

# Decision Notice



Decision 171/2012 Elekta Limited and Scottish Ministers

Radiotherapy equipment contract

Reference No: 201200025

Decision Date: 18 October 2012

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Rosemary Agnew**

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## Summary

Elekta Limited (Elekta) asked the Scottish Ministers (the Ministers) for information about a contract for the supply of radiotherapy equipment. The Ministers disclosed some information, indicated that they did not hold any information in relation to one part of the request, and withheld the remainder under various exemptions in Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA).

During the investigation, the Ministers disclosed additional information to Elekta, and continued to withhold only limited information contained in 12 documents, on the basis that it was exempt from disclosure under sections 33(2)(b) (Commercial interests and the economy) and 36(1) (Confidentiality) of FOISA. The Commissioner found that the Ministers had been entitled to withhold legal advice under section 36(1), but that some of the information withheld under section 33(2)(b) should have been disclosed to Elekta.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 28(2) (Relations within the United Kingdom); 33(2)(b) and (3) (Commercial interests and the economy); 36(1) (Confidentiality)

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

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1. In July 2011<sup>1</sup> the Scottish Government announced that Varian Medical Systems (Varian) had been awarded a contract to supply new equipment for radiotherapy departments in Glasgow, Edinburgh, Dundee, Aberdeen and Inverness. The procurement process had been undertaken by the Common Services Agency of the NHS (the CSA, commonly known as NHS National Services Scotland) on behalf of the five health boards purchasing the equipment.

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<sup>1</sup> <http://www.scotland.gov.uk/News/Releases/2011/07/27102615>



2. Elekta believes that the terms of the tender document were such that everyone other than Varian was effectively excluded from bidding, because the equipment sought was required to be interoperable with certain existing equipment supplied by Varian. Elekta commenced proceedings under the Public Contracts (Scotland) Regulations 2006 (the 2006 Regulations), prior to the end of the mandatory standstill period.
3. In terms of the 2006 Regulations, the CSA was, from the point at which Elekta had raised court proceedings, prohibited from entering into the contract with Varian, unless (a) the proceedings were determined, discontinued or disposed of or (b) the Court brought the prohibition to an end. The CSA sought a court order to allow it to enter into a contract with Varian.
4. The Court of Session set out its Opinion on this matter in *Elekta Limited v the Common Services Agency* [2011] CSOH 107<sup>2</sup> (*Elekta v the CSA*). Having concluded there was limited prospect of Elekta's case being successful, and that there would be adverse consequences for the CSA and the health boards if the standstill period was allowed to continue, the Court granted an order lifting the prohibition on the CSA from contracting with Varian.
5. On 3 October 2011, McGrigors LLP, on behalf of Elekta, wrote to the Ministers requesting the following in relation to the award of the contract to Varian (in this decision, all references to correspondence with Elekta are to correspondence with its solicitors, McGrigors LLP):
  - a. information including, but not restricted to, reports produced by the CSA/the NHS/Health Facilities Scotland (HFS, a division of the CSA) relating to the procurement and, specifically, any information which led to the conclusion that there was "an open procurement process";
  - b. information provided to Nicola Sturgeon regarding the case of *Elekta v the CSA*, including reports or minutes of discussions/meetings;
  - c. statistical information regarding the projected costs associated with the award of the radiotherapy equipment to Varian; and
  - d. information, including, but not restricted to, reports, statistics, minutes of meetings or records of calls which relate to the conclusion that the procurement of the radiotherapy equipment has "resulted in cash savings".Elekta indicated that it anticipated that the information sought in part d. may include some form of comparative analysis which considered the costs associated with the procurement and the costs which may have been associated with another form of procurement (for example, a multi-party framework agreement).
6. The Ministers responded on 26 October 2011. They advised Elekta that the procurement exercise had been led by HFS and so HFS, and not the Scottish Government, was the owner of the documents. They suggested that Elekta contact a named member of staff at the CSA about obtaining the information.

