

Decision Notice



Decision 015/2009 Lightways (Contractors) Limited and North Lanarkshire Council

Tendering process: Christmas Lighting

Reference No: 200800521
Decision Date: 16 February 2009

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Lightways (Contractors) Limited (Lightways) requested information relating to the tendering process undertaken by North Lanarkshire Council (the Council) in relation to its Christmas Lighting Consultancy Contract. The Council released some information, but withheld the remaining information under various exemptions contained in the Freedom of Information (Scotland) Act 2002 (FOISA). Lightways subsequently applied to the Commissioner for a decision as to whether the Council had complied with FOISA in responding to its request.

Following an investigation, the Commissioner found that the Council had been correct to withhold some of the information from Lightways, but required the Council to release much of the information it had withheld to Lightways.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 15(1) (Duty to provide advice and assistance), 20(6) (Requirement for review of refusal etc.), 25(1) (Information otherwise accessible); 30(b) and (c) (Prejudice to the effective conduct of public affairs); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data") and 4(4) (The data protection principles); Schedule 1 (The data protection principles) (The first principle) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6(1))

The full text of each of the statutory provisions cited above is reproduced in the Appendix of Relevant Statutory Provisions. The Appendix forms part of this decision.

Scottish Ministers v Scottish Information Commissioner 2007 S.C. 330 2007 S.L.T. 274:
<http://www.scotcourts.gov.uk/opinions/2007CSIH08.html>

The Public Contracts (Scotland) Regulations 2006



Background

1. Lightways made an information request to the Council following the award by the Council for its Christmas Lighting Consultancy Contract 2006-2009 in October 2006. Three companies, Amey plc (Amey), Blachere Illumination UK (Blachere) and Lightways tendered for the contract in August 2006 and Blachere was selected to provide the consultancy in October 2006. The Council noted in its tender documents that submissions could be subject to a freedom of information request and so each tendering company should indicate which sections of its tender responses should be withheld, if such a request were received. The tendering companies provided the Council with high level submissions as to which sections of their responses should be withheld.
2. On 7 November 2006, Lightways wrote to the Council requesting the following information:
 - Copies of the original background score sheet/score cards of each panel member in relation to each tender (Part A)
 - Copies of the full written tender submissions from Amey and Blachere (Part B)
3. The Council responded on 4 January 2007, releasing some information and withholding the remaining information under sections 25(1), 30(b)(i), 33(1)(b) and 38(1)(b) of FOISA.
4. Further correspondence took place between Lightways and the Council during 2007 and Lightways asked the Council to review its decision. During this period, Lightways also made an application to the Commissioner for a decision. However, after detailed consideration, the Commissioner decided that the application could not be validated and advised Lightways to make a revised request for review to the Council.
5. While this was happening, the Council provided the Commissioner with a copy of the information withheld from Lightways. Blachere's solicitors also wrote to the Commissioner setting out, in their opinion, why certain sections of their client's tender response should not be disclosed. The letter was acknowledged and the solicitors were advised to send their comments directly to the Council.
6. On 28 December 2007, Lightways asked the Council to review its decision. Lightways provided detailed arguments as to why it considered that the scoring sheets and each section of the other companies' tenders should be released.
7. The Council undertook a review of its initial response in accordance with section 20(6) of FOISA. The Council contacted Amey and Blachere to ascertain whether they would like to make any further submissions as to why information should be withheld; neither company provided further detailed submissions. The Council subsequently notified Lightways of the outcome of its review on 30 January 2008, releasing two additional pages of information and relying upon the previously cited exemptions.



8. On 7 April 2008, Lightways applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Lightways had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

10. On 28 April 2008, the investigating officer notified the Council in writing that an application had been received from Lightways and provided it with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). In particular, the Council was asked to justify its reliance on sections 33, 36(2) and 38(1)(b) of FOISA for withholding the information. A copy of the Commissioner's briefings on these exemptions was provided to the Council to ensure that the Council provided detailed submissions and considered the appropriate tests. The investigating officer also created a schedule of documents from the information the Council had provided to the Commissioner during the early stages of the case and supplied the Council with a copy of the schedule in order to assist it.
11. The Council responded on 23 May 2008, providing its submissions on why it considered that the exemptions it was relying upon to withhold the information should be upheld.
12. On 19 June 2008 the investigating officer sought comments from Lightways in relation to the exemption in section 38 of FOISA. Lightways provided a response on 2 July 2008.
13. Having considered in some detail the submissions received from the Council, the Commissioner found that the submissions were found too general for the purposes of this investigation. As a result, on 19 June 2008 further detailed submissions were sought from the Council on the exemptions being relied upon. The Council was asked to provide:
 - confirmation on which of the section 30 exemptions it was relying on to withhold information and arguments supporting its decision
 - a detailed consideration of the tests applicable to section 36(2)
 - clarification of the reliance of section 38(1)(b) to withhold references
14. In addition, the Council was asked to confirm certain details within the schedule of documents, and to provide copies of the submissions it had received from the other two tendering companies. It was asked to clarify what information was being withheld, given that it had indicated, for example, that blank pro formas were being withheld, and given that it appeared that certain information was being withheld in relation to one tender document while similar information in the other had been disclosed. Finally, given the passage of time between awarding the contract and carrying out a review (fifteen months), the Council was asked to reconsider whether the exemptions it had cited were still relevant.



