

Decision Notice 170/2019

Compensation or damages claims – Queensferry Crossing

Applicant: The Applicant

Public authority: Transport Scotland

Case Ref: 201900267



Scottish Information
Commissioner

Summary

Transport Scotland was asked about compensation or damages claims submitted to it by contractors in relation to the Queensferry Crossing project.

Transport Scotland withheld the information under section 33(1)(b) of FOISA, as it considered disclosure would prejudice the commercial interests of the contractors.

The Commissioner investigated and found that, while Transport Scotland had correctly withheld some information under section 33(1)(b) of FOISA, it had wrongly withheld other information under this exemption. He also found that some information, only identified during the investigation, should have been identified earlier.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 12 December 2018, the Applicant made a request for information to Transport Scotland. He asked for full details of all compensation or damages claims submitted to Transport Scotland in relation to the Queensferry Crossing project, either by the Forth Crossing Bridge Constructors (FCBC) or other contractors. The Applicant asked that the response should state the value of any claims submitted, when they were submitted and the current status of the claim.
2. Transport Scotland responded on 14 January 2019, refusing to provide the information requested under the exemption in section 33(1)(b) (Commercial interests and the economy) of FOISA. Transport Scotland believed disclosure would, or would be likely to, prejudice substantially FCBC's commercial interests and give advantages to competitors in future similar tendering exercises, with the public interest favouring non-disclosure.
3. On 14 January 2019, the Applicant wrote to Transport Scotland requesting a review of its decision. He did not believe Transport Scotland had demonstrated how disclosure would have a detrimental effect on either Transport Scotland or the contractors, given that the contract was finished and many of the headline figures were in the public domain. The Applicant believed there was a public interest in disclosing where public money was being spent.
4. Transport Scotland notified the Applicant of the outcome of its review on 8 February 2019, upholding its original decision with further explanation. Transport Scotland stated that disclosure of detailed financial costings and pricing information would harm the contractor's commercial interests, by enabling competitors to understand its method of business, approach to certain types of contract and the detail of its pricing structures, and place FCBC at a significant disadvantage in future competitions. This, Transport Scotland argued, could

adversely impact the Scottish Government through being unable to generate genuine and effective competitive tendering processes, which would not be in the public interest.

5. On 8 February 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Transport Scotland's review because he believed there was a clear public interest in releasing this information and Transport Scotland had not sufficiently demonstrated how either party would be negatively impacted by its disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 27 February 2019, Transport Scotland was notified in writing that the Applicant had made a valid application. Transport Scotland was asked to send the Commissioner the information withheld from the Applicant. Transport Scotland provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and to justify its reliance on section 33(1)(b) to withhold the information requested. Transport Scotland was also asked to comment on the searches carried out for the information, and the relevance of some of the information identified as falling within the scope of the Applicant's request.
9. The Applicant was also invited to comment on the public interest in disclosure of the information, but confirmed he had no further submissions to make. He was also asked to clarify the level of information he expected to receive, given that he had asked for "full details" of the claims. In response, the Applicant clarified that he was interested in the value of the claims, when they were submitted and their status in relation to settlement (i.e. had they been paid out).
10. Transport Scotland provided submissions to the Commissioner.

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 relevant submissions, or parts of submissions, made to him by both the Applicant and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

Information held

Clarification of request

12. Transport Scotland was asked to explain what consideration it had given to the level of information it believed the Applicant was seeking, given that he had asked for "full details", which (as set out in paragraph 9 above) he had subsequently clarified at the start of the investigation. It was also asked to explain the relevance of some of the information identified as falling within the scope of the request.

13. Transport Scotland submitted that, in its view, the Applicant's request was clear in its intentions and, as such, it did not consider it necessary to seek any clarification from him. However, given the subsequent clarification provided by the Applicant, Transport Scotland agreed that some of the withheld information, originally provided to the Commissioner, did not fall within the scope of the request as now clarified. As a result, Transport Scotland identified to the Commissioner all the information it now considered to fall within scope.

