risk its competitiveness in its markets and consequently damaging Serco's shareholders' interests.
27. Serco has added that, although the model is some ten years old, it remains a working model and can be used to ascertain sensitive commercial matters such as Serco's operating costs and margins. Serco has submitted that this would have an implicit adverse impact on the company's value as a result of the weakening of its competitive position through others undercutting its cost base and profit level based on information that could be obtained from within the model.



28. In his briefing on Section 33 of FOISA the Commissioner has said: "... in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time. Authorities should therefore disclose the information asked for unless it would be likely to cause real, actual and significant harm."
29. In this case, the Ministers have argued that the financial model could reveal or be used to ascertain sensitive commercial information, such as the business practices, methods, forecasts, operating costs and margins of Serco. They have further argued that release of the information would cause serious commercial prejudice to Serco by allowing its competitors access to such sensitive information.
30. In this case, it is clear to the Commissioner that Serco has commercial interests in relation to tendering exercises and contracts of this nature and is a commercial enterprise engaged in commercial activities.
31. The Commissioner notes that the financial model in this case is some years old and, at the time of Unison's request, had been in existence (following financial close and conclusion of the contract) for nine years. At that time, the prison at Kilmarnock had been operation under the contract for more than seven years, in other words just short of one third of the contract's duration.
32. The Commissioner considers that the PFI regime has matured considerably from the date of the financial model under consideration in this case. The requirements and expectations of a procuring authority for this type of contract will have changed considerably over that period, as in response will the methods and approaches of contractors.
33. The Commissioner is aware that the market for this type of contract is extremely competitive and therefore considers it likely that market prices for providing services of this nature will vary considerably over time, as will the assumptions and other information underlying those prices. In the Commissioner's opinion, the specification and terms of such contracts (and therefore their financial arrangements) will vary considerably and be dictated by the requirements of the client in respect of the particular contract at the material time.
34. The Commissioner's view is that the sensitivity of this financial model would have been most acute during the period of the negotiation of the contract, but that the model would not in any event have been tangible until financial close. Clearly, this had happened by the time the contract was concluded in November 1997. At that time, the Commissioner accepts that the information in it would have retained a considerable level of commercial sensitivity.
35. The Commissioner considers that a financial model of this kind will generally lose sensitivity after the contract has been concluded and is unpersuaded that it would retain the same degree of sensitivity over the duration of the contract, given the changes in the market likely over such a long period. Furthermore, in this case the Commissioner is only considering the model in the context of a hard copy or pdf (or equivalent) format, which would ensure that underlying calculations or formulae could not be examined.



36. Having considered all of the circumstances of this case, the Commissioner considers the passage of time between the creation of the financial model and the date of Unison's request to be extremely relevant. As noted above, the financial model under consideration was created approximately nine years prior to Unison's request. While accepting that the basic structure of the model may still be in use, the Commissioner is satisfied in this case that the significance of the information contained within this particular financial model would have diminished substantially over time, as prices, costs, service delivery methods/requirements and market, financial and other conditions (and therefore the assumptions underlying these and other relevant considerations in 1997) changed. Consequently, he cannot accept that the disclosure of the model in response to Unison's request would have prejudiced substantially, or would have been likely to prejudice, substantially the commercial interests of Serco as has been argued.
37. In the circumstances, therefore, the Commissioner is satisfied that, at the time of Unison's request and that of the SPS's review, no substantial prejudice would, or would have been likely to, follow from release to Serco of the information withheld under section 33(1)(b). He has concluded, therefore, that the Ministers have not demonstrated they were justified in applying the exemption in section 33(1)(b) of FOISA to the information. As the Commissioner has not accepted that this exemption applies, there is no need for him to go on to consider the public interest test in section 2(1)(b) of FOISA.
38. Having concluded that the information withheld in this case was not exempt under section 33(1)(b), the Commissioner now requires the SPS to supply Unison with a copy of the financial model in either hard copy or pdf (or equivalent) format.

Information not held

39. The second part of Unison's application to the Commissioner was for a copy of the FBC for Kilmarnock prison.
40. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that the information is not held. In its previous responses to Unison, the SPS has stated that it does not hold this information.
41. In their submissions to the Commissioner, the Ministers explained that the SPS has undertaken a thorough search of all the relevant files dealing with the Kilmarnock project and has consulted available members of staff who were involved in the Kilmarnock contract project. Based on the result of the search, there is no evidence to suggest that a FBC was prepared and, therefore, the requested information is not, and has not been, held by the SPS.
42. During the investigation, the Ministers also made enquiries to the Financial Partnerships Unit (the FPU) of the Scottish Government to ascertain if it held any relevant information. However, the FPU similarly held no relevant information.
43. The Ministers also explained their understanding that, in the early days of PPP/PFI projects, it was not necessarily the case that a FBC was prepared.



44. Having considered the Ministers' submissions on this point, and their explanation of the steps taken in order to ascertain whether this information was held, the Commissioner is satisfied that the information is not held by the SPS. He is satisfied that the Ministers have taken all reasonable steps to establish whether the information is available and has therefore concluded that the SPS was correct in informing Unison that it was unable to supply the information in question.

DECISION

The Commissioner finds that the Scottish Prison Service (the SPS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Unison.

The Commissioner finds that the SPS incorrectly applied the exemption in section 33(1)(b) of FOISA to the withheld financial model and consequently failed to comply with Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner finds that the SPS was justified in claiming that it did not hold the Full Business Case for Kilmarnock Prison and consequently giving notice to Unison in terms of section 17(1) of FOISA.

The Commissioner therefore requires the SPS to provide the applicant with the financial model in hard copy or pdf (or equivalent) format within 45 days after the date of intimation of this decision notice, that is by 12 October 2009.

Appeal

Should either Unison or the SPS 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.

Kevin Dunion
Scottish Information Commissioner
28 August 2009



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.

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
 - (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).

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with –

- (a) a notice given under section 21(5) or (9); or

...

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

...

- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made –

- (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of; or

...

- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.