<sup>2</sup> <http://www.scotcourts.gov.uk/opinions/2011CSOH107.html>



7. The Ministers also stated that they were unable to disclose the information and advice that had been submitted to them, on the basis that it was exempt from disclosure under sections 30(b)(i) and 33(2)(b) of FOISA. However, they provided a further copy of information about the procurement that had previously been provided to Elekta.
8. On 1 November 2011, Elekta asked the Ministers to clarify their response, which, as noted above, indicated that the information did not belong to the Scottish Government, but also that it was exempt from disclosure. Elekta asked the Ministers to confirm whether the request was being refused on the basis that the Ministers did not hold the information (section 17 of FOISA), or on the basis that the Ministers did hold the information, but were not willing to disclose it (section 16 of FOISA).
9. The Ministers notified Elekta of the outcome of their review on 28 November 2011. They indicated that they did not hold any information falling within part c., but disclosed certain information in relation to the other parts of the request. They withheld other information on the basis that it was exempt from disclosure under sections 30(b)(i) and (ii) and 36(1) of FOISA.
10. On 22 December 2011, Elekta wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
11. The application was validated by establishing that Elekta 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

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12. On 10 January 2012, the Ministers were notified in writing that an application had been received from Elekta and were asked to provide the Commissioner with the information withheld from it. The Ministers provided the information and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted the Ministers, giving them 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 they considered applicable to the information requested.
14. Having considered the information identified by the Ministers, and having considered the types of information that Elekta expected to be provided in response to its request, the investigating officer also asked questions to establish whether all relevant information had been identified.



15. The Ministers responded on 16 March 2012, advising that additional information had been identified in response to the investigating officer's questions, including information falling within the scope of part c. of Elekta's request (in relation to which the Ministers had indicated on review that no information was held). After reconsidering the withheld information, the Ministers disclosed some of it to Elekta on 30 March 2012.
16. The Ministers confirmed that they were no longer relying on section 17(1) of FOISA with respect to part c. of Elekta's request. .
17. Discussions took place between the investigating officer and the Ministers during the investigation, which led to the Ministers disclosing further information to Elekta. By the end of the investigation, most of the information had been provided to Elekta, with information in only 12 of the 48 documents being withheld. The Ministers considered that this information was exempt from disclosure under sections 33(2)(b) and 36(1) of FOISA.
18. The investigating officer also contacted Elekta during the investigation, enquiring whether the information disclosed subsequent to the Ministers' review response could be excluded from consideration in the Commissioner's decision and seeking its submissions on the matters to be considered in the case. Elekta confirmed that the information disclosed could be excluded from consideration in the decision and provided its submissions on the case.
19. Elekta's submissions, along with those of the Ministers, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

## **Commissioner's analysis and findings**

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20. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Elekta and the Ministers and is satisfied that no matter of relevance has been overlooked.
21. As noted above, the withheld information is contained within 12 of 48 documents identified as falling within the scope of the Elekta's request. These are numbered 5, 7, 8, 24, 25, 27, 29, 31, 33, 35, 37 and 47 within the schedule provided by the Ministers. Of these, only document 25 has been withheld in its entirety. The Ministers have disclosed copies of the other documents, subject to the redaction of information they consider to be exempt from disclosure.
22. Prior to considering whether exemptions apply to this information, the Commissioner will consider whether the Ministers were correct to rely upon section 17(1) of FOISA in relation to part c. of Elekta's request.

### **Section 17(1) – information not held**

23. In terms of section 1(4) of FOISA, the information to be provided in response to a request is, subject to limited provisions which are not relevant here, the information held at the time the request is received.



24. Section 17(1) of FOISA requires an authority, which receives a request for information it does not hold, to give the applicant notice in writing to that effect.
25. During the investigation, the Ministers located a substantial volume of information, and upon closer examination the investigating officer noted that some of the information was covered by part c. of Elekta's request.
26. As a result, the Ministers were asked if they still wished to rely upon section 17(1) of FOISA with respect to part c. In response, the Ministers agreed that they had been wrong to rely on section 17(1) of FOISA in response to this part of Elekta's request. The Commissioner must therefore conclude that the Ministers breached Part 1 of FOISA by notifying Elektra that they did not hold any information falling within part c. of its request.
27. However, considering the wide-ranging nature of Elekta's request, the Commissioner is satisfied that the Ministers have now undertaken appropriate searches and that, on balance of probabilities, these have identified all of the information they hold which falls within the scope of Elekta's request.

