

# Decision Notice

---

## Decision 157/2017: Mr James McEnaney and the Scottish Ministers

---

### Tender information

Reference No: 201700611

Decision Date: 26 September 2017



Scottish Information  
Commissioner

## Summary

---

The Scottish Ministers (the Ministers) were asked for information relating to a specific tender for the National Improvement Framework Standardised Assessments. The Ministers withheld some information, claiming that disclosure would substantially prejudice the effective conduct of public affairs and the commercial interests of ACER (who had been awarded the contract).

Following an investigation, during which some information was disclosed, the Commissioner found that the Ministers were entitled to withhold the remaining information. She was not wholly satisfied with the Ministers' interpretation of the request and made some comments on its handling.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1)(a) (Time for compliance); 30(c) (Prejudice to effective conduct of public affairs; 33(1)(b) (Commercial interests and the economy)

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

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

---

1. On 20 December 2016, Mr McEnaney made a request for information to the Ministers. The information requested was:
  - a) the names of each individual or organisation to bid for the Scottish Government's Tender 276420 - National Improvement Framework Standardised Assessments;
  - b) the bid documents from the chosen supplier;
  - c) the evaluation of the top three bids;
  - d) the expected final cost of the standardised testing system.
2. On 23 and 26 January 2017, the Ministers wrote to Mr McEnaney and apologised that they had not been able to respond within the time allowed. They explained that they were awaiting internal clearance to disclose the information they intended to provide.
3. Mr McEnaney wrote to the Ministers again on 7 February 2017, asking when he could expect a response. On 8 February 2017, the Ministers explained that they were still awaiting approval of the response.
4. The Ministers responded to the request on 17 February 2017. The Ministers provided Mr McEnaney with some of the information requested, stating that personal data had been redacted. In relation to part b) of his request, the Ministers stated that they were unable to provide some information as it was considered to be exempt in terms of sections 30(c), 33(1)(b) and 38(1)(b) of FOISA. The Ministers also stated certain tender information had not been provided as it did not comprise of the tenderers' technical or commercial proposals.

5. On 20 February 2017, Mr McEnaney wrote to the Ministers, requesting a review of their decision. He noted the Ministers had failed to respond to his request within the time allowed and did not believe he had been provided with an adequate explanation for this failure.
6. Mr McEnaney also questioned the Ministers' decision not to provide information it did not consider part of the tenderers' technical/commercial proposals, submitting that this information still fell within the scope of his request. He disagreed with the Ministers' application of sections 30(c) and 33(1)(b) of FOISA and provided reasons for this.
7. The Ministers notified Mr McEnaney of the outcome of their review on 20 March 2017. They apologised for the delay in responding to his initial request. They explained that the tender information not provided previously (but not withheld under an exemption) had not been considered to be "bid documents from the chosen supplier", as specified in his request. They provided him with that information, explaining that personal data had been redacted.
8. In the review outcome, the Ministers upheld their application of sections 30(c) (in relation to a risk register) and 33(1)(b) (in relation to some pricing information) of FOISA and explained why they considered these exemptions applied.
9. On 30 March 2017, Mr McEnaney wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. McEnaney stated he was dissatisfied with the outcome of the Ministers' review because the Ministers had failed to offer a satisfactory explanation either for the delay in responding to his initial request or the reasons given for this delay. He also questioned whether the Ministers' initial refusal to provide information considered outwith scope had been addressed adequately. He disputed the application of sections 30(c) and 33(1)(b) to withhold information.

## Investigation

---

10. The application was accepted as valid. The Commissioner confirmed that Mr McEnaney made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
11. On 12 April 2017, the Ministers were notified in writing that Mr McEnaney had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr McEnaney. The Ministers provided the information and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application, and answer specific questions, with specific reference to the requirements of the exemptions in sections 30(c) and 33(1)(b) of FOISA. They were also asked to comment on their handling of the request.
13. The Ministers responded, confirming that they considered both of these exemptions to apply to some of the information withheld. They provided reasons for their position. They confirmed, however, that some of the information withheld under section 33(1)(b) of FOISA could be disclosed.
14. Following further correspondence, the Ministers also accepted that certain information contained within the risk register, and previously withheld under section 30(c) could be disclosed. The Ministers provided this further information to Mr McEnaney.

15. Mr McEnaney acknowledged the information, but wished a decision on the remaining information and the Ministers' handling of the request.

## Commissioner's analysis and findings

---

16. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr McEnaney and the Ministers. She is satisfied that no matter of relevance has been overlooked.
17. The Commissioner will first of all consider the Ministers' handling of the request, before considering the application of sections 30(c) and 33(1)(b) of FOISA.