15. The Council responded on 14 July 2008. Some additional submissions were sought from the Council on 29 July 2008 and the Council responded on 18 August 2008.
16. While this was happening, the investigating officer obtained from Companies House copies of the recent reports and accounts submitted by Amey and Blachere to provide some background information for the purposes of the investigation.
17. The investigating officer also emailed provided Lightways with the opportunity to comment on the exemptions contained within sections 36(2) and 30(c) of FOISA and whether they accepted the Council's reliance on section 25 (Information otherwise accessible) of FOISA. Lightways provided their comments on these exemptions and confirmed that they accepted the Council's reliance on section 25 of FOISA to withhold the three sections. As a result, these three sections will not be considered further in this decision.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the information and submissions presented to him by both Lightways and the Council and is satisfied that no matter of relevance has been overlooked.

Timing

19. When the Commissioner receives an application and comes to a decision as to whether the public authority complied with Part 1 of FOISA in responding to the request, he must consider the position as at the time the public authority issued its response to the request for review – see the opinion of the Lord President in *Scottish Ministers v Scottish Information Commissioner*. In this instance, Lightways were notified of the outcome of review on 30 January 2008, some fifteen months after the contract was awarded on 3 October 2006. The Commissioner must therefore consider whether the exemptions applied as at that date, and not as at the date of the initial request or the response to that request.

Schedule of Documents and withheld information

20. The Council has provided a file of information which comprises the information it holds in respect of Parts A and B of Lightways' request and which forms the basis of the schedule of documents at the end of this decision. The Council has numbered the file pages sequentially and throughout the decision reference is made to these pages. Some pages are not referred to as these relate to the information which has already been released to Lightways. Part A of Lightways' request is contained within pages 1 to 12 of the file and Part B is contained within pages 42 to 361. The schedule indicates what information has been withheld and which exemption(s) in FOISA the Council is relying upon to withhold this information.



Consideration of section 38(1)(b)

21. The Council has withheld the following information which it considers to be personal data:
- pages 6 to 12 – signatures of the assessors on the individual score sheets
 - pages 42 to 68 – signatures of the Managing Director and General Manager of the tendering companies
 - pages 69, 70, 230, 232, 233, 235, 236, 242, 246 and 247 – verification initials on the bottom of tender response
 - page 243 – signature of a Blachere employee on a request for a bank reference
22. The Council submitted that disclosure of this information would breach the first data protection principle. As a consequence, the Council maintained that this was exempt information under section 38(1)(b) of FOISA (as read with section 38(2)(a)(i) or (b)).
23. In order for a public authority to rely on this exemption, it must first show that the withheld information is personal data for the purposes of the DPA and, second, that disclosure of the information would contravene one or more of the data protection principles laid down in the DPA.
24. The exemption under section 38(1)(b) claimed by the Council is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information under consideration personal data?

25. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).
26. The Commissioner accepts that the information withheld from Lightways (the signatures and initials of the individuals) relates to living individuals who are identifiable from that information or from that information and other information in the possession of the data controller, i.e. the Council. In all instances the various signatories have been named either directly below the actual signature or in other information held by the Council.
27. The Commissioner is satisfied that information withheld by the Council constitutes personal data as defined by the DPA.
28. However, FOISA does not exempt information from release simply because it is the personal data of a third party. As noted above, personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)) only if the disclosure of the information to a member of the public otherwise than under FOISA would contravene one or more of the data protection principles contained in the DPA. As noted above, the Council has argued that the first data protection principle would be breached if the information were to be disclosed.



First data protection principle – personal data shall be processed fairly and lawfully

29. The first data protection principle requires that the processing of personal data (in this case the disclosure of data into the public domain in response to the information request made by Lightways) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, to the DPA) is also met.
30. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA and is satisfied in this case that the personal data which has been withheld does not constitute sensitive personal data.
31. The Council submitted that the disclosure of the signatures etc. would prejudice the rights, freedoms and legitimate interests of the data subjects and that disclosure would be unfair for the purposes of the first data protection principle.
32. The Council has made no case that disclosure of the personal information would be unlawful, otherwise than as a result of breaching the first data protection principle (section 4(4) of the DPA makes it clear that data controllers must comply with the data protection principles). As a result, the Commissioner will look first of all at whether the disclosure of the personal data would be fair.

Is it fair to release the signatures?