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

28. The Ministers withheld information within documents 5, 7, 8, 33 (point 5) and 47 under section 33(2)(b) of FOISA.
29. Under section 33(2)(b) of FOISA, information is exempt if its disclosure would, or would be likely to, prejudice substantially the financial interests of an administration in the United Kingdom. This is a qualified exemption and is therefore subject to the public interest test.
30. "Administration in the United Kingdom" is defined in section 28(2) of FOISA. In this case, the Ministers indicated that disclosure of the relevant information would, or would be likely to, prejudice substantially the financial interests of the Scottish Administration (i.e. the Scottish Government).
31. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that an authority must be able to satisfy her that the prejudice caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the prejudice to be likely, there must be at least a significant probability of it occurring in the near or foreseeable future and not at some distant time.
32. The Ministers explained that, although the HFS undertook the procurement of radiology equipment on behalf of NHS Boards, the money was provided by the Scottish Government. The Scottish Government sat on the programme board to ensure that the public purse is used appropriately and that the financial interests of the Scottish Government were adhered to.
33. The Ministers maintained that premature disclosure of the information would jeopardise the ability of the Scottish Government and the NHS Boards to seek best value in an up-coming procurement exercise, and to be able to work to keep costs at a minimum in a time of extreme financial cutbacks.



34. The Ministers explained that, at the outset of the procurement process, there was a clear assumption that, if better value for money could be achieved in practice, the procurement would be repeated over a 2-year cycle, with a further approach to the market in the summer of 2012. During the investigation, the Ministers confirmed that the second procurement cycle was imminent, and that they wished to withhold the information in order to retain the same advantageous negotiating position that existed in the previous round.
35. While the Ministers recognised that the harmful effects of disclosure can diminish over time, they considered that this did not apply in the current case given the imminent tendering for similar equipment for other NHS Boards.
36. The Ministers also submitted that disclosure of the information would limit their ability to engage with private sector service providers on an equitable basis, as well as potentially discouraging private sector service providers from entering into commercial partnerships with them, as they would consider that any information supplied would automatically be disclosed.
37. They maintained that it is essential that they can operate in an environment in which they can freely and effectively consider contractual detail without this being already in the public domain or in anticipation of imminent disclosure to the public. The Ministers contended that disclosure of this information would prejudice their financial bargaining position, given that there are few suppliers of this type of equipment.
38. If the information in question was made public, the Ministers considered that it would be seen as a benchmark of what they considered acceptable in such a contract. They indicated that potential suppliers would be able to replay the calculations carried out during the first procurement, calculate the upper limit in terms of funding specific replacement machines or software and target the price at a figure marginally below it.
39. They considered this would significantly prejudice their ability to achieve value for money and would restrict their room for manoeuvre when entering discussions with potential contractors; without this information, potential suppliers would have to bid on the basis of their own costs with what they consider to be a reasonable profit margin against potential competitors. The Ministers submitted that this approach would ensure that the most competitive bids are submitted.
40. However, Elekta challenged the Ministers' submissions, maintaining that disclosure of the information would lead to the tenders being received being more, rather than less, competitive.
41. Elekta referred comments in paragraph 66 of *Decision 015/2009 Lightways (Contractors) Limited and North Lanarkshire Council*<sup>3</sup> (the Lightways Decision), which also considered financial information relating to a procurement exercise:

<sup>3</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800521.asp>



“The Commissioner disagrees with the Council's statement that costs will increase and suggests that the opposite will apply, in that once the tendering costs are known, competitors will aim to submit a price that is lower, but still compliant with the technical, quality and health and safety requirements, etc. Given the large number of public authorities covered by FOISA, and the amount spent by public authorities in tendering exercises such as this one, the Commissioner does not accept that the disclosure of such information would stop private companies from tendering for public authority contracts. While this is an argument which has been made even before FOISA came into force, the Commissioner has yet to be provided with any evidence to show that as a result of FOISA private bodies are no longer willing to contract with the public sector.”

42. Elekta submitted that the above conclusions also applied in this case, as the Ministers had provided no real evidence to support their assertion that competition would be reduced and tenderers reluctant to enter into contracts. In addition, they maintained that the amount of money spent by the Ministers each year on public procurement is so significant that private entities cannot afford to ignore such business opportunities.
43. Elekta also argued that, as a direct result of the procurement method chosen by the Scottish Government, and the specific requirement that any tenderer must have interoperability with existing systems, only one tenderer was able to participate in the procurement process, and that tenderer was awarded the contract to supply each of the NHS Boards. Given that the life span of the technology supplied is 10 years, Elekta maintained that the Scottish market for the products in question has been closed off to it (and others) for a decade. It commented that even if it, or any other party, was to seek to use the information in a future tender, the passage of a decade would make this information useless for the purposes of compiling that tender.