Information held / searches

14. In order to ascertain whether all relevant information had been identified, Transport Scotland was asked to explain the steps it took to establish what information it held which fell within the scope of the Applicant's request.
15. Transport Scotland submitted that all information held relating to the Queensferry Crossing project was held in one place, on Transport Scotland's behalf, namely by the Forth Replacement Crossing Employers Delivery Team: Commercial Team (EDT Commercial Team). It explained that the EDT Commercial Team were the contractors for the Forth Replacement Crossing, as part of a Joint Venture. As such, they were not Scottish Government employees and so did not have access to the Scottish Government networks. Accordingly, any information held in relation to claims for the Forth Replacement Crossing would not be held on the Scottish Government's electronic records management system (eRDM). As a small team of policy officers responsible for the Queensferry Crossing project had a good knowledge of the information held in relation to the subject matter, Transport Scotland did not consider searches of its own internal records were necessary, given that the information was held remotely by the contractor.
16. Transport Scotland explained that, at the initial request stage, it had asked the EDT Commercial Team to provide details of the information held. Having reviewed this information, the EDT Commercial Team had informed Transport Scotland that it considered the information to be commercially confidential and so should not be disclosed. However, the information was not provided to Transport Scotland by the EDT Commercial Team at that stage. Transport Scotland recognised, and apologised to the Commissioner for, its failings in this regard.
17. At review stage, Transport Scotland explained it had asked the EDT Commercial Team to provide it with the information held falling within the scope of the request. The EDT Commercial Team provided this information to Transport Scotland.

Further information identified

18. Transport Scotland submitted it did not hold a specific "claim submitted" date for each of the claims identified. To support its position on this, it explained that notification of intention to submit a claim is given at an initial stage by the contractor to the client, followed by letters substantiating each claim. Evidence is subsequently submitted by the contractor for each claim, which could be over a period of months or years. Consideration is then given to the validity and substantiation of each claim and a Final Assessed Value is established.
19. In light of this, Transport Scotland was asked by the investigating officer whether it was seeking to rely on section 17(1) (Notice that information is not held) of FOISA, for some of the "claim submitted" dates.
20. In response, Transport Scotland initially confirmed it did wish to rely on this provision in respect of claims for which the submitted date was not held. It informed the Commissioner

that, in the interests of completeness, further searches had been instructed to ensure all relevant information had been identified.

21. Transport Scotland subsequently confirmed to the Commissioner that these further searches had identified that the “claim submitted” dates were held for all claims. Transport Scotland provided this information to the Commissioner, and apologised it had not been identified earlier. It withdrew its reliance on section 17(1) of FOISA for this information, confirming it now wished to withhold it under section 33(1)(b).

The Commissioner’s views on the information held

22. Having considered the relevant submissions on searches, the Commissioner is satisfied that, by the end of the investigation, Transport Scotland had identified all of the information it held that was relevant to the request. However, the information referred to in paragraph 21 should clearly have been identified by the close of Transport Scotland’s review, at the latest. The Commissioner therefore finds that by not identifying the information, Transport Scotland failed to fully comply with section 1(1) of FOISA.
23. The Commissioner considers the practice of issuing a response, without first having had sight of the information in question, to fall below the standard he expects. He cannot accept that a measured response is capable of being issued without having given full consideration to the information identified as falling within the scope of a request. However, the Commissioner notes and welcomes that Transport Scotland has recognised and apologised for its failings in this respect.

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

24. Transport Scotland confirmed that it was withholding all of the information requested by the Applicant under section 33(1)(b) of FOISA. This 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 in section 2(1)(b) of FOISA.
25. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure;
 - (ii) the nature of those commercial interests, and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
26. 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.

The Applicant’s submissions

27. In both his request for review and his application to the Commissioner, the Applicant commented that he did not believe Transport Scotland had demonstrated how disclosure of the information would have a detrimental effect on either Transport Scotland’s or the contractor’s commercial interests, given that the contract was finished and a number of the

headline figures were in the public domain, either from Transport Scotland or from the contractors.