33. In considering the question of fairness, it is appropriate to consider matters such as the expectations of the data subjects, and how closely the information concerned relates to their private lives.
34. The Commissioner has noted a decision from the (UK) Information Commissioner, who is responsible for enforcing the DPA throughout the UK as well as for enforcing the (UK) Freedom of Information Act 2000. In this decision, *FS50086626 (Gloucester County Council)*, the Information Commissioner considered whether signatures should be released on a copy of a petition relating to an individual's end of tenancy review. However, he considered that the disclosure of the signatures would be unfair and that disclosure would breach the first data protection principle because of the threat of identity theft.
35. Having considered the position here and the identities of the individuals involved (it may, for example, not be unfair to disclose the signature or initials of a person with a high public profile, whose signature was already in the public domain), the Commissioner is satisfied that the disclosure of the individuals' signatures under FOISA would be unfair. Since the release of such information would be unfair, he is not required to go on to consider whether disclosure would otherwise be unlawful or whether one of the conditions in Schedule 2 can be met.



36. The Council released the Quality Assessment Sheet (page 1) to Lightways, with all the information present, but with the signatures re-ordered. The Council stated in its response of 18 August 2008, that it had released all the information and was not relying on any exemptions.
37. Having considered the fact that the only withheld information is the true order of the signatures, and the above conclusion by the Commissioner that the Council was correct to withhold signatures under section 38(1)(b) of FOISA, the Commissioner has come to the conclusion that no further information from the Quality Assessment Sheet should be released to Lightways.

Section 30(b)(i) and (ii): substantial inhibition to free and frank advice and exchange of views

38. The Council applied the exemptions in section 30(b)(i) and (ii) to the individual score sheets of the tender responses.
39. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that information falls within the scope of the exemption, it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
40. The Council did not differentiate between section 30(b)(i) and 30(b)(ii) in respect of the information withheld. Consequently, the Commissioner will consider whether either or both of these exemptions apply to the withheld information.
41. In order for the Council to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(ii) of FOISA, it must show that the disclosure of the information would, or would be likely to, inhibit substantially either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively.
42. The Commissioner has in previous decisions made his views clear that the standard to be met in applying the tests contained in sections 30(b)(i) and (ii) is high. In applying these exemptions, the principal consideration is not whether the information constitutes advice or opinion (although that may well be relevant), but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views, as the case may be.



43. In considering these exemptions, the Commissioner will look at the actual information withheld, not simply the category of information to which it belongs or the situation in which the request has arisen. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that such information will require to be disclosed routinely in the future. The Commissioner looks for authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
44. As noted above, the Council has withheld the individual score sheets of the tender responses (pages 3 to 11); these score sheets were created by three Council employees who were responsible for evaluating the tender responses. The Council stated in its response that the employees' judgement or their exercise of their duties would be affected if the information were released and they could refuse to undertake such work in the future. The Council also stated that if the information were released, employees may have concerns of adverse consequences from disappointed tenderers which would increase the complexity of tender assessment.
45. The Commissioner notes the Council's reasons for withholding the score sheets, but finds it difficult to accept that employees, whose role includes carrying out such tender assessments, could simply refuse to undertake such work in the future with the effect that tenders would simply not be assessed or would be deterred from making an appropriate assessment. In any event, he considers that such adverse consequences are highly unlikely, given that such tendering exercises are governed by the Public Contracts (Scotland) Regulations 2006, which ensure tenders are evaluated within a set of defined guidelines. In addition, the Council has its own evaluation criteria by which it assessed the tenders and which, if followed, would ensure that there would be no justification for reprisals. Therefore the Commissioner is of the view that the substantial inhibition envisaged by section 30(b)(i) and/or (ii) would not occur in this case.
46. In coming to this conclusion, the Commissioner has also taken into account the time which elapsed between the creation of the score sheets and the review carried out by the Council. He has also considered the currency of the score sheets at the time of the review. While a degree of protection may be afforded to such assessments prior to contract award, or even shortly after a contract has been awarded, the Commissioner considers that the need for such protection diminishes over time, following the award of the contract.
47. Given that the Commissioner has not upheld the reliance of the exemptions in section 30(b)(i) and (ii), he is not required to go on to consider the public interest test contained in section 2(1)(b) of FOISA.



Consideration of section 30(c): “otherwise” prejudice substantially

48. The Council also applied the exemption in section 30(c) to the score sheets. In terms of section 30(c), information is exempt if its disclosure would “otherwise” prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word “otherwise” in section 30(c) distinguishes the exemption in section 30(c) from the exemptions in sections 30(a) and (b) of FOISA.
49. The Council provided the same submissions in support of its reliance on the exemption in section 30(c) as it did for the exemptions in section 30(b). Given the use of the word “otherwise” in section 30(c), it is difficult to see how the same arguments can be relied on. In any event, having considered the submissions made by the Council regarding its reliance on the exemption in section 30(c) of FOISA, together with the information being withheld, the Commissioner does not agree that release of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs, for the same reasons that he does not consider the exemptions in section 30(b) to apply in this case.
50. The score sheets relate specifically to the tenders for the Christmas Lighting Consultancy 2006-2009. Each tender is unique in what is being requested and so are the tenderers’ responses. Each assessment will therefore be unique, so it is difficult to see how disclosure of the information would, or would be likely to, prejudice substantially the Council’s ability to assess future tenders in a fair and equitable manner. The Commissioner finds that he cannot, therefore, uphold the Council’s reliance on the exemption in section 30(c) of FOISA.
51. As noted above, the exemption in section 30(c) of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA. However, given that the Commissioner is satisfied that the exemption does not apply, he is not required to go on to consider the public interest.