### Handling of the request

18. Mr McEnaney has expressed dissatisfaction with the Ministers' handling of the request, highlighting their delay in responding (and more particularly the reasons for that delay) and their exclusion of certain information from the scope of the request. Both matters were addressed to some extent in the Ministers' review outcome, but Mr McEnaney remained dissatisfied with the Ministers' handling of them.
19. The review outcome acknowledged a failure to respond to the request within the 20 working days required by section 10(1) of FOISA. Mr McEnaney's dissatisfaction on this point focuses on the reasons given for the delay, which relate to obtaining internal clearance for a response. He expressed concern about delay being caused by the need to obtain such clearance.
20. The Ministers explained that the time of the request had been a particularly busy period for the team which responded and that due to the pressures of staff leave and other major policy projects, the team was overstretched and were unable to provide a response to Mr McEnaney within the required timescales. However, the Commissioner notes that the Ministers' communications to Mr McEnaney prior to a response being issued suggest that a response was ready and simply required internal clearance or approval.
21. The Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)<sup>1</sup> acknowledges that it is good practice to keep the applicant informed in the event of delay (see paragraph 4.8.2 in Part 2). The Commissioner should not find it necessary to note that such good practice should include providing explanations which are capable of withstanding subsequent scrutiny – here, the need to obtain internal clearance or approval, which appears to have underpinned the Ministers' explanations at the time, figures nowhere in the explanation given to the Commissioner during the investigation.
22. Paragraph 4.8.2 goes on to remind authorities that, whatever the reasons for any delay, the time limit for responding is absolute and failure to comply is a breach of the legislation. As indicated above, the Ministers did acknowledge this failure in their review outcome. In their submissions to the Commissioner, they added that, as part of the current intervention by the Commissioner, they are in the process of reconsidering their internal processes, establishing clearer lines of responsibility and ensuring timescales are clear and adhered to. They recognised that would not be of any comfort to Mr McEnaney.

---

<sup>1</sup> <http://www.gov.scot/Resource/0051/00510851.pdf>

23. The failure to comply with timescales having been acknowledged at review stage, the Commissioner does not consider it appropriate to make a formal finding of a breach of section 10(1) of FOISA on this point. She would, however, ask the Ministers to reflect on her comments in paragraph 21 above, in the interests of good practice.
24. With regard to information considered outwith scope, the Ministers appear to have maintained their original position at review stage, although they provided Mr McEnaney with the information in question. In their submissions to the Commissioner, the Ministers noted that Mr McEnaney had asked for “bid documents”, going on to explain that “bid” was to be equated with “tender” and that information relating to “the tender” and to “qualitative selection” were technically distinct.
25. With respect, this appears to the Commissioner to be a distinction which will be lost on any lay person, even a journalist reasonably familiar with the workings of the public sector. She considers it would have been reasonable for the Ministers to have interpreted “bid documents”, in layman’s terms, as including everything submitted by an entity bidding for the contract in question, with a view to winning that contract. Whether technically correct or not, a more restrictive interpretation of the term is likely to appear obstructive to the lay applicant.
26. The Ministers went on to explain that they identified the documents considered outwith scope by way of “helpful clarification” as to what Mr McEnaney would receive, rather than a refusal to provide the information, noting that they provided the information on review when Mr McEnaney indicated he wanted it. In the circumstances, however, it appears to the Commissioner that the more appropriate course of action (given the apparent doubt) would have been for the Ministers to have sought clarification, under section 1(3) of FOISA, as to whether Mr McEnaney did indeed intend to include this information within his request. As it is, the Commissioner does not consider it reasonable for the Ministers simply to have excluded this information from the scope of the request – in doing so, she considers they failed to deal with the request wholly in accordance with section 1(1) of FOISA.
27. Given that the information in question has been provided to Mr McEnaney, the Commissioner does not require the Ministers to take any action in respect of this breach, in response to Mr McEnaney’s application.

### **Section 30(c) – Prejudice to effective conduct of public affairs**

28. Section 30(c) of FOISA exempts information 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” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
29. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

