

Decision Notice



Decision 110/2009 Mr Conor McNally and City Building (Glasgow) LLP

Information relating to improvement project

Reference No: 200800995

Decision Date: 14 September 2009

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr McNally requested from City Building (Glasgow) LLP (CBG) information relating to improvement works carried out at a specified address. CBG responded by providing some information. However, CBG advised Mr McNally that the remainder of the information he had asked for was either not held by it, or was considered exempt in terms of section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr McNally remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that CBG had partially failed to deal with Mr McNally's request for information in accordance with Part 1 of FOISA by failing to advise him which of the information he had requested it did not hold and by failing to identify all of the information falling within the scope of his request. However, the Commissioner found that CBG had correctly applied the exemption in section 33(1)(b) in relation to the pricing information. The Commissioner did not require CBG to take any action in relation to the breaches identified in this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 17(1) (Notice that information is not held) and 33(1)(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.

Decision 069/2009: Conor McNally and City Building (Glasgow) LLP

Background

1. On 25 May 2008, Mr McNally wrote to CBG requesting a range of information relating to an improvement project carried out by CBG at a specified address in Glasgow as follows:
 - All documents that are relevant to the assessment, specification, costing and go-ahead for the work, up until the march-in date (i.e. the date the contractors arrived on site to start work).



- Site survey report
 - Details of sub-contractors, quotations invited and received.
 - Full details of proposal, calculations, costings, drawings etc. submitted to Glasgow Housing Association (GHA) or received from GHA.
 - Clarification questions submitted/answered between both parties.
 - Project risk assessment.
2. CBG responded on 2 June 2008. It noted that it had already provided some information to Mr McNally as a result of previous correspondence on the matter and that Mr McNally had indicated that further copies of these were not required. In relation to the remainder of the information requested, CBG advised Mr McNally that it considered the information to be exempt from disclosure in terms of section 33(1)(b) of FOISA (Commercial interests and the economy) on the basis that disclosure of the information would substantially prejudice its commercial interests. CBG also advised Mr McNally that it considered that the cost of providing the information sought by this request would exceed £600. Consequently, it indicated in terms of section 12 of FOISA that it was not obliged to comply with the request.
 3. On 5 June 2008, Mr McNally wrote to CBG requesting a review of its decision. Mr McNally stated that he did not accept that the release of the information would substantially prejudice the commercial interests of CBG. He also considered that the public interest favoured disclosing the information. Mr McNally also did not consider that the cost of providing the information would exceed £600.
 4. CBG notified Mr McNally of the outcome of its review on 26 June 2008. In its response, CBG confirmed that it considered its original response was correct and that the remaining information was exempt from disclosure in terms of section 33(1)(b) of FOISA. CBG also upheld its original view that the cost of providing the information would exceed £600.
 5. On 2 July 2008, Mr McNally wrote to the Commissioner, stating that he was dissatisfied with the outcome of CBG's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 6. The application was validated by establishing that Mr McNally 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. The case was then allocated to an investigating officer.



Investigation

7. The withheld information in this case was provided to the Commissioner by CBG in response to previous correspondence on a related matter.
8. On 24 July 2008, the investigating officer notified CBG in writing that a valid application had been received from Mr McNally, 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, CBG was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. CBG responded on 18 August 2008 providing its submissions on its application of the exemption in section 33(1)(b) of FOISA to the withheld information.
10. In further correspondence, CBG withdrew its reliance on section 12 of FOISA in relation to Mr McNally's request. Additionally, CBG advised that it did not hold certain of the information sought by Mr McNally's, in terms of section 17 of FOISA. CBG also sought to apply the exemption contained in section 36(2) of FOISA (Confidentiality) to certain pricing information contained within the withheld information.
11. During the investigation, the investigating officer required CBG to conduct additional searches which identified additional information falling within the scope of Mr McNally's request. Some of this information was subsequently supplied by CBG to Mr McNally. CBG applied the exemption in section 33(1)(b) of FOISA to the remainder of the newly identified information.
12. Mr McNally was also invited to provide his comments on the public interest in disclosure of the information under consideration.
13. The submissions made by both Mr McNally and CBG are summarised (where relevant) in the analysis and findings section below.

