

Decision Notice



Decision 239/2011 Tom Gordon of the Sunday Herald and City Building
(Glasgow) LLP

Tendering process for contract for supply of steel doors

Reference No: 200900989
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Summary

Mr Gordon, Scottish Political Editor of the Sunday Herald, requested from City Building (Glasgow) LLP (CBG) information relating to the award of a contract for the supply of doors. CBG withheld the information in its entirety under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA).

During the investigation, CBG disclosed much of the withheld information to Mr Gordon, but it continued to withhold pricing information from the winning tender, information identifying unsuccessful bidders in certain contexts, and certain personal data.

Following an investigation, the Commissioner concluded that CBG had partly complied with Part 1 of FOISA when responding to Mr Gordon's information request. He concluded that by withholding the vast majority of the information falling within the scope of Mr Gordon's request (which was disclosed to him during the investigation) CBG breached section 1(1) of FOISA.

However, he found that by withholding the limited information that it continued (at the end of his investigation) to consider exempt from disclosure under sections 33(1)(b), 36(2) and 38(1)(b) of FOISA, CBG complied with Part 1. He finds that these exemptions were properly applied to that information.

The Commissioner did not require any action to be taken, since CBG disclosed all non-exempt information falling within the scope of Mr Gordon's request prior to the issue of this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1), (2)(c) and (e)(ii) (Effect of Exemptions); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b), (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

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 6 March 2009, Mr Gordon wrote to CBG requesting the following information:
“...all records held by City Building (Glasgow) LLP or its agents related to the award of a contract for doors to Martec Engineering Group Ltd.”
The relevant contract was for the supply and fitting of controlled entry common entrance steel security doors and frames. For ease of reference, it will be referred to in this decision as “the steel doors contract”.
2. Mr Gordon provided the reference number and the date of publication of the relevant Contract Award Notice in the Official Journal of the European Union (OJEU). He also qualified his request by stating that:
“The information supplied should include, but not be limited to, details of the unsuccessful bids, including bidder names and values, a copy of the tender evaluation matrix used to evaluate the bids, and details of the meetings which signed off the contract, such as board papers and minutes.”
3. CBG responded on 2 April 2009. It withheld the requested information in its entirety, indicating that it was exempt from disclosure under sections 33(1)(a) and (b), 36(2) and 38 of FOISA.
4. On 7 April 2009, Mr Gordon wrote to CBG, requesting a review of its decision. Mr Gordon disputed the application of the exemption in section 33(1)(a) (which applies to trade secrets). He also commented that the other exemptions cited had been applied in a blanket fashion and he considered this to be disproportionate and unjustified.
5. CBG notified Mr Gordon of the outcome of its review on 8 May 2009. It upheld without modification its decision to withhold the requested information.
6. On 26 May 2009, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of CBG’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Gordon 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

8. On 16 June 2009, CBG was notified in writing that an application had been received from Mr Gordon and was asked to provide the Commissioner with any information withheld from him. CBG responded with what it considered to be the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted CBG, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, CBG was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. CBG was also asked to comment on the manner in which it had handled Mr Gordon's request.
10. The investigating officer noted that the information supplied to the Commissioner related only to the evaluation of tenders, while Mr Gordon's information request sought a far wider range of information (and CBG's correspondence with Mr Gordon had suggested that a wider range of information had been identified and judged to be exempt from disclosure). CBG was therefore asked to supply all information that fell within the scope of Mr Gordon's request together with a schedule indicating which exemptions had been judged to apply to which information.
11. In its response dated 20 August 2009, CBG supplied all the documentation which fell within the scope of Mr Gordon's original request and stated that it wished to withhold all of that information on the basis that it was exempt from disclosure in terms of sections 30(b) and (c), 33(1)(a) and (b), 35(1)(a), 36(2) and 38(1)(b) of FOISA.
12. Following further communications with the investigating officer, in April 2010 CBG disclosed the information withheld from Mr Gordon, subject to the redaction of information identifying unsuccessful bidders, most of the information drawn from the tenders, and CBG's evaluation of the tenders received. CBG also provided further submissions explaining the exemptions applied when redacting information and the rationale for their application.
13. This case was initially investigated in conjunction with the related case (concerning a request for information relating to a tendering process for a vehicle fleet service contract) which prompted the Commissioner's *Decision 102/2011 Tom Gordon of the Herald and City Building (Glasgow) LLP* (Decision 102/2011), which was issued on 26 May 2011. Decision 102/2011 found that CBG had breached Part 1 of FOISA in its handling of Mr Gordon's information request, and concluded that much of the information under consideration should have been disclosed. However, the Commissioner found that certain information had been correctly withheld under the exemptions in sections 36(2) and 38(1)(b) of FOISA.
14. Following the issue of Decision 102/2011, the investigating officer contacted CBG to invite it to consider whether, in the light of the conclusions in Decision 102/2011, it was willing to disclose further information to Mr Gordon, and whether it wished to provide further submissions in relation to any information it still wished to withhold.



