

# Decision Notice



Decision 238/2011 Tom Gordon of the Sunday Herald and City Building  
(Glasgow) LLP

Tendering process for machinery and plant hire contract

Reference No: 200900990  
Decision Date: 24 November 2011

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## Summary

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

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

Following the investigation, the Commissioner concluded that CBG had partly breached Part 1 of FOISA when responding to Mr Gordon's information request. He concluded that by withholding the vast majority of the information falling within the scope of Mr Gordon's request (which was disclosed to him during the investigation) and the information identifying unsuccessful bidders in certain contexts (which CBG had continued to withhold under section 36(2) of FOISA), CBG breached section 1(1) of FOISA. The Commissioner required CBG to disclose the information withheld under section 36(2) of FOISA to Mr Gordon.

However, the Commissioner found that CBG had correctly applied the exemptions in sections 33(1)(b) (Commercial interests and the economy) and 38(1)(b) (Personal data) when withholding certain personal data, and detailed pricing information drawn from the winning tender.

## Relevant statutory provisions and other sources

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

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



## Background

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



## Investigation

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



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

## Commissioner's analysis and findings

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

### The information under consideration

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



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

#### **Section 38(1)(b) – Personal information**

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





29. The Commissioner carefully reviewed CBG's approach to redacting personal data within the documents released to Mr Gordon in October 2011, and he found that it had consistently applied his findings regarding the extent of application of section 38(1)(b) to the information under consideration in Decision 102/2011 to the information under consideration in the current case. He also noted that the personal data falling within the scope of the request under consideration is of the same nature as that considered in Decision 102/2011.
30. Mr Gordon has made no additional submissions since the issue of Decision 102/2011 to suggest that he considers that its findings regarding the exemption in section 38(1)(b) of FOISA should not also be applied in the current case. As a result, the Commissioner presumes that his views on the application of the exemption in section 38(1)(b) to the information in this case remain as they were summarised in Decision 102/2011.
31. Given the similarity of the information under consideration, the relation between the requests, and that the submissions of both parties to the current case were considered fully in Decision 102/2011, the Commissioner considers that the reasoning set out at length in paragraphs 225 to 264 of Decision 102/2011 is also applicable to the current case.
32. The Commissioner will not repeat that reasoning in this decision. However, for same reasons set out there, he is satisfied that the information to which the exemption in section 38(1)(b) of FOISA has been applied in this case is personal data, as defined in section 1 of the DPA, and that its disclosure would breach the first data protection principle. As such, it is exempt from disclosure under section 38(1)(b) of FOISA.
33. Given that CBG has correctly applied that reasoning to the information under consideration in this case, he is satisfied that it has rightly decided to disclose some personal data, while appropriately applying the exemption in section 38(1)(b) to the information detailed in paragraph 28 above.

### **Section 36(2) - Confidentiality**

34. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
35. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the public authority obtained the information or by any other person.

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

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

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

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





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

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

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

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

*[...]*

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

41. Given CBG's submissions, the Commissioner must consider whether the same reasoning justifies its decision to withhold the names of bidding companies in similar circumstances and replace these with the labels "bidder 1" etc.
42. The Commissioner has first of all noted that CBG has applied the approach set out in paragraph 41 above systematically. It has not sought to withhold the identities of the unsuccessful bidders elsewhere within the information requested by Mr Gordon, or to otherwise obscure information about the assessment of their tenders.