Commissioner's analysis and findings

14. 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 Mr McNally and CBG and is satisfied that no matter of relevance has been overlooked.



15. This decision is closely related to *Decision 069/2009: Conor McNally and City Building (Glasgow) LLP*. In that decision, the Commissioner considered a request for information concerning the overall Home Improvement Framework Agreement, which had been awarded by GHA, following a tendering exercise, to CBG. The costings for the work carried out in relation to this particular request are based on the prices contained within the Schedule of Rates submitted by CBG as part of its successful tender for the overall Framework Agreement. This work was not the subject of a separate tendering exercise.
16. The Commissioner notes that his remit in carrying out this investigation extends to the consideration of whether CBG actually holds the relevant information requested by Mr McNally. He cannot comment on whether a public authority should have recorded any or more information about a particular event or process. Consequently, in this instance, he cannot comment on whether CBG ought to hold further recorded information.
17. CBG submitted that it had provided a considerable amount of information to Mr McNally which, it considered, substantially met the terms of his request. It maintained that the only information which it was withholding under Part 2 of FOISA was highly sensitive business and pricing information contained within the Schedule of Rates and derived from the Schedule of Rates.

Searches undertaken by CBG

18. In his application to the Commissioner, Mr McNally expressed dissatisfaction that CBG had not identified all of the information that fell within the scope of his request. In particular, Mr McNally considered that CBG must have conducted a site survey and he indicated he was aware that certain architectural drawings existed.
19. As noted at paragraph 11 above, following correspondence with the investigating officer, CBG identified additional information which fell within the scope of Mr McNally's request. These comprised architectural drawings, a document entitled "Construction Phase Health and Safety Plan" for the site in question (which the Commissioner considers to be the information referred to by Mr McNally as the project risk assessment), a work order and survey sheets and a contract completion and handover certificate.
20. CBG subsequently released the majority of this information to Mr McNally, but withheld the work order and survey sheets under section 33(1)(b) of FOISA.
21. CBG provided a detailed explanation of the further searches it had undertaken in order to identify all relevant information falling within the scope of Mr McNally's request and why it had not identified all the information prior to responding to Mr McNally's initial request. CBG explained that all information sources had been reviewed, including all manual files and project files, and stated that it considered that there were no further searches it could undertake.
22. As noted at paragraphs 11 and 19 above, the additional searches prompted by the investigating officer retrieved additional information which fell within the scope of Mr McNally's request. The Commissioner notes that, since the date of Mr McNally's application for a decision by him, CBG has released the majority of this additional information.



23. The Commissioner considers that by failing to identify all relevant information falling within the scope of the request at the time of its response to Mr McNally's request, CBG failed to comply with the requirements of section 1(1) of FOISA. The Commissioner accepts that this was rectified during the investigation, but he would remind CBG that a public authority must take reasonable steps to identify all the information sought.
24. The Commissioner is satisfied that, by the end of the investigation, the further searches carried out by CBG were reasonable and sufficient to have retrieved any correspondence or other recorded information covered by the terms of Mr McNally's request. He accepts that CBG does not hold any further information that could reasonably be retrieved which falls within the scope of Mr McNally's request.