30. The Ministers described the information withheld under section 30(c) as relating to the draft risk register prepared by ACER in order to demonstrate its competence in identifying and managing risk. They stated that it contained information on project risk scenarios and contingencies which was project-sensitive and which, if released to third parties, could constitute a risk to the effective operation and delivery of the project.
31. The Ministers further submitted that, by their nature, risk registers look at a number of worst case scenarios and how to manage them. In particular, they believed material extracted from the risk register could be reported on and misunderstood out of context. They explained that the material was hypothetical but could be interpreted as highlighting real issues and concerns with the development and implementation of National Standardised Assessments, and could place the successful implementation of the project at significant risk.
32. The Ministers also identified a risk that some of the hypothetical risks around, for example, system security could, if released, inspire someone with malicious intent to launch an attack on the system in an attempt to disrupt the introduction of the assessments.
33. The Ministers submitted that disclosure of this information would harm their ability to manage risks to projects effectively, as divulging risk management plans or contingency plans would make them less effective tools. They stated that the information was current and ongoing, which heightened the risk of harm.
34. Finally, the Ministers submitted that there was a real risk of harm in that those involved in identifying and managing risk would be likely to be reluctant to take part in or to contribute fully and candidly, if they became concerned that their observations and comments were likely to be released into the public domain.
35. Mr McEnaney did not accept that disclosing the risk register would inhibit candour on future similar occasions, as he assumed a failure to offer a candid risk register would damage an organisation or individual's chances of being awarded precisely the sort of government contract being discussed in this appeal.
36. During the investigation, the Ministers acknowledged that fear of information being wrongly interpreted or taken out of context was not a suitable reason for withholding information. They agreed to disclose the information in the risk register under the headings "Category", "Description" and "Effect".
37. Having considered the other information within the risk register, together with the submissions made by both the Ministers and Mr McEnaney, the Commissioner is satisfied – for the reasons advanced by the Ministers – that disclosure of the remaining withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs.
38. In all the circumstances, therefore, the Commissioner accepts that the Ministers were correct to apply the exemption in section 30(c) of FOISA to the information remaining withheld.

*Public Interest test – section 30(c)*

39. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

### Submissions by the Ministers

40. The Ministers accepted that there was a substantial public interest in scrutinising plans for the delivery of public projects, and that disclosure of this information would enable the public to better understand the depth of planning and consideration ACER had put into their tender for the Standardised Assessment contract, in particular around identifying potential specific risks and issues and their plans for managing and mitigating those risks.
41. Against this, the Ministers identified a clear danger that disclosure could significantly undermine the effective introduction of the National Standardised Assessments, and so would not be in the public interest. They commented that these assessments were an integral part of the Government's education reforms and the generation of data to drive improvement across Scottish education, which would be placed at risk by disclosing the remainder of the draft risk register. They concluded that disclosure was not in the public interest.

### Submissions by Mr McEnaney

42. Mr McEnaney considered there to be a clear public interest in favour of disclosure in this instance. He explained that the standardised testing system being introduced by the Scottish Government was a flagship educational reform, which would have an impact on a large proportion of the population. He highlighted the controversial nature of the policy and what he described as the Government's repeated rejection of accusations that their testing policy would lead to a number of negative, unintended consequences: it was in the public interest to know the extent to which concerns had been identified and addressed.

### Commissioner's conclusion

43. The Commissioner has considered the submissions made by Mr McEnaney regarding the impact the reforms will have on a large proportion of the population and the concerns he has raised regarding implementation of the testing system. She does not believe disclosure of the withheld information would contribute significantly to scrutiny of these matters.
44. The Commissioner acknowledges the general public interest in transparency and accountability, particularly where this might contribute to understanding how Scottish public authorities award specific contracts, the considerations taken into account and how the successful tenderer intends to implement proposals in a key policy area. She acknowledges that the withheld information might cast some light on these matters. She notes, however, that the Ministers disclosed information from the risk register during the investigation, under the headings "Category", "Description" and "Effect": such disclosure goes some way towards satisfying that public interest.
45. The Commissioner has also taken account of the submissions made by the Ministers on the public interest in maintaining the exemption. She has already acknowledged the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the Ministers' effective functioning in this area and their being able to fully utilise tools, such as the risk register. She accepts that such harm would not be in the public interest.
46. Taking all of the circumstances into consideration, on balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding this particular information. The public interest in disclosure might be greater in other cases, but the Commissioner must consider the information and the circumstances in each individual case. Having reached this conclusion, the Commissioner finds that the public interest in

disclosing the remaining information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. Therefore, the Ministers were entitled to withhold the information under that exemption.

