

Decision Notice



Decision 125/2014 Clow Group Limited and Transport Scotland

Erskine Bridge gantry works

Reference No: 201302895
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www.itspublicknowledge.info

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Summary

On 16 August 2013, solicitors acting on behalf of Clow Group Limited (Clow) asked Transport Scotland for information about payments relating to work on the underdeck gantries of the Erskine Bridge. Transport Scotland withheld information because it considered disclosure would be likely to cause substantial prejudice to the commercial interests of a third party, applying section 33(1)(b) of FOISA.

Following an investigation, the Commissioner accepted that Transport Scotland was entitled to do this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15(1) and (2) (Duty to provide advice and assistance); 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.

Background

1. On 16 August 2013, solicitors acting on behalf of Clow wrote to Transport Scotland requesting the following information:
 - (i) *... a detailed breakdown of the make-up of the 521.5 days awarded to C Spencer Ltd [CSL]? In addition, what were the discrete factual and/or legal bases justifying each extension of time and how many extensions of time were granted? This is the information which previously enabled the author of your earlier letter to identify the fact that 444 of the 521.5 days related to the gantry works.*
 - (ii) *... start and finish dates for each discrete award as it may be the case that a number of the awards are concurrent?*



(iii) ... *the make-up of monies paid to C Spencer Ltd in respect of the 521.5 days awarded? In the event that a fixed daily rate was paid, what was the daily rate and what was the make-up or justification of that daily rate?*

In this decision, subsequent references to Clow are to be read as including solicitors acting on the company's behalf.

2. Transport Scotland responded on 1 October 2013 that section 33(1)(b) of FOISA applied to each of the three parts of the request. Transport Scotland stated that releasing the information requested "would be likely to cause real and actual harm to a relevant commercial, financial or economic interest of a commercial company (C Spencer Ltd)", as disclosure would allow their day rates to be ascertained from the information. Transport Scotland concluded that the public interest favoured upholding the exemption.
3. On 4 November 2013, Clow wrote to Transport Scotland requesting a review of its decision. Clow stated that Transport Scotland had failed to respond directly to each of the three parts, and it was unclear what had been addressed in the refusal. Clow drew Transport Scotland's attention to the age of the contract to which the request related and the completion of the contract works. In addition, Clow identified public interest considerations which it believed favoured disclosure.
4. For (iii), to aid Transport Scotland in the advice and assistance it could provide (and with a view to eliminating concerns about ascertaining daily rates, which it was not interested in), Clow suggested rewording the request to read:

How much was paid to C Spencer Limited (CSL) in total for the extension of time and how much of that was claimed by C Spencer Limited for and on behalf of Clow Group Limited?
5. In its response of 25 November 2013, Transport Scotland upheld its application of section 33(1)(b) for parts (i) and (iii), with further reasoning on the application of the exemption and on the public interest. For part (ii), Transport Scotland concluded that it did not hold any information.
6. On 9 December 2013, Clow wrote to the Commissioner, stating that it was dissatisfied with the outcome of Transport Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Clow made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

8. Transport Scotland is an agency of the Scottish Ministers (the Ministers), and, in line with agreed procedures, the Ministers were notified on 12 December 2013 in writing that an application had been received from Clow and that an investigation into the matter by the Commissioner had commenced. Transport Scotland was asked to provide to the Commissioner any information withheld from Clow. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. Subsequent references in this decision to submissions sought and received from Transport Scotland are to be read as including submissions sought and received from the Ministers on behalf of Transport Scotland.
10. The investigating officer contacted Transport Scotland, 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. These focused on the concerns identified by Clow in its application.
11. Clow did not challenge Transport Scotland's conclusion that it held no information falling within the scope of part (ii), but asked the Commissioner to consider whether Transport Scotland had provided adequate advice and assistance in relation to this part of the request.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to her by both Clow and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) - Commercial interests and the economy

13. Transport Scotland relied on section 33(1)(b) of FOISA to withhold information falling within the scope of parts (i) and (iii). Transport Scotland specified to the Commissioner which parts of the withheld information it considered these applied to.
14. Section 33(1)(b) 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.
15. There are elements an authority needs to demonstrate are present when relying on this exemption. An authority 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 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 be (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.