Consideration of section 33(1)(b) (Commercial interests and the economy)

25. CBG has applied the exemption in section 33(1)(b) of FOISA to information contained in their schedule of rates or which can be derived from the schedule of rates. The withheld information comprises a site survey report containing information derived from the schedule of rates and a work order and survey sheets comprising information contained within, and derived from, the schedule of rates.
26. 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 subject to the public interest test in section 2(1)(b) of FOISA.
27. 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.
28. The Commissioner has considered the application of this exemption in depth previously in *Decision 069/2009*. The information withheld in this case under this exemption is the same information which was under consideration in that decision, i.e. the schedule of rates and information derived therefrom.
29. The Commissioner does not intend to repeat all of the arguments submitted by CBG in *Decision 069/2009* (which are set out in paragraphs 23 to 31). CBG has essentially repeated the submissions presented earlier and argued that disclosure of the information would cause substantial prejudice to its own commercial interests to the extent of threatening the viability of the entire organisation.
30. In his submissions, Mr McNally argued that the exemption should not be applied across the whole of the project. In particular, he contended that most of the information would not be reusable and would therefore be of little commercial value.



Conclusions on section 33(1)(b)

31. The Commissioner has firstly considered whether CBG has relevant commercial interests. Commercial interests will generally relate to any commercial trading activity an organisation undertakes, such as the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that CBG's activities are commercial in nature, and that it does have commercial interests.
32. When considering this exemption, the Commissioner has had regard to the views expressed in numerous previous decisions and reiterated in his briefing on the section 33(1)(b) exemption¹. In particular, the briefing says:

The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that 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. FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied."

33. The Commissioner accepts that the information withheld is based upon the Schedule of Rates that was originally calculated some years ago and that, notwithstanding its age, this remains the basis upon which CBG prices tenders for work of this nature. The Commissioner considers that this information - which would allow insights into CBG's overall pricing strategy, and not just that for one tender - would be of significant interest to CBG's competitors and could place it at a serious commercial disadvantage.
34. In this case, the Commissioner is persuaded by CBG's arguments that the disclosure of the information withheld would, or would be likely to, prejudice substantially its commercial interests by revealing underlying assumptions, pricing structures and margins employed by it and so that this exemption is engaged.
35. As noted above, the exemption under section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner must therefore 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.

The public interest test

36. In his submissions, Mr McNally provided a number of arguments with respect to the public interest in favour of disclosing the information withheld.

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



37. Mr McNally's submissions to the Commissioner regarding the application of the public interest test are essentially those presented by him, and considered by the Commissioner, in *Decision 069/2009*.
38. In summary, Mr McNally considered that the main factors in favour of disclosure of the information were allowing scrutiny of the tender process, ensuring effective oversight of public expenditure, enabling clarification of GHA's charges to homeowners, contribution to public debate on the subject and better participation in quality control.
39. CBG's submissions regarding the public interest test are also the same as those presented to the Commissioner in *Decision 069/2009*.
40. In summary, CBG considered the main factors in favour of withholding the information were the public interest in securing value for money in relation to its expenditure, avoiding providing CBG's competitors with an unfair advantage in tenders, protecting the integrity of future tended exercises and avoiding a course of action which would undermine the legislative intentions of the Local Government in Scotland Act 2003 regarding the supply of goods and services by local authorities.
41. The Commissioner has considered all of the arguments submitted by both parties in relation to this particular application and the circumstances of this case. The Commissioner considers that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In particular, he believes that organisations which engage in commercial activities within the public sector must expect some information about these activities to be disclosed and that there will be a significant public interest in scrutinising details of such activities in the interest of public accountability, particularly where expenditure has come under question and has aroused public discussion. The Commissioner is also mindful of the fact that the GHA-factored homeowners have had no say in the choice of contractor to carry out this work, but are still obliged to pay for work carried out to their properties.
42. In the Commissioner's view, the withheld information in this case, being drawn or derived from the Schedule of Rates, would constitute a core part of any tendering bid made by CBG in relation to its trading activities. In the Commissioner's opinion, if this information were to be made available to CBG's competitors, this would be highly likely to put CBG at a competitive disadvantage in any competitive tendering exercise it subsequently enters into.
43. The Commissioner believes that there is a public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for major tenders of this nature. The Commissioner also accepts that, where a public authority is engaging in competitive tendering, if it is able to do so without loss of competitive advantage caused by its status as a public body, that would be in the public interest.



44. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice to a person's commercial interests may result from the disclosure, the Commissioner does not believe that this is justified in this case. After weighing up the competing interests in this case, the Commissioner has concluded that, on balance, the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA.
45. Given that the Commissioner has concluded that the withheld information is exempt from disclosure, he has not gone on to consider the application of section 36(2) of FOISA to this information.

Consideration of section 17 (Notice that information is not held)

46. 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 it does not hold the information.
47. In its initial response to Mr McNally's request, CBG did not specifically state that certain information falling within the scope of Mr McNally's requests was not held by it. It did advise him that "some of the information requested may be held by GHA." CBG did not, however, advise Mr McNally what specific information it considered may be held by GHA.
48. During the course of the investigation, and following correspondence with the investigating officer, CBG confirmed to the Commissioner that it did not hold certain of the information contained in Mr McNally's request. Specifically, CBG stated that it did not hold quotations invited or received from sub-contractors, clarification questions and answers for the specific project or any drawings containing measurements for the property in question.
49. In relation to Mr McNally's request for details of tenders invited and submitted from sub-contractors in relation to the improvement work carried out at the specified address, CBG stated that it had provided Mr McNally with details of the sub-contractors who carried out work on the site. However, it stated that sub-contractors are appointed to individual jobs from its Annual Contractors List and tenders are not sought or received on a job by job basis. Accordingly, CBG confirmed that, in relation to this aspect of Mr McNally's request, the information was not held by it.
50. CBG also explained that there were no clarification questions and answers between it and GHA in relation to this particular project. CBG explained the electronic and manual searches undertaken by it in relation to the information sought in this case and that sought in Mr McNally's previous request which was the subject of *Decision 069/2009*. CBG explained that had there been any such information, it would have been contained in letters, emails or tenders and would have been held in the relevant files searched by it.



51. CBG also explained the process by which it calculated the size and dimensions to be used in pricing a particular job at a specific property. CBG explained that it obtained drawings from GHA's "TIF" files which are the original drawings for the building. These were made in imperial measures and CBG recalculated the figures to obtain the metric measurements used in pricing the particular job. CBG stated that their standard procedure is not to retain the hard copies of these original drawings on file and they have not done so in this case.
52. Having considered CBG's submissions on these point, and its explanation of the steps taken in order to ascertain that it does not hold the information in question, the Commissioner is satisfied, on balance of probabilities, that CBG does not hold the information. The Commissioner is satisfied that CBG has taken all reasonable steps to establish whether any appropriate information is available.
53. However, by failing to inform Mr McNally that it did not hold the information noted at paragraph 48 above, the Commissioner has concluded that CBG failed to comply with the technical requirements of section 17(1) of FOISA in relation to this aspect of his request.
54. The Commissioner does not require CBG to take any action in relation to this failure at the present time. The Commissioner would however urge CBG to ensure that adequate and appropriate responses are provided to information requests in future.

DECISION

The Commissioner finds that City Building (Glasgow) LLP (CBG) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McNally.

The Commissioner finds that CBG complied with Part 1 of FOISA by correctly withholding information contained within, or derived from, the Schedule of Rates under section 33(1)(b) of FOISA.

However, the Commissioner finds that by failing to identify certain documents that fell within the scope of Mr McNally's request, CBG breached section 1(1) of FOISA.

The Commissioner also finds that CBG failed to comply with the requirements of section 17(1) of FOISA by failing to inform Mr McNally that it did not hold some of the information requested by him.

The Commissioner does not require CBG to take any action in respect of these breaches in response to this particular application.

Decision 110/2009
Mr Conor McNally
and City Building (Glasgow) LLP



Appeal

Should either Mr McNally or CBG 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
Head of Enforcement
14 September 2009



Appendix

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
 - (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).