15. Following further communications (in which a settlement offer from CBG was declined by Mr Gordon), CBG decided to disclose further information to Mr Gordon, and it did so on 6 October 2011. The disclosure was subject to the redaction of the details of pricing set out in the winning bid, certain personal data, bank details and the identities of unsuccessful bidders in circumstances where they could be correlated with the content of their bids.
16. CBG provided further submissions regarding its application of the exemptions in sections 33(1)(b), 35(1)(a), 36(2) and 38(1)(b) to the information redacted in the documents disclosed to Mr Gordon on 6 October 2011. It confirmed that it no longer wished to rely on any other exemptions that had been previously cited (and so previous submissions on these should be disregarded), and that these final submissions superseded those previously made on the exemptions still being applied.
17. The investigating officer the contacted Mr Gordon to update him on developments in this case and to invite him to make any further comments he wished to be taken into consideration in the Commissioner's decision. The investigating officer indicated that if Mr Gordon did not indicate otherwise, it would be assumed that the comments he had made in relation to the request considered in Decision 102/2011 should be considered applicable also in this case. No further comments were received from Mr Gordon.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Gordon and CBG and is satisfied that no matter of relevance has been overlooked.

The information under consideration

19. Following the commencement of the Commissioner's investigation, CBG identified a range of information relating to the tendering process and award of the steel doors contract.
20. This decision deals with the information which the Commissioner has found to be within the scope of Mr Gordon's request.
21. As noted above, although CBG initially withheld all of the information requested by Mr Gordon, it decided during the investigation to disclose much of this to Mr Gordon, and it withdrew its previous submissions defending its decision to withhold the information in full. The remaining sections of this decision will consequently focus on the information that continues to be withheld, and the arguments made in relation to that information.
22. However, before doing so, the Commissioner would note that he finds that by withholding the information that was disclosed to Mr Gordon during the investigation at the point where it notified Mr Gordon of the outcome of its review (the point that is relevant for the purposes of the Commissioner's decision), CBG breached Part 1, and in particular section 1(1) of FOISA.



23. The information that continues to be withheld is pricing information drawn from Martec's bid, certain personal data, bank details and the identities of unsuccessful bidders in contexts where they could be correlated with the content of their bids.
24. In Decision 102/2011, it was noted that Mr Gordon had indicated that he did not dispute CBG's decision to withhold signatures or bank details, and the Commissioner has proceeded on the understanding that he is content with CBG's decision to withhold such information also in this case. For this reason, his discussion below has not considered the withheld signatures or bank details any further in what follows.
25. As in any case, the Commissioner has considered CBG's application of the relevant exemptions based on the circumstances that existed at the point where the public authority notified the applicant of the outcome of its review. In this case, that date is 8 May 2009. The Commissioner has disregarded any developments, and the effect of the passage of time on the applicability of any of the exemptions to be considered, since that date.
26. The Commissioner first considered CBG's application of the exemption in section 38(1)(b) of FOISA.

