

Decision Notice



Decision 073/2011 Mr Tom Gordon of The Herald and City Building (Glasgow)
LLP

Hospitality received

Reference No: 201001184
Decision Date: 7 April 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Gordon, Scottish Political Editor of The Herald newspaper, requested from City Building (Glasgow) LLP (CBG) information pertaining to hospitality received by certain of its senior managers since its inception. CBG disclosed a breakdown of the number of events at which hospitality had been accepted, but withheld the remainder of the requested information under section 33(1)(b) of Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that its disclosure would be substantially prejudicial to certain commercial interests.

Following a review, CBG advised Mr Gordon that it did not hold any information for the period prior to April 2007 (when it established a register of hospitality) and did not record the value of the hospitality. In relation to the period from April 2007 onwards, it disclosed additional information but withheld the remainder under section 33(1)(b) of FOISA. Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which CBG also relied upon section 38(1)(b) of FOISA (which relates to personal information), the Commissioner found that CBG had dealt with Mr Gordon's request for information in accordance with Part 1 of FOISA. He found that the withheld information was exempt from disclosure in terms of section 33(1)(b) of FOISA, on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of CBG.

Relevant statutory provisions and other sources

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

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

Background

1. On 24 March 2010, Mr Gordon emailed CBG requesting the following information:
All hospitality received by the managing director, senior managers of CBG in each financial year since its inception.



Mr Gordon indicated that this should include a description of the hospitality received, e.g. dinner, trip or football match; the date received; the supplier of the hospitality, the recipient(s); and the approximate value of the hospitality. He also suggested that in order to fulfil his request as quickly and cheaply as possible, copies of the original hospitality registers be disclosed.

2. CBG responded to Mr Gordon on 26 April 2010. It disclosed a list of the number and type of events where hospitality had been accepted by the Managing Director and other Directors, and explained that it did not hold a value for the hospitality. CBG advised that the remaining information was being withheld under section 33(1)(b) of FOISA.
3. On 28 April 2010, Mr Gordon emailed CBG requesting a review of its decision. He pointed out that hospitality registers, and the disclosure of information from them, was commonplace among Scottish public authorities. He did not believe there to be anything different about CBG, or any credible grounds for withholding the information. He cited reasons why he considered transparency to be particularly important in CBG's case.
4. CBG notified Mr Gordon of the outcome of its review on 26 May 2010. It had regard to the Court of Session opinion in *Glasgow City Council v Scottish Information Commissioner*¹ which highlighted that FOISA provided a right of access to information rather than specific documents: consequently, it was not obliged to provide him with a copy of its hospitality register. It provided Mr Gordon with details of individual instances of hospitality accepted by the Managing Director and other Directors. CBG went on to advise that it did not hold a hospitality register prior to April 2007 and did not know the value of the hospitality received. CBG also explained why it considered the remaining information should be withheld under section 33(1)(b) of FOISA, with reference to the public interest.
5. On 8 June 2010, 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. Specifically, Mr Gordon did not consider that that section 33(1)(b) applied to the withheld information and was not satisfied that all the information he had requested had been identified by CBG.
6. 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.

¹<http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



Investigation

7. On 14 June 2010, 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. In responding, CBG noted some omissions and duplication in its original response to Mr Gordon, providing an explanation for these. It provided a table containing details of the instances of hospitality covered by Mr Gordon's request, highlighting the information that was being withheld. The case was then allocated to an investigating officer.
8. 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 provide background information on its arrangements for recording the provision of hospitality, details of the searches undertaken to identify and locate any information held, why no information was held on the value of the hospitality received or prior to May 2007, and its justification for relying upon any provisions of FOISA it considered relevant to the withheld information (with particular reference to section 33(1)(b)).
9. CBG responded to all of the above questions. In addition to its submissions on section 33(1)(b) of FOISA, it advised (with supporting arguments) that certain information was also being withheld under section 38(1)(b) of FOISA. Further comments were subsequently obtained on the application of section 38(1)(b).
10. In discussion with the investigating officer, CBG agreed to provide Mr Gordon with a redacted version of the table provided to the Commissioner, which it did (highlighting that this was with a view to addressing the errors and inconsistencies referred to in paragraph 7 above) on 20 October 2010.
11. Mr Gordon's comments were sought and received on why the public interest test favoured disclosure of the information being withheld under section 33(1)(b), and also on his legitimate interest in the information being withheld under section 38(1)(b) of FOISA.