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43. However, he does not consider that the reasoning set out in Decision 102/2011 applies to the information under consideration in the current case. In reaching this conclusion, the Commissioner has noted that there are significant differences between the outcomes of the two tendering exercises, which mean that the information under consideration in this case differs from that considered in Decision 102/2011 in ways that are relevant for the application of the exemption in section 36(2) of FOISA.
44. First of all, following the tendering of the plant hire contract, CBG correctly followed its routine practice of returning or destroying unsuccessful tenders. It did not do this for the vehicle fleet contract that was the subject of the information request in Decision 102/2011. As a result, the information considered in Decision 102/2011 included the full tenders submitted by all bidders, but the information under consideration in this decision does not.
45. The main source of information about unsuccessful tenders in the current case is, therefore, CBG's report regarding the evaluation of bids. Information within those documents (which was disclosed to Mr Gordon during the investigation) makes clear that of the bids received, only one (the winning bid) met CBG's minimum requirements concerning the technical capacity of the bidder to be the sole provider operating a "one-stop" hire shop to CBG, and regarding economic and financial standing, with the minimum requirement being a turnover in excess of £10m.
46. The evaluation documents make clear that, having concluded that none of the unsuccessful tenderers met these minimum requirements, their bids were not fully evaluated. The evaluation documents under consideration in this case consequently provide no details of the pricing or other aspects of these bids. This is in contrast with the evaluation documents considered in Decision 102/2011, which contained pricing and other information drawn from the unsuccessful tenders, and provided significant insights into the content of those bids.
47. Turning to the application of section 36(2) to the information relating to the unsuccessful tenders that have been withheld in the current case, the Commissioner recognises that the identity of the bidders, and details of their turnover, constitutes information provided by those third parties within the context of the tendering process.
48. However, the Commissioner does not consider that this information (or any other information within the evaluation documents) holds (or held, at the time when CBG notified Mr Gordon of the outcome of its review) the necessary quality of confidence. He notes that the turnover of any company is information that is publicly available from Companies House, and so once the identity of a bidder is known, this information is routinely and easily available.
49. The key factor that led the Commissioner to find that section 36(2) of FOISA applied to information under consideration in Decision 102/2011 was that disclosure of the identity of a bidder with the content of its bid would be detrimental to those companies. Since the documents under consideration in this decision provide no detail of the content of the unsuccessful bids, the Commissioner is not persuaded that similar detriment would arise as a result of disclosure in this case.



50. The Commissioner considers that the disclosure of the identity of the bidder in all contexts within the information under consideration in the current case would allow only very limited additional information to become available about the unsuccessful bids, by allowing the evaluation score achieved by each bid to be known. In the information considered in Decision 102/2011, such association would have then allowed the score assigned to each company to be correlated with the financial and other details of each bid set out in the evaluation documents. That is not the case in the information currently under consideration.
51. For the foregoing reasons, the Commissioner is not persuaded that disclosure of the information to which section 36(2) of FOISA has been applied in this case would constitute an actionable breach of confidence. He therefore finds that section 36(2) was wrongly applied to this information.

### **Section 33(1)(b) – Commercial interests**

52. In terms of section 33(1)(b) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA.
53. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would, or would be likely to, be harmed by disclosure; the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. It would have to be at least likely, so there would require to be a significant probability of it occurring, in the near (and certainly the foreseeable) future.
54. CBG applied this exemption to information contained in or drawn from the pricing schedule submitted by the winning bidder for the plant hire contract. This included hire charges, delivery and uplift rates, details of the percentage rebate/discount offered, and the total value of the contract prior to this being applied (since this would allow calculation of the percentage applied). The total value of the contract and the final savings figures were disclosed.
55. It submitted that disclosure of this information would be likely to prejudice substantially its own commercial interests, as well as those of the winning bidder, CRH and its subcontractor Speedy Hire Ltd (Speedy).
56. The Commissioner is satisfied that each of CBG, CRH and Speedy have commercial interests. CRH and Speedy are both suppliers of services within the construction industries (and more widely), and both operate in a competitive trading environment for the purposes of revenue generation. CBG has commercial interests, both in relation to the successful outcome of its own procurement of services, and in relation to its wider commercial activities as a provider of services.



57. When considering whether disclosure would, or would be likely to, harm the commercial interests of these parties, the Commissioner must, as in any case, focus on the circumstances that prevailed at the time when CBG notified Mr Gordon of the outcome of its review. In this case, that was 8 May 2009.
58. Tendering for the plant hire contract took place in 2007. The contract was advertised in the OJEU on 1 June 2007, and the closing date for the return of tenders was 17 July 2007. The contract was awarded thereafter, for the period from 1 September 2007 to 31 August 2009, with the option of extending this for a further two years, subject to agreement being reached between the parties on price. The contract was extended for the additional two years from 1 September 2009.
59. Therefore, 8 May 2009 came more than 18 months after the plant hire contract was awarded, and approximately four months before the end of the original contract period. CBG has informed the Commissioner that it and CRH confirmed the extension of the contract for a further two years on 8 September 2009. At the time when CBG notified Mr Gordon of the outcome of its review, it remained uncertain as to whether a further tendering process would take place in July and August 2009 regarding a new contract.
60. The Commissioner first considered CBG's arguments regarding the potential for disclosure at that time to prejudice substantially the commercial interests of CRH.