Section 38(1)(b) – Personal information

27. The exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, where appropriate, section 38(2)(b)) exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles set out in Schedule 1 to the DPA. This exemption is absolute in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
28. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
29. CBG applied this exemption to certain personal data which was redacted from the information disclosed to Mr Gordon. In determining which personal data to withhold and release, it indicated that it had applied the reasoning set out in Decision 102/2011, and so it had withheld:
 - the names of staff within CBG who had provided administrative support to the tendering exercise (those who did not play a substantial role within the tendering process, or were not responsible for the administration and evaluation of the tender);
 - contact details of all employees within CBG and bidding companies (on the basis that Mr Gordon's legitimate interests could be met without disclosure of this information), except CBG's Customer Service Manager, whose contact details had been made public within published contract notices;
 - the names of staff within Martec who did not have a substantial role within the tendering process; and



- the names of all staff within unsuccessful bidding companies.
30. The Commissioner carefully reviewed CBG's approach to redacting personal data within the documents released to Mr Gordon in October 2011, and he found that it had consistently applied the findings regarding the extent of application of section 38(1)(b) to the information under consideration in Decision 102/2011 to the information under consideration in the current case. He also noted that the personal information falling within the scope of the request under consideration is of the same nature as that considered in Decision 102/2011.
31. Mr Gordon has made no additional submissions since the issue of Decision 102/2011 to suggest that he considers that its findings regarding the exemption in section 38(1)(b) of FOISA should not also be applied in the current case. As a result, the Commissioner presumes that his views on the application of the exemption in section 38(1)(b) to the information in this case remain as they were summarised in Decision 102/2011.
32. Given the similarity of the information under consideration, the relation between the requests, and that the submissions of both parties to the current case were considered fully in Decision 102/2011, the Commissioner considers that the reasoning set out at length in paragraphs 225 to 264 of Decision 102/2011 is also applicable to the current case.
33. The Commissioner will not repeat that reasoning in this decision. However, for same reasons set out there, he is satisfied that the information to which the exemption in section 38(1)(b) of FOISA has been applied in this case is personal data, as defined in section 1 of the DPA, and that its disclosure would breach the first data protection principle. As such, it is exempt from disclosure under section 38(1)(b) of FOISA.
34. Given that CBG has correctly applied that reasoning to the information under consideration in this case, he is satisfied that it has rightly decided to disclose some personal data, while appropriately applying the exemption in section 38(1)(b) to the information detailed in paragraph 29 above.

Section 36(2) - Confidentiality

35. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.



36. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the public authority obtained the information or by any other person.
37. CBG indicated that it had adopted the reasoning set out in Decision 102/2011 when applying the exemption in section 36(2), and it had accordingly removed the names of (and other information identifying) the unsuccessful tenderers where they appear in contexts that associated the companies with the contents of their bids. In these contexts, it systematically replaced the names with labels (Bidder 1, Bidder 2, etc.) to make clear to Mr Gordon which bid was being referred to at each point in the documents.
38. In Decision 102/2011, the Commissioner accepted that the withheld information included details of the bids made by unsuccessful tenderers. As this was information provided by third parties, it met the first test for the application of the exemption in section 36(2). The Commissioner went on to consider the three tests for determining whether disclosure of that information would constitute an actionable breach of confidence:
- the information must have the necessary quality of confidence
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality
 - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause detriment
39. For the details of the bids made by unsuccessful tenderers, the Commissioner accepted that the first two tests were met. When he considered the third test, he concluded that, given the passage of time, for the most part, disclosure of the information at the time when CBG had notified Mr Gordon of the outcome of its review would not have caused detriment to the companies concerned. However, he concluded that disclosure of that information contained in the unsuccessful tenders would be detrimental if it was also clear which bid had been put forward by which company. In paragraphs 151 to 153, he said:

However, having considered the particular nature of the tendering process under consideration in this case, the Commissioner finds that some sensitivity could remain in relation to the content of the tenders, particularly where the information is presented in the context in which it is made clear which company submitted each bid.