Commissioner's analysis and findings

12. 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.

Information falling within the scope of the request

13. Mr Gordon did not accept that CBG had identified all the information falling within the scope of his request. In his application, he commented that there was no information for the period 24 May 2008 to 28 January 2010.



14. The investigating officer requested and received submissions from CBG on the searches it had undertaken. CBG advised that its managers were reminded every quarter of the arrangements for recording all requests for approval of hospitality offered in the authority's hospitality register. CBG provided examples of the relevant documents to the investigating officer to support its submissions.
15. CBG went on to explain that informal systems had been in place prior to April 2007, when the new Director of Finance had identified the need for a formal system in light of CBG's new commercial role and the possibility of an increased number of hospitality invitations.
16. As there was only one member of staff who recorded and maintained the hospitality information, CBG had contacted this individual to obtain the hospitality information prior to responding to Mr Gordon.
17. Having considered the processes and systems in place, the Commissioner is satisfied that CBG took adequate steps in the circumstances to identify all the information falling within scope of Mr Gordon's request.

Information withheld

18. CBG provided the investigating officer and Mr Gordon with a table itemising 25 events at which its staff had accepted hospitality. CBG withheld information relating to 14 events and in particular withheld the following:
 - 14 instances of the names of the company, individual, job title or organisation providing hospitality
 - Locations for two hospitality events
 - Two instances of details associated with the hospitality event
 - Six dates (associated with three events, in relation to which CBG withheld the dates of the notification to the register and the date of the invitation/event).
19. CBG withheld some of the above information under section 38(1)(b) and all of the information under section 33(1)(b) of FOISA. The Commissioner first considered the application of section 33(1)(b) of FOISA to the information listed above.

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

20. 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 a Scottish public authority). This is a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.



21. 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 might 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. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be prejudiced substantially.
22. CBG has applied the exemption in section 33(1)(b) to all of the withheld information. It maintained that disclosure would, or would be likely to, prejudice substantially the commercial interests both of itself and the third parties who provided the hospitality.
23. The Commissioner is satisfied that both CBG and the third party organisations from which hospitality was received have commercial interests. In all cases, the organisations or individuals are involved in the provision of good and services in competitive and commercial environments.
24. CBG provided very detailed submissions to explain its consideration of this exemption in relation to each of the events concerned. The Commissioner will not repeat these submissions in full, but would note that he has considered them fully.
25. In each case, CBG explained the relationship between it and the individual or organisation providing hospitality, and the effects that it believed disclosure would have on the commercial interests of that third party and CBG.
26. In each case, CBG's submissions have maintained that disclosing the information revealing that a certain third party provided hospitality to CBG would lead to unsubstantiated allegations of impropriety which would prejudice that third party's ability to do business, to win contracts and continue to service ongoing contracts. CBG has argued, in essence, that if the identities of the providers of hospitality were known, then current and future customers and suppliers of the third parties would withdraw from existing contracts or not enter into future contracts with the third parties.
27. CBG's submissions with respect to harm to its own commercial interests highlighted that it accepts hospitality from third parties as an important part of its business development and supply chain management (although it does not accept hospitality from individual/companies who are tendering for work at the time of invitation). It maintained that disclosure would lead to a "cooling effect" on the number of hospitality invitations it receives, leading to CBG missing out on contract opportunities and the chance to build relationships that such events bring.
28. It argued that disclosure of the withheld information could reveal its relationships with the individuals and companies concerned, thereby prompting competitors to seek work from those third parties to the detriment of its own work stream. It also maintained that disclosure would be likely to harm its relationships with the individuals concerned if they considered that their interests were harmed by disclosure, also affecting its ability to secure further work with them.