#### *Commissioner's conclusion*

44. The Commissioner has considered all of the comments from both Elekta and the Ministers (including those which are not summarised above).
45. Given its role in funding the procurement of the radiotherapy equipment, the Commissioner accepts that the financial interests of the Scottish Administration could be prejudiced if disclosure of information would undermine its ability to achieve best value in future tendering exercises of a similar nature.
46. The central question for the Commissioner is therefore whether disclosure of the information in question would, or would be likely to, prejudice substantially those financial interests.
47. The Commissioner has considered the points raised by Elekta carefully, and the decision to which it referred. However, she would note also that each case must be considered on its own merits. Relevant considerations will include the timing of a request, and whether the information has continued relevance to the up-coming procurement exercises. The information under consideration in this case is of a different nature from that considered in the Lightways Decision. The information considered in the Lightways Decision was finalised pricing, whereas, in the current case, it is cost savings for the entire project, and interim strategic calculations.





48. Given that a similar procurement process was anticipated at the relevant time (i.e. when the Ministers notified Elekta at the outcome of their review), those cost savings and the interim calculations would have continued relevance in that forthcoming procurement process. The Commissioner accepts that this information would be beneficial to a provider considering bidding, since it would give an indication of the calculations of costs and savings over the life of the contract awarded in 2011.
49. Having considered the information withheld under this exemption, the Commissioner is, on the whole, satisfied with the Ministers' statements that disclosure of this information would, or would be likely to, prejudice substantially the financial interests of the Ministers, by revealing details of their expectations and calculations, and so undermining their bargaining position and ability to achieve best value in the up-coming procurement exercise.
50. The Commissioner has noted Elekta's comment that the information would be of limited value given its belief that only one company would be capable of meeting the contract requirements. The Commissioner cannot say whether one or more supplier would be capable of making a compliant bid. However, she considers that disclosure of the information would undermine the ability of the Scottish Government and of health boards to achieve best value, whether one or several suppliers tendered for a further contract.
51. The Commissioner accepts the Ministers' argument that disclosure could undermine the purpose of the competitive tendering process, by enabling tenderers to adopt a pricing strategy based on an understanding of the Ministers' analysis of what had gone before, rather than identifying the most competitive price and service that they could offer. She therefore finds that disclosure would thereby be likely to reduce the possibility of equal or greater savings being made in the next tendering.
52. However, the Commissioner is not able to accept that disclosure of the information withheld on page 63 of document 47 (columns in a table specifying the equipment cost if bought individually by the NHS Board and the cost if the equipment was bought nationally by the CSA) would, or would be likely to, prejudice substantially the financial interests of the Scottish Administration.
53. During the investigation, the Commissioner invited the Ministers to provide further explanation as to why they believed that disclosure of this particular information would harm their financial interests. The Ministers responded by confirming that they still wished to withhold this information, but did not explain what harm would follow from its disclosure. In the circumstances, the Ministers have not been able to satisfy the Commissioner that the exemption applies.
54. In conclusion, the Commissioner is satisfied that disclosure of the information withheld by the Ministers under section 33(2)(b), except for the information contained in page 63 of document 47, would, or would be likely to, prejudice substantially the financial interests of an administration in the United Kingdom and that it is therefore exempt from disclosure.



