

Decision Notice 072/2020

Rental income from commercial property

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 201901703



Scottish Information
Commissioner

Summary

The Council was asked for rental income (or asking price) for land, buildings or property rented to commercial clients or currently vacant for the year 2018/2019.

The Council withheld the information under section 33(1)(b) of FOISA, as it considered disclosure would prejudice substantially the commercial interests of the Council.

The Commissioner investigated and found that the Council had partially breached FOISA in responding to the request. While the information had been correctly withheld as its disclosure would (or would be likely to) prejudice substantially the commercial interests of the Council, the review response was issued outwith the required 20 working days.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 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.

Background

1. On 3 July 2019, the Applicant made a request for information to the City of Edinburgh Council (the Council). The information requested was rental income (or asking price) for each building, land or premise rented to commercial clients or currently vacant for the year 2018/2019.
2. The Council responded on 30 July 2019, providing a web link detailing current commercial properties available with asking prices where appropriate. The Council withheld the rental income information under section 33(1)(b) of FOISA, on the basis that disclosure would be likely to prejudice the Council's commercial interests substantially. The Council considered the public interest in its response.
3. On 30 July 2019, the Applicant wrote to the Council requesting a review of its decision, on the basis that he did not consider the Council had provided a full explanation of the substantial harm it claimed likely in the event of disclosure. He also believed the public interest argument put forward by the Council was flawed.
4. The Council notified the Applicant of the outcome of its review on 4 September 2019, apologising for its late response and upholding its original decision.
5. On 10 September 2019, the Applicant wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he:
 - (i) did not consider the Council had given sufficient explanation as to the substantial harm that would be caused by disclosure;

- (ii) did not believe that the Council had come to the correct conclusion with regard to the public interest;
- (iii) noted that the Council's response to his review requirement had been made outwith the 20 working day period allowed under section 21(1) of FOISA.

Investigation

- 6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
- 7. On 7 October 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
- 8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application, with particular reference to its application of section 33(1)(b) and the public interest test.
- 9. The Applicant was also asked for his submissions on the public interest test and for any other comments he wished to make.
- 10. Both the Council and the Applicant provided the investigating officer with submissions.

Commissioner's analysis and findings

- 11. 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 him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 21(1) of FOISA – Review by a Scottish public authority

- 12. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement for review to comply, subject to qualifications that are not relevant in this case.
- 13. The Council notified the Applicant of the outcome of its review 25 working days after receipt of the requirement for review.
- 14. Therefore, the Commissioner must find that in this respect the Council failed to comply with section 21(1) of FOISA.
- 15. As noted above, the Council acknowledged this late response in its review outcome and apologised.

Section 33(1)(b) of FOISA – Commercial interests and the economy

- 16. The Council submitted that the information sought by the Applicant was exempt from disclosure in terms of section 33(1)(b) of FOISA. This 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.

17. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
 - (i) Whose commercial interests would (or would be likely to) be prejudiced substantially 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.
18. 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 for the authority, it will assist matters if the third party has been consulted on the elements referred to above. There is no third party involved in this case.

Submissions from the Council

19. The Council explained that it operates as a Landlord within the commercial lease sector in Edinburgh and offers commercial leases on the open market to interested parties.
20. The Council submitted that disclosing the withheld information would cause substantial harm to its own commercial interests.
21. The Council's commercial interest, it submitted, lay in maximising returns to the city through effective management of its commercial leasing portfolio, whilst competing with other commercial landlords.
22. The Council submitted that its commercial interests would be substantially disadvantaged in its negotiations with current and prospective tenants as tenants would be able to make use of this information within negotiations.
23. It was the Council's view that disclosure would substantially prejudice its ability to compete effectively against other commercial landlords within the same geographical area, as competitors would have access to the Council's leasing price arrangements and could make use of this when competing for tenants for similar commercial lease opportunities.
24. The Council also explained that the asking price and the agreed rent do not necessarily correlate. It explained that the majority of properties it offers for rent go to a closing date. Offers, particularly where there is strong competition, can be in excess of the quoted asking price.
25. The Council concluded that its ability to maximise its return on assets through the competitive market would likely be substantially prejudiced if actual rental returns from all commercial leases were publicly available.