29. CBG highlighted again the previous scrutiny of its relationships with other contractors, and noted that if similar allegations of impropriety were prompted by disclosure in this case, its ability to secure work would be compromised as a result of the consequent harm to its reputation and brand. It also suggested that companies with which it does business may choose not to tender for future contracts offered by CBG, with a consequent impact on CBG's own ability to compete effectively as a provider of services.
30. When asked to explain why it had been willing to disclose details of certain events but not others, CBG explained that it had withheld information in cases where it had ongoing or anticipated commercial relationships with the organisations or individuals concerned. With respect to the events where it had disclosed information identifying the hosts and the nature of the event, it noted that the hosts either did not have commercial interests to protect, or that CBG did not have any ongoing or anticipated commercial relationship with that host.
31. In his submissions, which were provided after he received a summary of CBG's comments on the case, Mr Gordon rejected CBG's arguments with respect to harm, and noted that many public authorities publish details of hospitality received as a matter of course. His request for review highlighted that the maintenance and disclosure of information within registers of hospitality is commonplace for many public authorities covered by FOISA, including the Scottish Government, councils, and health boards.
32. The Commissioner has considered all of these comments. He recognises that some public authorities do routinely disclose details of hospitality received. However, he also recognises that CBG is a public authority established specifically to engage in commercial activities, and that it does so in competition with organisations which are not public authorities, and which would not normally disclose information about the hospitality they receive. He considers that the nature of CBG and its core commercial functions, which differ from those of the other public authorities referred to in Mr Gordon's request for review, are a relevant consideration in this case.
33. The Commissioner acknowledges that for CBG, hospitality events hosted by existing or potential clients will provide opportunities for business development and building and maintaining commercial relationships. While the Commissioner does not accept all aspects of CBG's submissions, he does accept that disclosure of the withheld information could harm relationships with the hosts concerned and lead to a reduction in the number of similar opportunities on offer (from the same or other commercial hosts) in future, to the detriment of CBG's business, and its ability to compete with other suppliers of similar services.
34. In the light of the above, the Commissioner has concluded that disclosure of the information under consideration would, or would be likely to, prejudice substantially CBG's commercial interests, and so the exemption in section 33(1)(b) was properly applied on that basis.

Consideration of the public interest

35. 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.



36. Mr Gordon has argued that there is a public interest in the withheld information being disclosed as doing so would allow transparency and avoid suspicion that business was being traded for favours.
37. In its submissions, CBG recognised the general public interest in transparency and in information being accessible, and also the more specific public interest in ensuring the probity of CBG's senior managers and that award contract procedures are properly followed.
38. However, it maintained that there are effective review systems in place regarding any offers of hospitality/gifts (including review by CBG's Audit Committee and Glasgow City Council's Internal Audit Section) and the award of contracts (via both EU and UK statutory rules that are subject to the supervision of the courts).
39. CBG recognised that this in itself did not conclusively tip the balance of public interest towards withholding the information, but it asked the Commissioner to recognise that significant negative consequences would occur with the release of the withheld information.
40. The Commissioner has again noted all of the comments from both CBG and Mr Gordon when considering the balancing exercise with regard to the public interest in this case.
41. While Mr Gordon has suggested that disclosure is required to ensure that business has been traded for favours, he considers that there is nothing to suggest that this is the case. He notes that CBG has withheld information in relation to only a small number of events, involving organisations with which it has existing or prospective commercial links. He agrees with CBG that the existing oversight procedures it mentions provide checks to ensure the probity of CBG staff and its contract award procedures. While disclosure in this case would contribute to some extent to the public interest by allowing more general scrutiny of CBG's relationships and acceptance of hospitality, the Commissioner has given only limited weight to this public interest.
42. With respect to the public interest in maintaining the exemption, the Commissioner has concluded that, having accepted that disclosure of the information would be harmful to CBG's commercial interests, disclosure would be contrary to the public interest. He considers that it is in the public interest that CBG is able to compete effectively within the commercial markets within which it operates. He recognises that disclosure in this case would place it in a disadvantageous position with respect to its competitors with respect to its ability to build and maintain relationships business contacts.
43. Having balanced the public interest for and against disclosure in this case, the Commissioner has concluded that in all the circumstances, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration.
44. In reaching this conclusion, the Commissioner has taken account of a) the total number of such hospitality events concerned (14 over a period of almost 2 years, b) the nature of the events (which include attendance at football matches, rounds of golf and dinners) and c) that the scale of the hospitality is not excessive.



45. The Commissioner therefore finds that CBG was entitled to withhold the information under consideration in this decision. Having reached this conclusion, he has not gone on to consider whether disclosure would harm the commercial interests of third parties, or whether the exemption in section 38(1)(b) is also applicable to any of the withheld information.

DECISION

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

Appeal

Should either Mr Gordon or City Building (Glasgow) LLP 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.

Margaret Keyse
Head of Enforcement
7 April 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.

...

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

2 Effect of exemptions

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

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...