*Public interest test*

55. As noted above, the exemption in section 33(2)(b) of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, even where the exemption applies, the information must be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
56. The Ministers commented that there is undoubtedly a public interest in the disclosure of financial-related information held by those who are responsible for spending taxpayers' money. However, they maintained that the public interest in enabling them to come to contractual arrangements with third parties in the best interests of the public purse outweighs the public interest in the "minutiae" of contract details.
57. The Ministers considered that disclosing the information could jeopardise their relations with commercial organisations which might become unwilling to contract with the public sector were sensitive data likely to be compromised. The Ministers added that, since they believed that disclosure would have the effect of reducing the market (i.e. reducing the number of competitors willing to enter into contracts with the Scottish Government), this would limit the options available to the Ministers to successfully achieve the most beneficial results financially, and, consequently, in the public interest.
58. The Ministers indicated that they did not consider that it would be in the public interest to undermine the ability of either contractor or purchaser to obtain the best outcome for the taxpayer by early disclosure of such sensitive information.
59. In their submissions, Elekta argued that disclosure of the information would allow the public to scrutinise the decision-making process which led to the Scottish Government running a procurement process in which there could only be one winner. Elekta commented that the Scottish Government selected that process and argued that it was justified, but have withheld information relating to it on the grounds that it is commercially sensitive. Elekta stated that, even if the information is commercially sensitive, the public still has a right to see how and why decisions were made. Elekta commented that, if the public cannot see the information, the Scottish Government was not accountable for its decisions.
60. Elekta also highlighted a number of factors that they considered were relevant to the consideration of the public interest, which included:
  - disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
  - disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money; and
  - the fact that Nicola Sturgeon's announcement that 'cash savings' were made required to be supported by underlying evidence.



*Commissioner's conclusion*

61. The Commissioner has considered all of the submissions from both Elekta and the Ministers when undertaking the public interest balancing test.
62. She recognises that disclosure of the information to which section 33(2)(b) of FOISA has been applied would contribute some additional understanding of the procurement process followed, and whether this did produce savings for the public purse. However, she also notes that the information under consideration at this stage is very limited and would contribute little to understanding the Ministers' decision making beyond what has already been disclosed prior to the issue of this decision.
63. The Commissioner welcomes the Ministers' decision during the investigation to disclose a substantial volume of information that had previously been withheld in this case. She considers that these disclosures have contributed much to the public interest identified by Elekta.
64. Given that the information under consideration here would contribute little additional understanding, and represents interim calculations of some relevance to up-coming (at the relevant time) procurement processes, the Commissioner accepts that there is a public interest in allowing the authorities undertaking and planning procurement process a degree of private space to develop and analyse such information without the concern that it will be disclosed into the public domain.
65. While the Commissioner recognises that the withheld information may be of interest to Elekta, she considers there to be greater public interest in enabling the Ministers to obtain the best financial deal and ensure that any monies allocated to projects are on a sound financial basis.
66. After weighing up the competing interests in this case, the Commissioner has concluded that, in all the circumstances, the public interest in disclosing the information she has found to be exempt under section 33(2)(b) of FOISA is outweighed by the public interest in maintaining that exemption.

**Section 36(1) of FOISA - Confidentiality**

67. The Ministers have withheld some or all of the information in documents 24, 25, 27, 29, 31, 33 (point 4), 35 and 37 under section 36(1) of FOISA.
68. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege (LPP), applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.



69. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
70. The information being withheld under this exemption is legal advice obtained by the HFS from their legal advisers, Central Legal Services (CLS). The Ministers commented that, given that the procurement process was challenged in court by Elekta, it was imperative that legal advice was sought and utilised to inform all the interested parties involved in the process to highlight legal implications for the process, the programme and project boards and ultimately the Cabinet Secretary.
71. The Commissioner is satisfied that the information comprises communications between legal advisers and client, provided in circumstances in which legal advice privilege could apply.
72. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal advice privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed: for this to be the case, the information must possess the quality of confidence at that time (i.e. at least up to the point at which the authority carries out its review and communicates the outcome to the applicant).
73. A claim of confidentiality will not be capable of being maintained where information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of all or part of the information under consideration, any privilege associated with that information (or the relevant part) is also effectively lost.
74. Having considered the Ministers' submissions and the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary.
75. The Commissioner is therefore satisfied that the withheld information to which section 36(1) has been applied is (and was at the time relevant for this decision) information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings and is exempt from disclosure under section 36(1) of FOISA.
76. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