Transport Scotland's submissions

28. In its submissions to the Commissioner, Transport Scotland explained that an agreement had been entered into between the Scottish Ministers (the Ministers) and the FCBC to maintain the confidentiality of this specific information through the construction period.
29. Transport Scotland provided the Commissioner with a copy of the relevant Schedule in the Forth Replacement Crossing contract relating to confidentiality, acknowledging that this allowed for disclosure under FOISA where an exemption could not properly be applied.
30. Transport Scotland stated that the Queensferry Crossing was able to be opened in September 2017, with finishing and snagging works outstanding. This, it explained, remained the case and so the construction period had not yet officially ended. Outstanding works were being progressed and various sub-contractors were engaged on-site. Transport Scotland confirmed that FCBC was contractually obliged to rectify defects or faults for a five-year period from the date of opening, and that defect issues were a normal part of any major contract.

Commercial interests

31. Transport Scotland submitted that the parties whose commercial interests would be prejudiced substantially by disclosure of the withheld information were:
 - FCBC (Hochtief Solutions A.G., Dragados S.A., American Bridge International Corporation, and Galliford Try Infrastructure Limited (trading as Morrison Construction))
 - The Scottish Government / Transport Scotland.
32. Transport Scotland argued that information relating to claims submitted by the contractor related to a live contract currently being delivered, disclosure of which would be likely to prejudice substantially the confidentiality of commercial information provided by FCBC. Acknowledging that the Queensferry Crossing was open to traffic, Transport Scotland explained that contractors remained on-site concluding finishing and snagging works, and so the contract remained live. In Transport Scotland's view, even if the contract had concluded, it would still consider the information to be commercially sensitive.
33. For the contractor's commercial interests, Transport Scotland submitted that, although the Queensferry Crossing was a bespoke project, it used the same tender and procurement process for other major infrastructure projects. As such, it believed disclosure of the information would have a substantial impact on similar projects, as the contractor's interests covered many similar elements and work requirements across such projects (examples being purchasing materials and employing labour), and bids would be anticipated from many of the same contractors within the construction sector.
34. For its own commercial interests, Transport Scotland submitted that the claims were not related to the project being bespoke. While recognising it was unlikely that the same bridge would be built again, Transport Scotland explained it continued to enter into construction contracts in which similar risks are transferred to the contractor.
35. Having considered Transport Scotland's submissions on this point, the Commissioner is satisfied that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. These concern the negotiation of claims for compensation raised by the contractor, submitted to Transport Scotland.

36. The Commissioner accepts that Transport Scotland has identified commercial interests relating to both itself and the contractor, which might be adversely impacted should disclosure of the information prejudice their ability to enter negotiations with a view to reaching a settlement on the claims submitted.
37. The Commissioner must now go on to consider whether the commercial interests identified by Transport Scotland would, or would be likely to, be prejudiced substantially by disclosure of the information.

How would disclosure prejudice these commercial interests?

38. Transport Scotland submitted that disclosure of the information would be likely to compromise final payment discussions with sub-contractors, should they become aware that a claim involving their work had been settled. It explained that, where a sub-contractor or a supplier becomes aware that the main contractor has received additional funding, they will be encouraged to increase their demands.
39. Transport Scotland argued that contractors need to keep details surrounding tenders and final costs confidential, as disclosure would seriously restrict them in any future tendering process, by allowing rival bidders to know what a particular company would be likely to price particular tasks at. It believed disclosure would also jeopardise the contractor's ability to negotiate sub-contracts for the Crossing, still to be let or concluded.
40. In Transport Scotland's view, disclosure would give potential future bidders a commercial advantage over FCBC in knowing the value of claims submitted by its collective companies, and any values agreed by the client (in this case, the Ministers). This, in turn, would jeopardise FCBC's ability to negotiate future sub-contracts by revealing its negotiating position in relation to claims of this nature.
41. Further to this, Transport Scotland argued disclosure would lead to difficulties in reaching agreement on price for those contracts still to be let for this project, and when tendering for future contracts. It explained that contractors would potentially be encouraged to submit low prices for future contracts, making up the shortfall by exploring avenues to secure additional funding. One tactic, Transport Scotland submitted, was for contractors to submit inflated claims in order to obtain partial payment based on the risk that, should litigation be pursued, some remuneration would be forthcoming from the client as an alternative to the cost of defending an action.
42. Transport Scotland also believed that disclosure would jeopardise future "in contract" relationships with contractors, by providing access to information relating to variations submitted by contractors, and revealing what the Ministers might be "prepared to accept", both in subject matter and corresponding value. In Transport Scotland's view, this would be likely to jeopardise the negotiation and management of future contracts and project budgets.
43. In conclusion, Transport Scotland submitted that disclosure would be likely to prejudice substantially both its own, and the Ministers', commercial interests, and its ability to secure best value for the public purse, in light of the contract in place with FCBC for the delivery of this long term project. Should contractors become concerned that their commercially sensitive information would be released into the public domain (and therefore by default to competitors and potential sub-contractors), Transport Scotland believed this would adversely impact its ability to achieve best value when negotiating similar future contracts, making it less likely that it could attract contractors and good tender applications.