The Commissioner recognises that there is a distinction between the disclosure of the content of each bid (in terms of the pricing, the service offered, etc.) in isolation from other information which identifies that bid with the company submitting it, and disclosure of the content of the bid along with the information identifying the company which made that submission.



With respect to the unsuccessful tenders, the Commissioner considers that disclosure of the content of the bid alongside the information which identifies the bidder which submitted it would (at the relevant time) have caused detriment to the companies concerned, by allowing identification of the particular strengths and weaknesses that were revealed within an unsuccessful bid with a particular company, potentially negatively affecting existing or potential customers' perceptions of them, and allowing competitors to compete more effectively against those companies.

40. In paragraph 160, he concluded that this detriment could be avoided if the information was disclosed subject to modification:

The Commissioner considers that this detriment can be avoided if the content of the unsuccessful tenders were presented in a manner that did not reveal which company submitted that bid. The Commissioner considers therefore, that the tests for an actionable breach of confidence are met, but only in relation to:

- (a) the contents of unsuccessful tenders which either directly or indirectly identify the company submitting the relevant tender, and*
- (b) references to the unsuccessful tendering companies within CBG's evaluation documents where these are associated with particular aspects of the companies' bids.*

41. Following consideration of whether a public interest defence could be maintained, the Commissioner concluded that disclosure of this information would constitute an actionable breach of confidence, and so the exemption in section 36(2) had been correctly applied to this limited information. As a result, he required (at paragraph 169) the disclosure of information contained in the following documents subject to modification:

[...]

- (a) The names of unsuccessful tenderers should be removed from the evaluation documents wherever they appear in contexts that associate the bidding company with content of their bids. To allow the content of each bid and CBG's evaluation of the bids to be understood properly, however, the names should be systematically be replaced with labels (e.g. Company A, Company B etc) to ensure it is clear which bid is being referred to at each point.*
- (b) Letters informing companies of the outcome of the tendering process and their score should be modified to remove information identifying the company receiving it, instead replacing this information with the label assigned within the evaluation documents.*

42. Given CBG's submissions, the Commissioner must consider whether the reasoning set out above also justifies the withholding the names of or other information identifying the unsuccessful bidding companies (and replacement of these with the labels "bidder 1" etc.) in similar circumstances in the current case.



43. The Commissioner has first of all noted that CBG has applied the approach set out in paragraph 41 systematically. It has not sought to withhold the identities of the unsuccessful bidders elsewhere within the information requested by Mr Gordon, or to otherwise obscure information about the assessment of their tenders.
44. The Commissioner has noted also that the information under consideration is of a similar nature to that considered in Decision 102/2011. As in that case, the information includes details of the content of the unsuccessful tenders which is information supplied by third parties.
45. The Commissioner recognises that the inherent nature of the tendering process implies an obligation of confidentiality with respect to certain types of information, at the time of submission of tenders and their evaluation by the procuring organisation. The Commissioner accepts that that information drawn from the unsuccessful tenders which is under consideration in this case held, in May 2009, the necessary quality of confidence, and had been supplied in circumstances which imposed an obligation of confidence. The steel doors contract was awarded in November 2008, less than six months before CBG notified Mr Gordon of the outcome of its review in May 2009 (and some 18 months after the award of the contract relevant to Decision 102/2011). The Commissioner is satisfied, given the limited passage of time, that the duty of confidence remained in place at that time.
46. CBG has not maintained in this case that disclosure of the content drawn from the unsuccessful bids, in isolation of the identity of the bidders, would be detrimental to those companies. Again, taking into consideration the limited passage of time (and so the likelihood of continued relevance of the pricing strategies therein to other tendering processes), and for the reasons set out in paragraph 39 above, the Commissioner accepts that disclosure would have been detrimental to the unsuccessful bidding companies if the disclosure of content of their bids allowed the identification of the strengths and weaknesses of the particular bids with the company making that bid.
47. However, for the reasons set out in Decision 102/2011, the Commissioner considers that in this case also, the detriment was avoided by applying the modifications that CBG has made. He finds that the tests for an actionable breach of confidence are met only in relation to the limited types of information described in paragraph 38 above.
48. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2)(c) of FOISA and not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
49. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.