Submissions from the Applicant

26. The Applicant, in his submissions, accepted that he was asking for commercial information that could have an impact on the commercial interests of the Council. However, he disagreed that disclosure would lead to substantial prejudice.
27. The Applicant considered the Council had not shown that substantial prejudice to its commercial interests was likely. He considered the weakening of future lease negotiations to be a hypothetical possibility and that the Council had not been shown there was a significant probability of it occurring.

28. The Applicant's view was that asking prices and actual prices were not fundamentally different and that, as the asking prices were in the public domain, the Council's argument was fundamentally flawed.

Commissioner's findings on section 33(1)(b)

29. Having considered the Council's submissions, the Commissioner is satisfied that the interests identified by the Council are commercial interests for the purposes of this exemption. The information sought comprises the commercial rent achieved by the Council per unit.
30. While the Council's submissions could have been more focused, the Commissioner accepts that the disclosure of this information would have been likely to create a decidedly uneven playing field in an active, competitive property market (which Edinburgh's clearly is, or at least was at the time the Council dealt with this request) and thus prejudice substantially the commercial interests of the Council by allowing competitors and prospective tenants an insight into its leasing price arrangements. It does not follow that the same argument could necessarily be sustained in respect of every local authority's commercial property portfolio, at every given time.
31. Accordingly, in this case, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA is engaged in relation to all of the information that is being withheld by the Council.

The public interest test

32. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all 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).

The Council's comments on the public interest

33. The Council acknowledged there was a clear public interest in understanding how it manages its funds and achieves the best value for its citizens. The Council publishes Annual Accounts that detail the income received by the Council by service, and commercial rental income is accounted for within the overall income of the Place Directorate.
34. The Council's view was that disclosure would harm its ability to achieve best value or maximise returns from the effective management of the Council's assets. This, it believed, would have a detrimental impact on service provision across the Council's remit, which would not be in the public interest. The Council argued that this was because rental income is returned to the Council's general fund and therefore supports the funding of Council services to the benefit of all citizens: available funding to do this would be reduced if there was a drop in its rental income following the disclosure of the withheld information.

The Applicant's comments on the public interest

35. The Applicant considered that the Council had the balance in the public interest test wrong and argued that it was in the public interest to have the information in the public domain.
36. The Applicant considered that the Council should operate in a realm of transparency and accountability. The purchase of buildings and their subsequent lease should be open to public scrutiny to ensure value for money.

37. The Applicant's view was that public authorities should act generally in favour of disclosing information. He argued disclosure would contribute significantly to ensuring effective oversight of expenditure of public funds and value for money from lease agreements, and also reveal any potential malpractice.

The Commissioner's conclusions on the public interest

38. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to scrutiny of public finances. There would not, however, appear to be any public interest argument more specific to the circumstances of this particular request.
39. That said, the Commissioner accepts that there is a public interest in Scottish public authorities being able to achieve best value and maximise returns from the effective management of assets. The Commissioner also acknowledges that there is public interest in ensuring that there is fair competition in the commercial environment in which the Council operates.
40. The Commissioner recognises that it would be contrary to the public interest to place the Council in a disadvantageous position with respect to its competitors.
41. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration.

Decision

The Commissioner finds that City of Edinburgh Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Council failed to comply with the required statutory timescales for responding to the requirement for review, as set out in section 21(1) of FOISA.

However, the Commissioner accepts that the Council was entitled to withhold the information requested under section 33(1)(b) of FOISA.

Given that the Council has apologised to the Applicant for its late response, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or the Council 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
Head of Enforcement

8 June 2020

Appendix 1: 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.
- ...

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.
- ...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- ...

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).
- ...

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