Section 33(1)(b): substantial prejudice of commercial interests

52. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
53. In this case, the Council has applied the exemption in section 33(1)(b) to the majority of sections submitted by both tendering companies and the Comparison Schedule of Rates for Tenderers (page 12).
54. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests 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.



55. In addition, where an authority considers that the exemption in section 33(1)(b) of FOISA applies, it must still go on to consider, in line with section 2(1)(b) of FOISA, whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
56. In its submissions to the Commissioner, the Council stated that Amey's, Blachere's and its own commercial interests would be substantially prejudiced by the disclosure of the information.
57. It is clear to the Commissioner that both Amey and Blachere have commercial interests in relation to the tendering exercise. Both are commercial enterprises engaged in commercial activity. The Commissioner has also considered whether the Council itself has commercial interests and is not convinced that it does in the circumstances of this case. However, even if it does have such interests, as becomes evident below, he does not believe that these interests would, or would be likely to be, prejudiced substantially by the disclosure of the information.
58. As noted above, as part of the tendering exercise, the Council requested that companies should indicate in their tender submissions which sections of the tender should be withheld if a freedom of information request were made. Both Amey and Blachere provided high level submissions as to which sections of its tender submissions should be withheld. (Blachere's solicitors subsequently provided more detailed reasoning as to why certain sections should not be disclosed.)
59. The Council has incorporated the submissions made by and on behalf of Blachere into its arguments on section 33(1)(b).
60. The Council has argued that disclosure of the withheld information would give a competitor a commercial advantage over Amey and Blachere with the effect that their prices would be undercut. In addition, competitors could simply copy the information and adopt procedures at no cost to themselves. This would prejudice substantially both companies' commercial interests.
61. The Council also considers that if the information were to be released, tenderers would be reluctant to submit tenders in the future, thus prejudicing substantially the Council's own commercial interests.
62. The Council also stated that the information was not in the public domain and that there was no public interest in the disclosure of the information.



63. The Council has commented that some of the tender submissions (Health and Safety Policies, Organisational Charts) were the result of significant expenditure by Amey and Blachere and that, given that these could be copied by competitors, they should be withheld under section 33(1)(b) of FOISA. (The Commissioner notes, however, that the supply of copyrighted documents under FOISA does not give a person who receives the information an automatic or unlimited right to re-use the documents without obtaining the consent of the copyright holder. A person who receives such information must take account of the Copyright, Designs and Patents Act 1988 and any restrictions that apply to the re-use of the information which is subject to third party copyright.)
64. Lightways provided detailed commentary on each section withheld by the Council and why the exemption in section 33(1)(b) did not apply. In summary, Lightways consider that disclosing the information would ensure that tenders comply with certain standards, that some of the information is already publicly available and, in any event, given that some of the information is general and not bespoke, it is difficult to see the harm that would be caused by releasing the information. Lightways also commented that disclosing the information would ensure that tenderers comply with certain standards – the Commissioner considers that this, and some other matters raised by Lightways, are relevant to consideration of the public interest test, as opposed to whether disclosure would, or would be likely to, prejudice substantially commercial interests.
65. In this case, the Commissioner is not persuaded by the Council's arguments that disclosure would, or would be likely to prejudice substantially either its own or Amey's and Blachere's commercial interests. The Council's arguments concerning the impact of disclosure have been essentially hypothetical in nature and have merely suggested that some sort of effect *could* flow from disclosure. The Council submissions lack substance as to how disclosure of the information in this case would, or would be likely to, have a substantially prejudicial effect on the commercial interests of the parties involved.
66. The only argument put forward by the Council as to why its own commercial interests would, or would be likely to be prejudiced substantially, is that by disclosing this information it might find that companies would be reluctant to tender for its contracts in the future, which, it added, would be to the detriment of the Council and the public interest, in that competition would be limited, leading to the Council having to pay more for the services or receive a poorer service than was necessary. 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.