50. The parties' submissions relevant to this point in this case are those previously considered in paragraphs 163 to 166 of Decision 102/2011, and for the reasons set out there, the Commissioner does not consider that a public interest defence could be maintained in relation to the limited information found to meet the tests for an actionable breach of confidence in the current case.
51. The Commissioner's conclusions with respect to the application of the exemption in section 36(2) of FOISA in the current therefore mirror those set out in the preceding text drawn from Decision 102/2011. Since CBG has applied those findings correctly and consistently to the information under consider in the current case, the Commissioner finds (for the reasons set out more fully in Decision 102/2011) that it has correctly applied the exemption in section 36(2) to the relevant information in the current case.

Section 33(1)(b) – Commercial interests

52. In terms of section 33(1)(b) of FOISA, 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, subject to the public interest test in section 2(1)(b) of FOISA.
53. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it 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 substantially by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. It would have to be at least likely, so there would require to be a significant probability of it occurring, in the near (and certainly the foreseeable) future.
54. CBG applied this exemption to information contained in or drawn from the pricing schedule submitted by Martec, the winning bidder for the steel doors contract. This included prices for the individual items, and details of the percentage rebate/discount offered. CBG disclosed the total value of the contract.
55. CBG has argued that disclosure of that information at that time when it notified Mr Gordon of the outcome of its review would have been likely to prejudice substantially its own commercial interests and those of Martec.
56. The Commissioner is satisfied that both CBG and Martec have relevant commercial interests. Martec is a designer and supplier of steel products, including security doors, which operates in a competitive trading environment for the purposes of revenue generation. CBG has commercial interests, both in relation to the successful outcome of its own procurement of services, and in relation to its wider commercial activities as a provider of services.

Decision 239/2011
Mr Tom Gordon of the Sunday Herald and
and City Building (Glasgow) LLP



57. It is relevant to the consideration of whether disclosure would harm CBG or Martec's commercial interests below to note the timings with respect to the award of the steel doors contract and Mr Gordon's information request. The steel doors contract was advertised in the OJEU in September 2008, and the deadline for submitting tenders was 24 October 2008. The contract was awarded in November 2008 and commenced on 1 December 2008. The contract was awarded for a period of two years, with the option to extend (from December 2010) for a further three years.
58. The relevant date for the Commissioner's consideration of the current case (8 May 2009) is therefore less than six months after the steel doors contract was awarded and commenced, and approximately 18 months before the point where it could be renewed, subject to agreement between the parties on price.
59. In relation to steel doors contract (and in contrast with the circumstances of the plant hire contract that was discussed in Decision 238/2011 *Tom Gordon of the Sunday Herald and City Building (Glasgow) LLP* (Decision 238/2011)), CBG has explained that, in May 2009, it would have been anticipated that the steel doors contract would be extended in December 2010 and so it would not be retendering the contract after the initial two year period. CBG commented that there was no need to go to the market again to check whether best value had been achieved, after its procurement process had involved full consideration of three tenders which met the necessary selection criteria, and the prices and overall submission by Martec had significantly outweighed those of the other bidders.
60. The Commissioner first considered CBG's submissions with respect to Martec's commercial interests. CBG has maintained that, if disclosed at the relevant time, the withheld information could have been used by Martec's competitors should they and Martec have been tendering for other steel door contracts.
61. With respect to Martec's own views on the withheld information, CBG acknowledged that Martec had not listed any information within the FOI certificate within the tender documents. This had asked bidders to identify information they would consider exempt from disclosure if it was requested under FOISA, the reasons for it being considered exempt from disclosure and the period for which it would remain exempt.
62. However, CBG also noted that identification of information within such a certificate was only one factor to be taken into account when assessing commercial sensitivity, and it added that tenderers are notoriously bad at completing the FOI certificate in invitations to tender.
63. It indicated that it had contacted Martec in October 2009 to establish its views on disclosure in this case. In response, Martec indicated that it did not want information from its tender to be released because it would impact on its commercial dealings (at that point) and its ability to win new tenders. It indicated that its prices were for CBG's eyes only.
64. CBG submitted that the pricing strategy contained within Martec's tender would be relevant also to other tendering processes given the short period of time since the award of the contract and CBG's review of Mr Gordon's request. It indicated that within this period, any significant changes to Martec's pricing methodology were unlikely.