16. Transport Scotland explained that the commercial interests engaged in this case were those of its contractor, CSL, and also those of itself. Transport Scotland explained that CSL's interests were commercial interests because the withheld information included details of CSL's commercial information, including daily rates, the total amount of additional payments made and the make-up of the amount paid to them (which would enable the daily rate to be calculated, even if the rate itself were withheld). Transport Scotland submitted that it had a commercial interest in securing value for money in future contracts, which was likely to be significantly harmed by information on a contractor's daily rates and the extent of, and reasons for, additional payments becoming known to competitors.
17. Transport Scotland confirmed that it had contacted CSL to ascertain their views on disclosure of the information, and that these had been provided. A copy of the letter setting out CSL's views was supplied to the Commissioner.
18. The Commissioner accepts that Transport Scotland has identified commercial interests which fall within the terms of this exemption: those of CSL and Transport Scotland itself.
19. An authority also needs to indicate how those commercial interests it has identified would (or would be likely to) be prejudiced by disclosure of the information.
20. In its application, Clow submitted that any commercially sensitive element "has been diluted." Clow's understanding was that the contract in question was complete, that the date of substantial completion was 20 June 2011, and therefore Transport Scotland was incorrect in claiming that the contract was still active and that the release of the requested information would harm CSL.
21. Clow pointed out that the Commissioner's *Decision 216/2006 Mr David McNie and West Lothian Council*¹ acknowledged that the passage of time since the acceptance of a tender was a relevant factor in considering whether "significant harm" would be caused by the disclosure of financial information relating to the original tender. In that decision, the Commissioner stated, at paragraph 27, that the passage of time (three years) had:

"... reduced the potential value of the information to any competitors to future tenders, as prices (even allowing for inflation), service delivery methods and market conditions will undoubtedly have changed."
22. In this case, alluding to *Decision 216/2006*, Clow believed the passage of time to have greatly reduced, if not eliminated, any risk of the requested information being used to gain commercial advantage over CSL. Clow commented that the market in construction services was continually changing and:

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200503281.aspx>



“... the prices for which these services were provided three years ago do not have any significance to tenders which are rendered today. It is extremely unlikely that a contractor or sub-contractor would use this information in pricing for a tender in 2014.”

23. Clow also submitted that its amendment to the third part of the request for information eliminated any concern that CSL's daily rates (of three years ago) would be ascertainable from disclosure.
24. Transport Scotland explained that it had looked at guidance from the Commissioner, and also at previous decisions. It referred to *Decision 233/2006 Mr Mike Portlock and Glasgow City Council*², which it considered directly comparable. Transport Scotland believed provision of whole costs could still be used to calculate the daily rates, and the release of such information could disrupt the ability of Transport Scotland in any future attempts to engage in contracts for similar work. Transport Scotland also submitted that disclosure would be likely to cause significant harm to any negotiations between CSL and sub-contractors.
25. Transport Scotland thought disclosure of the information would be likely to substantially prejudice its ability to achieve best value when contracting for this type of work in the future. Transport Scotland believed it would be less likely to be able to seek out contractors, or get as many good tenderers, if contractors were concerned that it would be likely to release their commercially sensitive information into the public domain, and therefore to competitors. If Transport Scotland were to release the cost information requested (or information which could be used to ascertain costs) it would be likely to discourage specialist contractors from tendering for future contracts, therefore impacting on Transport Scotland's ability to secure value for money for the public purse. By releasing information on prices, Transport Scotland said it could risk a diminished pool of tenderers for such specialist roles.
26. Transport Scotland confirmed that the contract was still “live”, but argued that even if it had been completed, the information was still commercially sensitive as it provided relatively recent costing information. It submitted that daily rates could be arrived at even if only totals were provided. It also argued that disclosure in response to part (i) would allow a sub-contractor to estimate the additional amount paid to CSL which related to work carried out by that sub-contractor, exposing CSL to claims which might not be justified and thus making it significantly more difficult for CSL to achieve a good deal in negotiations with its sub-contractors.
27. As stated in previous decisions, the time-sensitivity of certain commercial information is recognised in the Scottish Ministers' Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the Environmental information (Scotland) Regulations 2004 (at 4.3 in Part 2):