67. In the Commissioner's opinion, the disclosure of the tender submissions and Comparison Schedule of Rates for Tenderers from 2006 would not cause (or be likely to cause) substantial prejudice to those parties involved if they were to submit tenders for a future contract. The specification and terms of any future contract will be dictated by the Council's requirements in respect of that particular contract, at the material time.
68. While the Commissioner notes Blachere's comments in relation to information that they would regard as being of advantage to competitors, the elements they have described, such as health and safety policy, equal opportunities policy, company information, service level agreement, references, and hardware and software, all appear to be relatively generic and relate to standard practices in the industry. It is the Commissioner's view that the disclosure of such information in this instance would not, and would not be likely to, cause substantial prejudice to the commercial interests of Blachere (or, indeed, to Amey).
69. In relation to schedule of rates, the Commissioner notes that the tender was for consultancy services and was not a fixed price contract in which distinct physical items were costed. As a result, the final price will change and elements will be re-priced. In addition, before the winning bidder can start providing services, a contract including terms and conditions and prices will have to be agreed between the parties and this is highly likely to result in prices being adjusted either by considering new or reduced requirements on behalf of the Council. In having considered the schedule of rates in detail which in many cases are a high level sum not a detailed price, the Commissioner considers that it is the methodologies and computational processes involved in working out the pricing structures which are of value rather than the pricing structures themselves. Therefore the Commissioner does not accept that the disclosure of the schedule of rates in this instance would result in the kind of harm anticipated or would now be of use or value to any company's competitors.
70. The Commissioner is also mindful of the effect of the passage of time in assessing whether the release of the information will cause the required degree of harm, given the likelihood that the harm likely to be caused by certain information will diminish over time. Disclosure of information relating to a tendering process may well cause harm to the commercial interests of those submitting tenders during or immediately following that process, but the likelihood of this harm tends to diminish with the passage of time, as prices, service delivery methods and market conditions change.
71. As noted above, the tender was awarded in October 2006, fifteen months prior to the Council issuing a notice under section 21(10) of FOISA in response to Lightways' request for review. The Commissioner considers that any commercial sensitivity in the information in question which may have existed at the time of the tender award would have significantly diminished in the intervening period.



72. In the circumstances, therefore, the Commissioner is satisfied that by the time the Council carried out its review of Lightways' request in January 2008, no substantial prejudice would, or would have been likely to, follow from release of the information withheld under section 33(1)(b), either to the Council or to Amey or Blachere. He has concluded that the Council has not demonstrated that it was justified in applying the exemption in section 33(1)(b) of FOISA to the information. As the Commissioner has not accepted that this exemption applies, there is no need for him to go on to consider the public interest test in section 2(1)(b) of FOISA.

Section 36(2): confidentiality

73. The Council also withheld most of the information under section 36(2) of FOISA.
74. Information is exempt under section 36(2) of FOISA if the information was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person.
75. The exemption in section 36(2) is absolute, in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is justified in the public interest (this is commonly known as "the public interest defence").
76. In order to rely on section 36(2), an authority needs to demonstrate that certain elements apply, the first one being that the information must have been obtained by the Council from another person.
77. The information which has been withheld here comprises the tender submissions from Amey and from Blachere. The Commissioner is satisfied that the information has been obtained from another person.
78. The second test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person or persons from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled. The Commissioner is required to consider the application of this second test in relation to the information submitted by the tendering companies in their tender responses to the Council.
79. The Commissioner considers that there are usually three main requirements to be met before a claim for breach of confidence can be established. These are:
- i. the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already



- ii. the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement) or implied from the circumstances or the nature of the relationship between the parties; and
- iii. there must be unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

Necessary quality of confidence

- 80. To have the necessary quality of confidence, the information should not be generally accessible.
- 81. As detailed above, during the tendering exercise, the Council asked for submissions from Amey and Blachere as to whether the information they submitted in their tender responses should be withheld or released, in line with guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as "the Section 60 Code"). Both companies provided high level submissions as to which sections should be withheld, with Blachere supplementing these with additional arguments as to why some sections should be withheld. However, Blachere did not provide any specific arguments on the exemption in section 36(2), but instead focussed on the commercial prejudice that would occur if the information was released; which has been considered in the application of section 33(1)(b) by the Council earlier in this decision.
- 82. Similarly, the Council did not provide detailed reasoning as to why it was relying on the exemption in section 36(2) of FOISA to withhold the information. The Council's arguments can be summarised as follows; this information was provided in support of the suppliers' applications and there was therefore no anticipation that the information would be made public. However, the Commissioner considers that this is not a strong enough argument when considering section 36(2) as the authority must demonstrate that the information supplied has the necessary quality of confidence and an actionable breach will ensue if the information is released. The Council was made aware of the Commissioner's view on this exemption and the tests which he considered required to be met at the beginning of the investigation.
- 83. The Council is aware that FOISA has established the right to access recorded information and authorities should anticipate that any recorded information they hold can be requested and must generally be released unless an exemption applies. The Council has noted such rights in its tender information which it sends to suppliers with the tender request. The Council also requires the tenderers to sign a form in acceptance that information supplied in a tender response can be disclosed via a FOISA request; in this case the tenderers signed such forms. The possible disclosure of information by the Council is tempered with the provision that tenderers can indicate what information should be withheld if a FOISA request is made and the Council will take this into consideration when deciding what information can be released, but the Council's decision will be final.