Third party comments

44. In its submissions to the Commissioner, Transport Scotland confirmed it had not initially sought FCBC's views as it considered the information to be exempt from disclosure under section 33(1)(b) of FOISA; however, these had been obtained during the investigation.
45. In its view, FCBC commented that, while there was unlikely to be another major bridge, the same tendering and procurement strategy was used by Transport Scotland, for example, in the A9 project, proposals for which were currently being developed.
46. FCBC submitted that Transport Scotland procures contracts on the basis of commercially confidential lump sums, where the contractor bears the risk for almost everything. Had the contract been procured on an open book cost basis, with equal risk sharing, it suggested the argument for disclosure might have been different.
47. FCBC explained that the contractors were public limited companies, whose shareholder prices and return was greatly affected by market forces and knowledge, the controlling influence being the obligation on contractors to publish annual accounts. It considered that disclosure of a one-sided list of "claims" - effectively contractor income - into the public domain, to those not professionally qualified to understand the implications and effects (given the commercial terms of the contract), would be misleading and could upset the share market.
48. FCBC submitted that disclosure could also provide other tendering contractors with confidential information on Transport Scotland's and FCBC's commercial strategy: this was covered by clause 1.9 of the contract.
49. In conclusion, while recognising that the decision on disclosure rested with Transport Scotland, FCBC did not expect, or agree to, commercially sensitive information relating to its confidential income being disclosed.

The Commissioner's views – section 33(1)(b)

50. The Commissioner has carefully considered all the arguments put forward, along with the withheld information, and the confidentiality clause.
51. In doing so, the Commissioner notes that the Applicant did not seek information on the actual amounts settled and paid out. Given the Applicant did not request this information, the Commissioner has not given any consideration as to its disclosure. His considerations, in this case, concern Transport Scotland's decision to withhold the specific information requested by the Applicant, as clarified by him at the start of the investigation, namely the value of the claims, when they were submitted and their status in relation to settlement (i.e. whether they had been paid out).
52. In this case, the Commissioner considers disclosure of the withheld information would allow public scrutiny of the amounts for compensation claimed by the contractor in this high-profile high-value project.
53. On the other hand, the Commissioner accepts that disclosure of the amounts claimed could impact on the management of future contracts and project budgets, as claimed by Transport Scotland, particularly in relation to any negotiations for compensation in future projects, were it to become public knowledge what the Ministers might be prepared to settle on in this case.
54. The Commissioner recognises that disclosure of the information would provide sub-contractors with details of additional income to the contractor relating to their particular

works, thus giving them the opportunity to explore ways in which to similarly benefit. He accepts that this would be to the commercial detriment of the contractor.

55. To some degree, the Commissioner also concurs with Transport Scotland's arguments that disclosure could allow bidders, for any sub-contracts still to be let, to lower their bids with the intention of submitting inflated claims in the hope that some compensation would be forthcoming as an alternative to defending a court action. This would clearly impact on the contractor's ability to negotiate best value.
56. However, the Commissioner does not accept Transport Scotland's arguments that disclosure of the information would impact significantly on its ability to negotiate future major infrastructure projects tendered for on a similar basis. He finds this argument somewhat speculative and overstated.
57. In conclusion, the Commissioner is satisfied that the information relating to the amounts claimed was of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was properly applied on this basis.
58. However, he is not similarly convinced that disclosure of information relating to the dates when the claims were submitted and their settlement status would have the impact claimed by Transport Scotland. Transport Scotland has already confirmed that this information is held, and the Commissioner does not agree that its disclosure would, or would be likely to, prejudice substantially the commercial interests of Transport Scotland, the Ministers, or FCBC, in the manner claimed.
59. The Commissioner therefore finds that Transport Scotland wrongly withheld the information relating to the dates when the claims were submitted and their settlement status under section 33(1)(b) of FOISA and requires it to disclose this information to the Applicant. Given that he has found this information to have been wrongly withheld, he is not required to go on to consider the public interest for this particular information.