65. CBG also noted that the doors offered by Martec were part of its product range, and so Martec would have been likely to offer the same products to other purchasers, and the mode of delivery would remain the same.

Commissioner's comments regarding Martec's commercial interests

66. The Commissioner has noted all of CBG's comments, along with the withheld information. In this case, he is mindful in particular that a relatively short period of time had passed since the award of the steel doors contract and the date when CBG notified Mr Gordon of the outcome of its review. This period is considerably shorter than the time that had passed since the award of the contracts that were the subject of the related requests considered in Decisions 102/2011 and 238/2011.
67. It is clear from the information released to and withheld from Mr Gordon in this case that the market for the provision of steel doors of the type procured by CBG is a competitive one. Given the nature of the products, the Commissioner also recognises that Martec's product offerings and general pricing strategies would not have been likely to have changed significantly in the period since the steel doors contract was awarded and May 2009.
68. This said, the Commissioner does not consider it plausible to assume that Martec would adopt the same pricing strategy in relation to every procurement process, and so that disclosure of the current information would give a competitor a complete understanding of its pricing strategy in future tenders. As he has noted in previous decisions, the Commissioner considers that each procurement process will be unique, taking into consideration the particular needs of the procuring organisation, and the economic and other circumstances of the time. Success in a tendering process will not be achieved by simply applying the pricing or general strategy adopted by one company in a previous tendering process.
69. The Commissioner considers that Martec's strategy in any tendering process will be devised in response to that tender, to develop the most competitive offer possible given the procuring company's requirements, the period of the contract and Martec's costs, desire and capacity to deliver the required services for that organisation.
70. Nonetheless, given the currency of the withheld information in May 2009, and the relatively standardised nature of the product offering and mode of its delivery, the Commissioner does accept that the information would have give significant (though not complete) insights into the bidding strategy adopted by Martec when tendering for the steel doors contract. He accepts CBG's submission that those insights could have been used by Martec's competitors to their advantage, which would have been able to use the insights gained to devise bids more likely to succeed in competition with Martec for other contracts of a similar nature.
71. Had this occurred, he accepts that it would have been likely to be substantially prejudicial to Martec's commercial interests, by reducing its ability to compete effectively in such tendering processes.



72. While the Commissioner has recognised in many decisions that the commercial sensitivity of pricing information will diminish over time, he does not consider that it would have done so significantly in the period from the award of the steel doors contract in November 2008 to May 2009.
73. For these reasons, the Commissioner accepts that disclosure at that time would have been likely to prejudice the commercial interests of Martec. He accepts that the exemption in section 33(1)(b) of FOISA was correctly applied on that basis.