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

47. The Ministers submitted that some of the information held was also exempt in terms of section 33(1)(b) of FOISA, which 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 and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
48. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
  - (i) whose commercial interests would (or would be likely to) be harmed by disclosure;
  - (ii) the nature of those commercial interests; and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
49. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
50. The Ministers submitted that the commercial interests of ACER would, or would be likely to, be harmed by the disclosure of the information, which contained details of its pricing and operational methodologies.
51. The Ministers also confirmed that it had consulted with ACER, who provided submissions to the effect that disclosure of the information would have a substantial prejudicial effect on its commercial interests.
52. In this case, having considered all of the circumstances, the Commissioner is satisfied that ACER (in providing a service and operating for profit in a commercial market) would have relevant commercial interests in the information requested.
53. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests she has identified would, or would be likely to, be prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described above: such prejudice must be at least likely before the exemption can apply.
54. In their submissions to the Commissioner, the Ministers stated that if the information requested was made public, the design, configuration, supply and component parts of ACER products and services would be put at risk, as would its ability to compete effectively in future tendering exercises. Disclosing the information, the Ministers submitted, would allow daily rates and other details to be calculated.
55. The Ministers stated that disclosure of the information would put ACER at a significant commercial disadvantage were this to occur. They submitted that the substantial prejudice would be manifested in two ways.



56. Firstly, competitors will be able to draw up bids with a level of knowledge about ACER's business model and pricing mechanisms that went significantly beyond what would normally be expected in a functioning marketplace and, secondly, ACER would find itself in a position of relative weakness in negotiations with other potential clients, who would find themselves equipped with an unusual level of knowledge of ACER's agreement with another client.
57. The Ministers submitted that while there might be a general presumption that the impact of releasing commercial information decreases over time, the contract in question remained contemporary rather than historic. It argued that the passage of time had not diminished any impact disclosure of the withheld information would have.
58. The Commissioner has considered the information withheld under this exemption, along with the submissions received. From the submissions made by the Ministers, with the submissions from ACER, it is evident that disclosure of the remaining information withheld under this exemption would have had, or would have been likely to have had, a substantially prejudicial effect on the commercial interests of ACER. She is therefore satisfied that the information withheld is exempt under section 33(1)(b): its disclosure would, or would be likely to, prejudice substantially the commercial interests of ACER.

#### *Public interest test - section 33(1)(b)*

59. As mentioned above, the exemption in section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

#### Submissions by the Ministers

60. The Ministers accepted that there was a public interest in enabling the public to better understand the Scottish Government's activities, ensuring that it was held to account for spending and achieving value for money for the taxpayer.
61. On the other hand, the Ministers submitted that it was in the public interest to withhold the information, allowing them to ensure healthy competition for public contracts and obtain best value in public expenditure. They underlined the need to ensure that potential tenderers are not discouraged from tendering for public contracts by a justified fear that their commercially confidential information will be released publicly.
62. The Ministers also considered there to be a clear danger that disclosure might actually undermine the ability of the Scottish Government, and other public bodies, to achieve value for money. They submitted that undermining the trust implied by a competitive tendering process could have far-reaching consequences for the public sector's ability to deliver services.

#### Submissions by Mr McEnaney

63. The public interest submissions from Mr McEnaney are the same as those provided in relation to section 30(c) – see above.

#### The Commissioner's conclusion

64. The Commissioner acknowledges the general public interest in transparency and accountability, as noted by both parties, particularly where this involves actual and potential spending from the public purse. This is a significant area of expenditure and there will be circumstances in which information of this nature should be disclosed in the public interest.

However, the Commissioner must consider the particular circumstances of each case when considering an application for a decision.

65. The Commissioner has also taken full account of the submissions made by the Ministers in support of maintaining the exemption. She has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that this would not be in the public interest. It is in the public interest for the Ministers, in common with other Scottish public authorities, to be able to consider tenders effectively in a competitive market, with a view to implementing appropriate policies and securing best value for the public purse.
66. In all the circumstances of this case, the Commissioner finds there to be a strong public interest in maintaining the exemption in section 33(1)(b), in order to maintain the effectiveness of the Ministers' ability to obtain best value in an open market. To counteract this, there would need to be a compelling specific public interest in disclosure. While acknowledging the validity of Mr McEnaney's submissions, the Commissioner does not consider such a compelling specific case to have been made here.
67. Taking account of all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. Consequently, she finds that the Ministers were entitled to withhold the remaining information under section 33(1)(b) of FOISA.

## Decision

---

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr McEnaney's request for information, by excluding certain information unreasonably from the scope of the request.

However, the Commissioner also finds that the Ministers were entitled to withhold certain information from Mr McEnaney under sections 30(c) and 33(1)(b) of FOISA, and complied with Part 1 of FOISA to that extent. Given that this was the only information remaining withheld at the close of the investigation (the information considered outwith scope being among the information disclosed), the Commissioner does not require the Ministers to take any action in this case, in response to Mr McEnaney's application.

## **Appeal**

---

Should either Mr McEnaney or the Scottish Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**26 September 2017**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

...

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

...

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

#### 2 Effect of exemptions

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

...

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

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

### **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).

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

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