Most contractual and procurement-related information is only sensitive for a definable period of time. It is not, however, possible to be prescriptive about when the sensitivity will decrease; this time period will vary widely depending on the type of procurement information in question and the stage reached in the tender exercise. The sensitivity of price information may

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200501687.aspx>



decrease after a relatively short period, whereas 'trade secret' information may be sensitive for much longer.

28. The Commissioner must not disclose within a decision notice, information which has been withheld by the authority. In this decision, the Commissioner has aimed to make her reasoning as full as it can be without risking the disclosure of such information.
29. The Commissioner accepts that there is still a time-sensitivity to this information, given that the contract is still not fully complete ("live", as described by Transport Scotland). The Commissioner does not consider it possible to identify in this decision the aspects in which it remains "live".
30. Transport Scotland commented that CSL was a specialist contractor. The Commissioner acknowledges Transport Scotland's point that this is a specialist area of work and that the potential pool of tenderers for such contracts is limited. However, the Commissioner does not consider it entirely plausible to assume that CSL would adopt the same pricing strategy in relation to every procurement process, so that disclosure of the information would give a competitor a complete understanding of its commercial interests in future tenders.
31. Nonetheless, the Commissioner accepts that release of this information would have given some insights into aspects of the commercial interests of both CSL and Transport Scotland. She accepts Transport Scotland's submission that those insights could have been used by CSL's competitors to their advantage. Also, she accepts that release of the information would have been likely to prejudice CSL's commercial interests substantially in any negotiations with its sub-contractors.
32. She also accepts Transport Scotland's submission that release of the information would provide insight into Transport Scotland's commercial interests, to the extent of engaging section 33(1)(b).
33. The Commissioner therefore accepts that disclosure of the withheld information would be likely to prejudice substantially the commercial interests of both CSL and Transport Scotland, and that the exemption in section 33(1)(b) was correctly applied on that basis.

Public interest test

34. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
35. Transport Scotland acknowledged that there was some public interest in disclosure of the information, to provide transparency on how public money had been spent in relation to this particular contract. However, Transport Scotland felt that there was "a strong public interest in avoiding significant harm to the commercial interests of CSL" (both in any negotiations with sub-contractors and in prejudicing its competitiveness in future procurement tenders).



36. Transport Scotland also identified a strong public interest in avoiding prejudice to its own commercial interests, either by giving tenderers information on the amounts it might pay or by reducing the number of contractors willing to bid for contracts due to concerns about future release of their commercially sensitive information. Transport Scotland said that would be likely to lead to higher costs in securing contractors (which would need to be paid using public funds), and greater difficulty in securing appropriate contractors (which might also lead to higher costs).
37. Clow submitted that the public interest in disclosure was greater than the public interest in withholding the information. Clow referred to the Commissioner's *Decision 218/2007* which, at paragraph 109, drew attention to the importance for each case being considered on its own merits, taking account of the "content and context of the information concerned". It also identified factors which may inform a decision on the public interest highlighted in the Section 60 Code, including:
- The general public interest that information is accessible; and
 - Whether disclosure would contribute to ensuring effective oversight of public funds.
38. Clow submitted that disclosure would allow an understanding of how and why the work was carried out in the way that it was, and greater understanding for companies interested in similar future projects. These factors would allow greater scrutiny of the decision-making process relating to such extensions, and thereby improve accountability and participation by companies involved in these projects (or who desired to be involved in such projects) and the public at large.
39. As public funds were used for payment of the fees to CSL, Clow continued, disclosure of the information sought in the first and third requests was in the public interest in ensuring the effective oversight of such funds. Clow again emphasized that the information was "now three years out of date and irrelevant for any contractor or subcontractor aiming to be involved in a similar project, now or in the future, in relation to pricing and daily rates." For this reason, Clow submitted, the information would not be used to undercut a similar project and any risk associated with this possibility did not outweigh the public interest in disclosure detailed above.
40. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She acknowledges that disclosure in this case would contribute to the public's understanding of the contract. The Commissioner agrees with Clow that there is a public interest in ensuring effective oversight of public funds, and that release of the information would allow such oversight. She also recognises a public interest in ensuring that value for money is seen to be obtained, particularly where this involves the public purse (as it does here).
41. On the other hand, the Commissioner accepts that there is a public interest in ensuring that there is fair competition. She accepts that where a public authority is engaging in competitive tendering, it is in the public interest that it is able to do so without its status as a public body impacting significantly on its ability to purchase effectively in a competitive market; in