#### *Submissions from CBG*

61. CBG has submitted that, in May 2009, disclosure of the information to which section 33(1)(b) of FOISA has been applied would have been likely to prejudice substantially CBG's commercial interests in two ways:
  - It could have been used by CRH's competitors should they and CRH have been tendering for plant hire contracts with purchasers other than CRH, and
  - It could have been used by CRH's competitors should they have been tendering for a new plant hire contract in July/August of 2009.
62. To demonstrate the continued sensitivity of the information at that time, it highlighted that when submitting its tender documentation, CRH had identified (within the Freedom of Information Certificate) that it considered the pricing schedule should not be disclosed in response to a request made in terms of FOISA for the period from 1 September 2007 to 31 August 2009 (i.e. for the life of the initial contract period).
63. CBG recognised that the identification or otherwise of information in response to a request of the type contained in the freedom of information certificate cannot be taken as conclusive of the (non-)application of an exemption. However, it agreed with the Commissioner's view (as set out in e.g. in Decision 102/2011, and in line with the Opinion of the Court of Session in the case of *Healthcare at Home Ltd. v Common Services Agency [2011] CSOH 22*) that, while not conclusive, it is a relevant factor to be taken into account.



64. CBG also contacted CRH during the investigation, asking it to provide further comments on its reasons for wishing this information to be withheld. It forwarded on CRH's response to this request to the Commissioner.
65. In that response, CRH maintained that disclosure of the pricing information would prejudice substantially its commercial interests. It noted that the pricing information within the tender was submitted on a very detailed level, showing each plant item's weekly hire cost per unit, and confidential details of CRH's rebate structure. CRH commented that disclosure of this information would allow competitors or other interested parties access to its rates and pricing structure at a "granular" level, its discount structure and the ability to estimate margins charged by CRH. It maintained that this would in turn impact on its ability to secure future business in a competitive tendering environment, both with respect to future tenders by CBG, or other customers.
66. CRH also commented that limited price movement in the market covered by the plant hire contract meant that the prices offered in relation to the plant hire contract were not materially different from its current pricing policy. It requested that the pricing information be withheld to ensure that it has the ability to participate in future tender activity on a level playing field with competitors, without detailed pricing information being publicly available.
67. CBG's submissions provided a range of evidence and reasoning in support of its continued application of section 33(1)(b) in relation to CRH's commercial interests. It recognised, for example, that each tendering process will proceed in a unique environment and reflect the needs of the particular purchaser, but indicated that, had it tendered for a new plant hire contract in the summer of 2009, its needs would have remained substantially the same as in 2007. It commented that variations are slight across procurers of plant tools and equipment compared with other products and services; the products are relatively standardised and the mode of delivery of contracts has been and remains standard.
68. Regarding pricing, CBG commented that it would have expected very limited change in prices in the period between the award of the plant hire contract in 2007, and the period leading to the potential retendering in the summer of 2009. It highlighted that, when the contract was extended in 2009, CRH's charges for items either remained the same or were subject to small reductions (which CBG presumed were offered by CRH as an inducement to extend the contract rather than risk losing out in a further tendering exercise).
69. CBG submitted that it was reasonable to infer that, had a tendering exercise taken place, CRH's pricing structure would not have changed significantly from that set out in 2007. It noted that price increases would not have been sustainable, given the effects of the economic downturn on the construction industry. It noted that the strategy adopted by many major hire firms in this period (which might have been expected to be followed by CRH) had been to reduce capital expenditure on new plant, and reduce costs while more or less maintaining price levels. It highlighted that Speedy's 2009 annual report<sup>1</sup> indicated that it had adopted this strategy.

<sup>1</sup> [http://www.speedyhire.plc.uk/download/2009\\_Annual\\_Report\\_tcm6-1828.pdf](http://www.speedyhire.plc.uk/download/2009_Annual_Report_tcm6-1828.pdf)





70. CBG also identified a series of significant public sector plant hire contracts which had been tendered in the year following Mr Gordon's information request being made, for which CRH might have tendered. It provided worked examples showing how a company with access to the pricing information withheld in this case might be used by a competitor bidding for contracts involving some or all of the same tools.