84. The Commissioner considers that many of the withheld sections of information do not have the necessary quality of confidence to be withheld under section 36(2). As discussed in *Decision 180/2006 Mr Alfred Weir and Fife Council* and in the Commissioner's briefing on section 36 the passage of time also diminishes the necessarily quality of confidence. An obligation of confidentiality could be inferred from the circumstances under which information was initially provided by the tendering companies and the information might have been judged to have been confidential at the time the bids were being assessed. However, it cannot necessarily be regarded in this way once the tendering process has been concluded and the contract awarded. The tendering process for the Christmas Lighting Consultancy Contract 2006-2009 was concluded in October 2006, fifteen months prior to the request from Lightways. The Commissioner is of the opinion that the passage of time has decreased the commercial sensitivity of the information by the time Lightways made their request.
85. Other conditions to be considered when deciding whether information has the necessary quality of confidence are whether the information is common knowledge and whether a member of the public would have to apply skill and labour to produce the information; it could be said that the information must have the basic attribute of inaccessibility.
86. Bearing the above considerations in mind, the Commissioner deems that the following sections do not have the necessary quality of confidence:
- Financial Statements 2004 and 2005 (pages 71 to 106) and Financial Information (pages 255 to 256): the Commissioner considers that these are generally accessible. Tendering companies Amey and Blachere are private limited companies and are required by the Companies Act 2006 to submit an annual return. Consequently, the financial information contained within these pages was publicly available at the time of the request. The Commissioner has also taken account of the fact that the financial statements were out of date as at the date of the review and that the tendering company would have submitted accounts for intervening years.
 - Company Information (pages 252 to 254): this relates solely to Amey, as the Council released Blachere's information. It is not clear from the Council's submissions what specific information made Amey's information more sensitive that it had to be withheld. As stated above, since this company is a private limited company much of the information contained within these pages is publicly available and the information that is not specifically available could be easily summarised from general knowledge about the company.
 - Health & Safety Policies (pages 107 to 227 and 269 to 293) and Equal Opportunity Policies (pages 240 to 241): the Council argued that both Amey and Blachere had invested a considerable amount of money in employing an external contractor to develop these policies. Whilst that may be so, the Commissioner has studied the information withheld, and does not consider that the policies are unique given that they simply re-iterate standard practices in these areas. Similarly, the Equal Opportunities Policy refers to standard accepted practice.



- Project Management Process (pages 237 to 239), Service Level Agreement (pages 248 to 251) Quality of Service (pages 260 to 265) and Service Delivery and Quality Management Plans (pages 297 to 357): it is noted that these sections were created by the tendering companies and are considered to be unique and different from the creation process used for the Health and Safety and Equal Opportunity Policies. However, again having considered the withheld information, the Commissioner has come to the conclusion that the first two sections are again generic documents which do not reveal any information which a member of the public could not recreate. The third section describes in general terms tendering Amey's quality of service, but not to the level of detail required to uphold this exemption. The fourth section includes generic section on policies such as an environmental policy, but also includes an overview of three current contracts and general description of how it manages contracts. Although this fourth section does incorporate more company specific information, the Commissioner considers that this has lost any quality of confidence it had since the information was created. The contracts do not contain sensitive information, and the Commissioner considers that the description of contract management is again a document which could be written by a person with knowledge of the bids and tenders sector.
- References (pages 242 and 266): these sections refer to references which the tendering companies have put forward to support their tender submissions/experience. The reference section is a blank form which each of the tenderers completed with the organisation, contact name, telephone number, email address and one line contract overview. In this case, all references are for public authorities which have to comply with FOISA and the Public Contracts (Scotland) Regulations 2006. Taking into account the age of the information and the fact that public authorities publicise contract awards, the Commissioner has concluded that this information does not have the necessary quality of confidence.
- Request to Bank (pages 267 to 268): the information withheld here comprises of blank pro formas for Amey to complete and sign to permit the Council to request financial information about the company's financial status and a prompt payment certificate. In its email of 18 August 2008, the Council stated that it wished to withhold the name of the bank on the top of page 267 and that the remaining information in the two pages could be released to Lightways. It is anticipated that the name of the bank will be reasonably accessible from the accounts lodged with Companies House, therefore, the Commissioner does not consider that this information has the necessary quality of confidence.



- Bank Reference (page 243): this section of the tender response is a completed version of the request to the bank pro forma detailed above. The only specific information within this page is the name of Blachere's bank, the value of the contract and the signature of the Accounts Manager. The signature of the Accounts Manager has been considered under section 38(1)(b) of FOISA above and the Commissioner is of the opinion that it should be withheld. Blachere's bank is known from their accounts submitted to Companies House, so this leaves the value of the contract as the only piece of information which is not in the public domain. Given the timing of the award of the contract as opposed to the date on which the review was carried out by the Council, the Commissioner does not consider that this information has the necessary quality of confidence.
- Technical Statement (pages 235 to 236): this section incorporates a description of the software and hardware used by Blachere and how it would process and manage a contract. Again, the information contained within these pages is a high level overview of the company's software and processes. The information within this section is not sufficiently specific or detailed to enable a person to replicate Blachere's unique way of working. Therefore the Commissioner does not consider that this information has the necessary quality of confidence.
- Business probity (page 259): this information was provided by Amey, and is another pro forma which each tendering company is required to complete when submitting a tender. The Council has released Blachere's business probity form and it is not clear from the Council's submissions what specific information made tendering Amey's information more sensitive that it had to be withheld. The Commissioner considers that the information contained within the form does not specify any information about Blachere, which is not already publicly available. Therefore the Commissioner does not consider that this information has the necessary quality of confidence.