Public interest test

74. As the Commissioner has found that the exemption in section 33(1)(b) applies, he 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).
75. When invited to provide comments regarding the public interest in relation to the withheld information (prior to CBG's disclosure of much of the previously withheld information at the end of the investigation), Mr Gordon commented that this request relates to the expenditure of a large sum of money by a company whose profits and losses have a direct bearing on public funds, namely those of Glasgow City Council. He noted that the contract tenders were issued with a reference to FOISA and the possible future release of information under it. He noted that FOISA has been a standard part of the business environment in Scotland for many years.
76. Mr Gordon was invited to make further submissions regarding this case (and another related case) following the issue of Decision 102/2011, and again following CBG's additional disclosures at the end of this investigation, but he did not do so.
77. Within its submissions on the public interest test, CBG recognised the following public interest factors in disclosure of the pricing information:
- The general public interest in information being accessible;
 - That in ensuring the probity of its procurement processes and that contract award procedures are followed;
 - That in persons being able to understand the process followed by CBG in tendering for contracts and how decisions relating to the expenditure of significant amounts of public funds are spent, and
 - That in ensuring effective oversight of funds by a business whose profits and losses affect the funds of Glasgow City Council.
78. Weighing against disclosure, CBG submitted that disclosure would have negatively affected the ability of Martec to win contracts at a time when maintaining turnover and business was particularly important. It maintained that this was contrary to the general public interest in allowing companies to maintain their effectiveness.

Decision 239/2011
Mr Tom Gordon of the Sunday Herald and
and City Building (Glasgow) LLP



79. It highlighted that there is a multi-layered system in place to ensure the probity of contract awards, including statute and internal governance rules, and oversight by Glasgow City Council's internal audit section, and the courts (if an aggrieved bidder raises a court action) and the EU Commissioner (if a complaint is raised). It maintained that the detailed pricing information is not necessary to allow understanding of the tendering process and CBG's decision making.
80. Having balanced the public interest for and against disclosure, CBG concluded that the public interest in maintaining the exemption in section 33(1)(b) outweighed that in disclosure of the withheld pricing information.

Conclusions regarding the public interest test

81. The Commissioner has noted all of the comments made by both CBG and Mr Gordon regarding the public interest test. He recognises in particular that there is a public interest in allowing full understanding of the tendering process, and the costs of the services purchased by the Council. This would allow public scrutiny of the contract agreed between CBG and Martec and consideration of whether that represented value for money.
82. Against this, the Commissioner has weighed the public interest in allowing fair competition and avoiding putting the winning bidder at a disadvantage against its competitors with respect to its pricing strategies. The Commissioner considers that, at the time when CBG notified Mr Gordon of the outcome of its review, that factor carried significant weight, particularly in this case given the short period between the award of the steel doors contract and the time of that review.
83. The Commissioner considers that the public interest in allowing scrutiny of the tendering process could have been met to a significant extent at that time by the disclosure of information other than the detailed pricing information withheld by CBG.
84. Having weighed the public interest for and against the disclosure of the detailed pricing information, in all the circumstances of the case (which held at the time when CBG notified Mr Gordon of the outcome of its review), the Commissioner has found that the public interest in maintaining the exemption outweighed that in disclosure of the detailed pricing information.
85. The Commissioner therefore concludes that CBG correctly applied the exemption in section 33(1)(b) to the pricing information that it continues to withhold.
86. Having reached this conclusion, it is not necessary for the Commissioner to consider the application of the exemption in section 33(1)(b) of FOISA insofar as it relates to the commercial interests of CBG. It is also not necessary for the Commissioner to consider CBG's application of the exemption in section 35(1)(a) of FOISA to the withheld information.



DECISION

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

The Commissioner finds that by withholding the limited information that it continued (at the end of his investigation) to consider exempt from disclosure under sections 33(1)(b), 36(2) and 38(1)(b) of FOISA, CBG complied with Part 1. He finds that these exemptions were properly applied to that information.

However, he concludes that it breached Part 1 and section 1(1) of FOISA by withholding the vast majority of the information falling within the scope of Mr Gordon's request and which was disclosed to him during the investigation. The Commissioner is satisfied that CBG rectified this breach by disclosing information during the investigation, and so he does not require any further action to be taken in response to this decision.

Appeal

Should either Mr Gordon or CBG wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
24 November 2011



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.
...
- (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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
...
 - (c) section 36(2);
... - (e) in subsection (1) of section 38 –



...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

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).

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-



(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...