particular, by securing best value through the widest possible responses from suitable persons.

42. The Commissioner has also taken account of the submissions made by Transport Scotland in favour of maintaining the exemption: she has already acknowledged the risk of substantial commercial prejudice in this case to CSL and to Transport Scotland. She accepts that this would not be in the public interest. It is in the public interest for Transport Scotland, in common with other Scottish public authorities, to be able to procure services in a competitive market, thus securing best value for the public purse.
43. Having already concluded that disclosure in this case would harm CSL's commercial interests substantially, the Commissioner recognises that it would be contrary to the public interest to place CSL in a disadvantageous position with respect to competitors.
44. The Commissioner has considered all the factors set out above. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice may result, the Commissioner does not believe that this would be justified in this case. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration. The Commissioner therefore finds that the information was correctly withheld by Transport Scotland under section 33(1)(b) of FOISA.

Section 15 - advice and assistance

45. Clow's application to the Commissioner questioned how Transport Scotland dealt with part (ii) in terms of section 15 of FOISA and whether Transport Scotland should have provided advice and assistance in terms of section 15 of FOISA (and the Section 60 Code, that is the Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004). In this context, Clow referred in particular to advice and assistance on who did hold the requested information.
46. Transport Scotland was invited by the Commissioner to comment on this point.
47. Transport Scotland explained that neither it nor the Operating Company held this information. Transport Scotland stated that the only other avenue for obtaining the information would be to request it from CSL (which Transport Scotland noted was a private company and therefore not covered by Freedom of Information legislation).
48. Section 15(1) of FOISA provides that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
49. Section 15(2) of FOISA provides that a Scottish public authority which conforms with the Section 60 Code is to be taken to comply with its duty under section 15(1).



50. The Section 60 Code states (at 1.3 in Part 2):
- “Authorities should be flexible in offering advice and assistance*
- ...*
- Advice and assistance can be given either before a request is made, or to clarify what information an applicant wants after a request has been made.”*
51. The Section 60 Code (at 1.4 in Part 2) also provides that the advice and assistance will depend on the particular circumstances of the case and notes that there will be certain individuals who may not be expected to express themselves with precision and who need more support in describing the information they wish to receive.
52. As the Commissioner has said in previous decisions, she is of the view that an applicant who is solicitor (or a solicitor acting on behalf of an applicant) would generally be expected to be able to describe the information sought, and to understand restrictions on disclosure where they applied.
53. At 2.1 in Part 2, the Section 60 Code states that where the authority is aware that the information requested is instead held by another authority, the authority should provide contact details for that other authority and suggest that the applicant reapplies there. In this case, however, the information was not held by another Scottish public authority and it is difficult to see what could have been added to enabling Clow to pursue its rights under FOISA by providing details of where it was in fact held.
54. In all the circumstances, the Commissioner is satisfied that Transport Scotland was not required to provide additional advice and assistance to discharge its duty under section 15 of FOISA in relation to Clow’s request 2.

DECISION

The Commissioner finds that Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Clow Group Limited.



Appeal

Should either Clow Group Limited or Transport Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner
11 June 2014



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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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).

...