87. The Commissioner considers that the following do have the necessary quality of confidence:

- Insurance (pages 230 to 232, 257 to 258)
- Organisational charts (pages 228 to 229, 294 to 296)
- Schedule of rates (pages 246 to 247, 360 to 361)

Obligation to maintain confidentiality

88. The second condition to be met when considering whether the disclosure of information would constitute an actionable breach of confidence is that the Council must have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
89. As stated above, Amey and Blachere submitted the information in response to a tendering exercise. The Council also requested and obtained submissions from the companies as to whether any part of their tender submissions should be withheld.



90. Having read the submissions from the companies, the Commissioner accepts that the types of information identified in paragraph 87 were received under an explicit obligation to maintain confidentiality.

Unauthorised disclosure which would cause detriment

91. The third matter to be considered is whether the disclosure would be unauthorised *and* whether the disclosure would cause detriment.
92. The Commissioner is satisfied that when Amey and Blachere submitted their tenders to the Council, they did so in the expectation that the information in them would not be disclosed into the public domain, at least not at that time. This is understandable as neither company would want to jeopardise its chances of winning the contract by revealing what it considered to be the information that would be key to their success.
93. During the investigation, the Council consulted with Amey and Blachere to ascertain their views on disclosure. One upheld its previous submissions and the other did not respond. The Council took the latter response to be a confirmation that they did not want the information released and, therefore, that disclosure would be unauthorised.
94. Having considered the remaining three types of information, and in the absence of any additional arguments from the Council on this matter, the Commissioner has concluded that only the disclosure of information concerning insurance (pages 230, 232, 257 and 258) would cause detriment to the parties concerned.
95. The Commissioner considers that the release of the other two types of information (organisational charts and schedule of rates) would not cause the detriment required by this exemption. The schedule of rates have been discussed in detail in the consideration of the section 33(1)(b) exemption and similar arguments apply in this case, in that the prices are not static and will be subject to variation, and that the tender requirements will be unique each time. With regard to the organisational charts, there is nothing in these charts that is out of the ordinary or special, the disclosure of which could cause detriment; they are not unique and simply depict a typical company's organisational set-up.
96. While the threshold of detriment is not particularly high for this purpose, the Commissioner can identify nothing in the information which would, at the time that the Council dealt with the Lightways' request for review, have been capable of causing detriment to the tendering companies.

Conclusion on section 36(2)

97. For the reasons set out above, the Commissioner finds that only the information contained within pages 230, 232, 257 and 258 is exempt under section 36(2) of FOISA. All remaining information withheld by the Council under section 36(2) of FOISA should be released to Lightways (unless that information has already been found to be exempt).



General Comments on the Council's Handling of the Information Request

98. The Council initially refused to respond to Lightways' information request and instead advised Lightways that full feedback had been provided to it in terms of the Public Contracts (Scotland) Regulations 2006. Only when Lightways specifically stated that it was making a request under FOISA did the Council respond to this request. Section 1 of FOISA stipulates that a person who requests information from a public authority is entitled to receive the information. Section 8 of FOISA makes it clear that a person making an information request under FOISA does not have to stipulate that the request is being made under FOISA.
99. Lightways asked the Council to review its decision, but again the Council refused to accept Lightways' request for review until a period of discussion had ensued between the Commissioner, Lightways and the Council.
100. Lightways commented in their application to the Commissioner, that the Council had not made it easy for them to identify exactly what information had been withheld and which exemption(s) it had relied on to do so. Lightways asked the Council to provide them with a table (schedule of documents) indicating what information had been withheld and why. The Council did not provide such a schedule of documents and provided a narrative response on each occasion instead. The Council adopted the same style of correspondence during the Commissioner's investigation. Although the creation of such a schedule of documents is not a requirement of FOISA, it makes the reasoning for withholding large volumes of information easier for both the applicant and public authority.
101. Since the Council did not prepare a schedule of documents, this led to inaccuracies and inconsistencies in its submissions to the Commissioner; for example, blank documents were withheld and exemptions were applied to instances of one information type but was not applied to other instances of the same type of information.
102. Lightways were dissatisfied with the fact that the Council relied upon additional exemptions during the investigation.
103. While it is clearly not good practice for a public authority to cite new exemptions only during an investigation, the Commissioner is satisfied that natural justice requires that he consider any new exemptions which are relied on. Where this happens, the Commissioner will usually give the applicant an opportunity to comment on any additional exemptions cited, as happened in this case.



DECISION

The Commissioner finds that North Lanarkshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Lightways (Contractors) Limited.