### *Public Interest Test*

77. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*<sup>4</sup>, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
78. The Ministers considered that there is undoubtedly public interest in the transparency and accountability of procurement processes involving the public purse. However, the Ministers considered that there is greater public interest in enabling decisions to be taken in a fully informed legal context, which requires a degree of protected confidentiality to ensure that the Government or its representatives are able to defend its legal interests and that it is not prejudiced by inappropriate disclosure of information or legal analysis.
79. For these reasons, the Ministers considered that the public interest in disclosure was outweighed considerably by the public interest in maintaining this exemption.
80. In its submissions, Elekta made reference to *Decision 023/2005 Mr David Emslie and Communities Scotland*<sup>5</sup> in which the Commissioner indicated that communications between a legal adviser and client would only be disclosed in highly compelling cases. Elekta maintained that there are highly compelling circumstances in this case.
81. Elekta also highlighted the decision of the Information Tribunal in the case EA/2007/0052 between Mersey Tunnel Users Association and the Information Commissioner and Merseytravel.<sup>6</sup> (The Information Tribunal deals with appeals made against decisions of the UK Information Commissioner made under the Freedom of Information Act 2000.) In that case, the Information Tribunal concluded that the balance of the public interest favoured the disclosure of certain legal advice. Elekta highlighted that similar arguments had been put forward by the Ministers to those considered by the Information Tribunal, and maintained that the reasoning followed there should be adopted in the current case.
82. Elekta took the view that the factors which favour disclosure in this case are heavier than those which favour non-disclosure and that, if the amounts of money involved, the number of people affected, the clear absence of litigation and lack of transparency regarding the procurement process are all considered together, the same conclusion should be reached here.
83. Elekta also commented that, as “vast” amounts of public money were spent on this contract, every member of the public has a clear interest to see where and how this budget is being allocated; as Nicola Sturgeon had announced that “cash savings” had been made as a result of this procurement, information supporting this statement must be disclosed.

<sup>4</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

<sup>5</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2005/200501380.asp>

<sup>6</sup> [http://foiwiki.com/foiwiki/info\\_tribunal/DBFiles/Decision/i46/MerseyTunnelDecision\\_website.pdf](http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i46/MerseyTunnelDecision_website.pdf)



84. The Commissioner accepts that Elekta has identified a public interest in disclosure of the information under consideration in order to scrutinise the Ministers' decision making and expenditure in a substantial public procurement exercise, which Elekta considers to have been flawed. She recognises that, following the issue of the Opinion of the Court of Session mentioned in paragraph 4 above, there is no longer on-going litigation on this procurement, and so there is arguably less public interest in maintaining the exemption in section 36(1) than if litigation had remained live or in prospect at the relevant time.
85. However, the Commissioner considers that the general public interest in ensuring the effective administration of justice, and for that purpose, enabling all organisations, including public authorities, to obtain and consider legal advice on a confidential basis, is very weighty.
86. In this case, she does not consider that Elekta has demonstrated there to be public interest considerations that outweigh the public interest in maintaining the exemption, and notes that the situation here can be distinguished from the MTUA case, in that the legal advice which has been withheld relates to Elekta's court appeal, rather than to how money was spent on the procurement or what cash savings were made.
87. On balance, therefore, the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).
88. Therefore, she is satisfied that the Ministers applied correctly the public interest test in withholding the information in documents 24, 25, 27, 29, 31, 33 (point 4), 35 and 37 from Elekta and that this information is exempt from disclosure by virtue of section 36(1) of FOISA.

## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Elekta Limited (Elekta).

The Commissioner finds that the Ministers were entitled to withhold information in documents 5, 7, 8, 33 (point 5) and 47 (pages 13 and 34) under section 33(2)(b) of FOISA and to withhold information in documents 24, 25, 27, 29, 31, 33 (point 4), 35 and 37 under 36(1) of FOISA.

However, by advising Elekta that they held no information in respect to part c. of its request in terms of section 17(1) of FOISA and by withholding the information on page 63 of document 47 under section 33(2)(b) of FOISA, the Ministers failed to comply with Part 1.

The Commissioner therefore requires the Ministers to disclose the information withheld on page 63 of document 47, by **Monday, 3 December 2012**.



## Appeal

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Should either Elekta or the Scottish Ministers 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**18 October 2012**



## Appendix

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### 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.
- ...
- (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.
- ...

##### 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.=

## **28 Relations within the United Kingdom**

...

(2) In subsection (1), "administration in the United Kingdom" means-

(a) the Government of the United Kingdom;

(b) the Scottish Administration;

(c) the Executive Committee of the Northern Ireland Assembly; or

(d) the National Assembly for Wales.

## **33 Commercial interests and the economy**

...

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

...

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

(3) In subsection (2) "administration in the United Kingdom" has the same meaning as in section 28(2).

## **36 Confidentiality**

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...