*Conclusions regarding section 33(1)(b)*

71. The Commissioner has considered all of the comments made by CBG (include those that are not summarised fully above), the withheld pricing information and the timing of Mr Gordon's information request.
72. He has noted that, following the issue of Decision 102/2011, CBG disclosed much of the information that it had previously withheld under the exemption in section 33(1)(b), and has continued to withhold only the detailed pricing information contained in or drawn from the pricing schedule contained in CRH's tender.
73. Given the timing of Mr Gordon's information request with respect to the completion of the original contracted period, CRH's own comments about the sensitivity of the pricing information, and the supporting submissions and evidence supplied by CBG, the Commissioner is satisfied that disclosure of the pricing information, at the time when CBG notified Mr Gordon of the outcome of its review, would, or would have been likely to, prejudice substantially CRH's commercial interests.
74. In reaching this conclusion, he has noted the level of detail with respect to the pricing of individual plant items contained within this pricing schedule. He accepts that, whether or not CBG had initiated a further tendering process relating to a new plant hire contract in July or August of 2009 (and with the benefit of hindsight, it is now known that it did not), disclosure of the withheld pricing information would have offered CRH's competitors significant insights into the pricing strategy adopted by CRH when bidding for a contract of this type, enabling competitors to gain advantage and prepare their own tenders in the light of that knowledge.
75. Given the level of detail provided, the Commissioner accepts that access to that information would have been likely to have detrimental effects on CRH's ability to compete effectively in tendering processes in which the procuring organisations were seeking some or all of the items covered by CBG's tender.
76. For this reason, the Commissioner concludes that the exemption in section 33(1)(b) of FOISA applied to the pricing information that CBG continued to withhold at the time when it notified Mr Gordon of the outcome of its review.





*Public interest test*

77. As the Commissioner has found that the exemption in section 33(1)(b) applies, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
78. When invited to provide comments regarding the public interest in relation to the withheld information (prior to CBG's disclosure of much of the previously withheld information at the end of the investigation), Mr Gordon commented that this request relates to the expenditure of a large sum of money by a company whose profits and losses have a direct bearing on public funds, namely those of Glasgow City Council. He noted that the contract tenders were issued with a reference to FOISA and the possible future release of information under it. He noted that FOISA has been a standard part of the business environment in Scotland for many years.
79. Mr Gordon was invited to make further submissions regarding this case (and another related case) following the issue of Decision 102/2011, and again following CBG's additional disclosures at the end of this investigation, but he did not do so.
80. Within its submissions on the public interest test, CBG recognised the following public interest factors in disclosure of the pricing information:
- The general public interest in information being accessible;
  - That in ensuring the probity of its procurement processes and that contract award procedures are followed;
  - That in persons being able to understand the process followed by CBG in tendering for contracts and how decisions relating to the expenditure of significant amounts of public funds are spent, and
  - That in ensuring effective oversight of funds by a business whose profits and losses affect the funds of Glasgow City Council.
81. Weighing against disclosure, CBG submitted that disclosure would have negatively affected the ability of CRH to win contracts at a time when maintaining turnover and business was particularly important. It maintained that this was contrary to the general public interest in allowing companies to maintain their effectiveness.
82. It highlighted that there is a multi-layered system in place to ensure the probity of contract awards, including statute and internal governance rules, and oversight by Glasgow City Council's internal audit section, and the courts (if an aggrieved bidder raises a court action) and the EU Commissioner (if a complaint is raised). It maintained that the detailed pricing information is not necessary to allow understanding of the tendering process and CBG's decision making.

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83. Having balanced the public interest for and against disclosure, CBG concluded that the public interest in maintaining the exemption in section 33(1)(b) outweighed that in disclosure of the withheld pricing information.

*Conclusions regarding the public interest test*

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

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## DECISION

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

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

However, he concludes that it breached Part 1 and section 1(1) of FOISA by withholding the vast majority of the information falling within the scope of Mr Gordon's request and which was disclosed to him during the investigation. The Commissioner is satisfied that CBG rectified this breach by disclosing information during the investigation.

He also finds that CBG incorrectly applied the exemption in section 36(2) to the information to which it continued to withhold on this basis at the end of the investigation, and in so doing it breached Part 1 and section 1(1).

The Commissioner therefore requires CBG to provide in full the information provided to Mr Gordon that was subject to modification as a result of CBG's application of the exemption in section 36(2), by 12 January 2012.

## Appeal

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**24 November 2011**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.  
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.  
...
- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

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



...

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

### 33 Commercial interests and the economy

- (1) Information is exempt information if-

...

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

...

### 36 Confidentiality

...

- (2) Information is exempt information if-

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

### 38 Personal information

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

...

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

...

- (2) The first condition is-



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

(i) any of the data protection principles; or

...

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

(5) In this section-

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

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

...