The Commissioner finds that the Council was entitled to withhold limited information under section 36(2) and section 38(1)(b) of FOISA. However, the Commissioner also finds that the Council was wrong to withhold other information under the exemptions in sections 30(b), 30(c), 33(1)(b) and 36(2) of FOISA.

The Commissioner therefore requires the Council to release the information identified in the Schedule of Documents within 45 days after the date of intimation of this decision notice, that is by 2 April 2009.

Appeal

Should either Lightways (Contractors) Limited or North Lanarkshire Council 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
16 February 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

(...)

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

(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.

(...)

15 Duty to provide advice and assistance

(1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

20 Requirement for review of refusal etc.

(...)

(6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(...)

(b) would, or would be likely to, inhibit substantially-

(i) the free and frank provision of advice; or

(ii) the free and frank exchange of views for the purposes of deliberation (...)

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



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
 - (ii) [...]
 - (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.

DATA PROTECTION ACT 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

[...]

"personal data" means data which relate to a living individual who can be identified-

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

4 The data protection principles

...

- (4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.



SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.



Schedule of documents

Pages of the tender responses have been initialled. The initials appear sporadically throughout the tender responses, consequently these initials have been considered together as a separate item in this schedule of documents - please refer to the end of this table.

Sect/(NLC Page Ref)	Company	Document/Information Description	Information withheld	Exemption	Upheld?	Release/Withhold
3 (1)	N/A	Quality assessment sheet	All information released, but the signatures together with the date have been ordered alphabetically	30(b) and 30(c)	Not upheld	Release
4 (3-11)	N/A	Individual score sheets	Withheld in full	38(1)(b), 30(b) and (c)	38(1)(b) upheld 30(b) and (c) Not upheld	Release with signatures redacted
5 (12)	N/A	Comparison Schedule of Rates for Tenderers	Figures redacted	33(1)(b)	Not upheld	Release
8 (16 – 17)	N/A	A report dated 29 August 2006 entitled "Christmas Lighting Consultancy - 2006/2009"	Released	25	N/A	N/A
9 (18 – 38)	N/A	The Councils' Contract Standing Orders	Released	25	N/A	N/A
10 (39 – 41)	N/A	A report dated 11 October 2006 entitled "Christmas Lighting Consultancy — 2006/2009"	Released	25	N/A	N/A
11(a) (42-50)	Blachere	'Tender forms'	Signatures	38(1)(b)	Upheld	Withhold
11(a) (60-68)	Amey	'Tender forms'	Signatures	38(1)(b)	Upheld	Withhold
11(b)(A) (69, 70)	Blachere	Part B – Financial Information/Status	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
(71 – 106)	Blachere	Financial Statements 2004, 2005	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
11(b)(B) 107-116	Blachere	Health & Safety Policy	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
11(b)(B) 117-227	Blachere's subcontractor	Health & Safety Policy	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
11(b)(C) 228-229	Blachere	Organisational Chart	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
11(b)(D) 230 - 232	Blachere	Insurance Details	Withheld name of insurer, policy	36(2)	Upheld	Withhold

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Sect/(NLC Page Ref)	Company	Document/Information Description	Information withheld	Exemption	Upheld?	Release/Withhold
			number and expiry date for employers liability and third party insurance and contact details. Also signatures on bottom of page			
11(b)(F) 235 - 236	Blachere	A statement describing technical equipment/IT systems, resources and turnover	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
237 – 239	Blachere	Project Management process	Withheld in its entirety	36(2)	Not upheld	Release
11(b)(G) 240 – 241	Blachere	Equal Opportunities Policy	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
11(b)(H) 242	Blachere	References	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
11(b)(I) 243	Blachere	Bank reference	Withheld in its entirety	36(2) 38(1)(b)	38(1)(b) upheld for signature 33(1)(b) and 36(2) not upheld	Release with signature redacted
11(b)(J) 244 – 245	Blachere	Schedule of rates	Figures withheld	33(1)(b) 36(2)	Not upheld	Release
11(b)(K) 248 - 251	Blachere's subcontractor	Service Level Agreement	Withheld in its entirety	33(1)(b) 36(2)	Not upheld	Release
11(c)(A) 252-254	Amey	Company Information	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
255-259	Amey	Financial Information	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
260-265	Amey	Quality of service	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
266	Amey	References	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
267 – 268	Amey	Request to Bank	Name of bank solely withheld	33(1)(b), 36(2)	Not upheld	Release
269 - 293	Amey	Health & Safety Policy	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
294 - 296	Amey	Staff / Organisational Chart	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release
297 – 357	Amey	Service Delivery Plan / Quality Management Plan	Withheld in its entirety	33(1)(b), 36(2)	Not upheld	Release

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358 - 361	Amey	Schedule of rates	Figures withheld	33(1)(b), 36(2)	Not upheld	Release
69, 70, 230, 232, 233, 235, 236, 242, 246 and 247	N/A	Verification initials	Initials at bottom of pages	38(1)(b)	Upheld	Withhold