Public interest test – section 33(1)(b)

60. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the remaining withheld information, he is now required to consider the public interest test required by section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
61. In both his request for review and his application to the Commissioner, the Applicant argued there was a public interest in disclosure of information where public money was being spent.
62. In its submissions to the Commissioner, Transport Scotland recognised that there was a public interest in disclosure of the information, to provide openness and transparency surrounding public expenditure in relation to this particular element of the contract. It would also ensure that the Ministers were held to account for achieving best value for money for the taxpayer.
63. In Transport Scotland's view, this had been met, to some extent, by a report¹ by Audit Scotland in August 2018 on the Forth Replacement Crossing, published on its website. This, Transport Scotland submitted, provided independent assurance that public money was spent properly, efficiently and effectively on this project, and was further evidenced by Audit

¹ <https://www.audit-scotland.gov.uk/report/forth-replacement-crossing>

Scotland's findings that the final cost of the project was around 8-16 per cent less than the initial estimate.

64. Against disclosure, Transport Scotland argued that there was a strong public interest in avoiding significant harm to FCBC's commercial interests, both in its negotiations with sub-contractors and in competing in future tender exercises. It also highlighted the need to maintain a level of trust with contractors, and so maintain confidences, and not to distort competition.
65. Similarly, Transport Scotland submitted there was a strong public interest in preserving its own commercial interests, by avoiding disclosure of information which would prejudice its ability to achieve best value in future contracts, and in ensuring potential contractors were reassured that their commercially sensitive information would remain confidential. In Transport Scotland's view, there was no public interest in disclosure of information that would result in greater difficulty and higher public costs in securing future contractors.
66. In conclusion, Transport Scotland considered that, on balance, the public interest in the disclosure of the information was considerably outweighed by that in withholding it.

The Commissioner's views on the public interest

67. The Commissioner acknowledges the general public interest in openness, transparency and accountability, particularly in relation to the scrutiny of public finances for a project of this financial magnitude. He accepts that this has, to some extent, been met by the independent report by Audit Scotland on the Forth Replacement Crossing.
68. In line with his views above, the Commissioner is not convinced by Transport Scotland's public interest arguments, that disclosure of the information would have the adverse effect claimed in tendering for future similar projects, even taking into account that (while the Queensferry Crossing project is a bespoke project) Transport Scotland uses the same tendering processes across other major infrastructure projects.
69. On the other hand, however, the Commissioner does not believe there is any public interest in the disclosure of information which would have an adverse impact on the contractor's commercial interests, as described above. He notes that the information was provided by the contractor with an expectation of confidentiality, as evidenced by the confidentiality clause. He has also taken into account that, while the Queensferry Crossing was opened in September 2017, the contract is still live and works are still ongoing to rectify defects and complete outstanding works.
70. Having balanced the public interest arguments for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the remaining withheld information under consideration here. The Commissioner therefore finds that Transport Scotland was entitled to withhold the information relating to the value of the claims submitted under section 33(1)(b) of FOISA.

Decision

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

The Commissioner finds that Transport Scotland was entitled to withhold some information under section 33(1)(b) of FOISA.

However, the Commissioner finds that Transport Scotland wrongly withheld other information under section 33(1)(b), and only identified some information after the Commissioner's investigation had started, thereby failing to comply with section 1(1) of FOISA.

The Commissioner therefore requires Transport Scotland to disclose to the Applicant the information he has found to have been wrongly withheld, by **13 January 2020**.

Appeal

Should either the Applicant 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.

Enforcement

If Transport Scotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Transport Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Transport Scotland as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

28 November 2019

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

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).
- ...

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