



Decision Notice 066/2024

Flat rate fee paid to insurance claims handler

Authority: Fife Council

Case Ref: 202201051

Summary

The Applicant asked the Authority for the total cost it paid (or was due to pay) to its insurance claim handler for dealing with a specific claim for damages. The Authority withheld the information on the basis that it was commercially sensitive. The Commissioner investigated and found that the Authority complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner)

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 11 August 2022, the Applicant made a request for information to the Authority. Among other things, the Applicant asked for the total cost paid (or to be paid) by the Authority to Gallagher Bassett for dealing with a specific claim for damages.
2. The Authority responded on 19 August 2022. The Authority withheld the information, under section 33(1)(b) (Commercial interests and the economy) of FOISA, on the basis that disclosure would, or would be likely to, substantially prejudice the commercial interests of the itself and Gallagher Bassett.

3. On 23 August 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority had previously stated that only “an estimate” could be calculated, which was very different from an exact “flat rate per claim”. The Applicant submitted that this implied that different cases are, or can be, charged differently and that the Authority could therefore not rely on the “flat rate per fee” reason to withhold the information requested.
4. The Authority notified the Applicant of the outcome of its review on 21 September 2022, fully upholding its original decision. The Authority explained that the requested information would reveal Gallagher Basset’s flat rate for dealing with the specified claim and that it was therefore exempt under section 33(1)(b) of FOISA.
5. The Authority also referred the Applicant to the [Decision 152/2021](#)¹ of the Commissioner, in which the Commissioner accepted, in respect of the same information, that disclosure would, or would be likely to, substantially prejudice the commercial interests of the Authority and its insurers and claims handler.
6. The Authority explained that it therefore was satisfied, as the Commissioner was in Decision 152/2021, that the withheld information in this case had been properly withheld under section 33(1)(b) of FOISA.
7. On the same day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority’s review because he did not consider the information requested to be commercially sensitive and that it was in the public interest for the information to be disclosed.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 14 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority provided its comments.
10. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information.
11. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

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

13. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person

¹ <https://www.itspublicknowledge.info/decision-1522021>

(including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

14. There are a number of elements a Scottish public 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.
15. 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.

The Authority's submissions about the exemption

16. The Authority noted that the information requested relates to the total cost incurred by Gallagher Basset for a particular claim.
17. By way of background, the Authority explained that the cost is a flat rate applied to all claims that are dealt with by the claim handler who is contracted by its motor insurance provider (RMP). RMP have the right to deal with the claims themselves or delegate to a claim handling company of their choice. RMP appointed Gallagher Basset to carry out all claims, which charge a flat rate fee relevant to the class of claim, for each claim referred to them to handle.
18. The Authority confirmed that it wished to continue rely on section 33(1)(b) of FOISA to withhold the information requested for the reasons set out in its review response and by the Commissioner in Decision 152/2021.
19. In its review response, the Authority specifically noted that disclosure of the withheld information could adversely impact the commercial interests of all parties in relation to future tenders, including cost to the Authority in the event that RMP considered taking legal action (for breach of contract) as a result of disclosure of the information.
20. In its submissions, the Authority reiterated that the commercial interests of RMP, Gallagher Bassett and the Authority itself would be impacted by disclosure of the information.
21. The Authority also submitted that the insurers considered the information to be confidential and commercially sensitive. In support of this, the Authority explained that, in their motor insurance tender submission, RMP stated that their bid was commercially sensitive and disclosure might disadvantage them in bidding for future contracts. In their third party insurance claim handling tender submission, RMP also stated their response was confidential and commercially sensitive.
22. The Authority noted that Decision 152/2021 of the Commissioner found that the withheld information was commercially sensitive, but explained that, due to the passage of time, it made further contact with RMP to confirm their position. The Authority provided evidence from RMP showing that they continued to consider the information commercially sensitive and that disclosure would be detrimental to their commercial interests.

23. During the investigation, the Authority confirmed that the fees within the withheld information are renewed annually. The Authority also explained that historical rates were still commercially sensitive as the rates do not change significantly from one year to the next, meaning a competitor would be able to use historical rates to determine the current rate.

The Applicant's submissions about the exemption

24. The Applicant was dissatisfied with the Authority's response for the reasons set out (at paragraph 3) in his requirement for review.
25. In summary, the Applicant did not agree that the withheld information was commercially sensitive.

The Commissioner's view

26. The Commissioner has carefully considered all of the arguments put forward, along with the withheld information.
27. The Commissioner is satisfied that the withheld information is commercial in nature and that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA.
28. The Commissioner recognises that successful parties in a tendering process must be able to enter into contracts with the Authority for the provision of the relevant services, which stipulate the relevant terms and conditions and associated financial information. The matters recorded in such contracts will generally be commercial in nature (as the Commissioner is satisfied that matters under consideration here are).
29. The Commissioner accepts that the Authority has identified commercial interests relating to its insurers and claim handler, which could be adversely impacted should disclosure of the withheld information disadvantage it in bidding for future contracts.
30. The Commissioner also accepts that the Authority has identified commercial interests relating to itself, should disclosure of the withheld information lead to litigation being raised by the insurers as a result of disclosure.
31. Having identified these commercial interests, the Commissioner must consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information.
32. The Commissioner is satisfied that the information requested is not publicly available, and recognises that disclosure of the flat rate fee into the public domain would allow other commercial competitors to gain unfair advantage in competing for future tenders for this area of work, by being able to undercut on price.
33. With this in mind, the Commissioner accepts that disclosure of the withheld information would place the Authority's insurers at a competitive disadvantage in negotiating future tenders and would, or would be likely to, prejudice its commercial interests to a significant extent. In reaching this conclusion, the Commissioner has taken account of the fact that the relevant fees are agreed annually on renewal.
34. The Commissioner also recognises that the insurers consider the withheld information confidential and are clear in their position on harm as a consequence of disclosure. In the circumstances, public disclosure of the withheld information would be likely to impact on the Authority's relationship with its insurers. This would be likely to jeopardise the Authority's

commercial interests substantially, were the insurers to take legal action against the Authority for breach of contract, at a financial cost to the Authority.

35. In the circumstances, therefore, the Commissioner is satisfied that the withheld information was of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was correctly applied on that basis.

Public interest test

36. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, he is now therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The Authority's submissions about the public interest

37. The Authority acknowledged that disclosure of the information would provide clarity on the costs involved and satisfy the public interest in transparency and accountability by allowing effective scrutiny of whether the Authority is obtaining value for money.
38. However, the Authority considered that disclosure of the withheld information would give competitors a valuable insight into the specific rates charged by Gallagher Bassett for the referral of individual claims, thus giving them unfair commercial advantage.
39. The Authority also submitted that there is no public interest in placing a particular organisation at a commercial disadvantage, simply as a result of having entered into a commercial contract with a public body to provide a service, as a result of a formal tender process, where disclosure of certain financial information has a consequential impact on that organisation's ability to continue to participate fairly in a competitive market.
40. Taking these competing public interests into account, the Authority concluded, that the balance of public interest favoured maintaining the application of the exemption in section 33(1)(b) of FOISA.

The Applicant's submissions about the public interest

41. The Applicant submitted that the public interest favoured disclosure of the withheld information because the Authority is spending public money and there should be openness and transparency regarding how public funds are spent.

The Commissioner's view

42. The Commissioner has considered the submissions from both parties, together with the withheld information, which comprises the flat rate fee incurred by the Authority for referring insurance claims to Gallagher Bassett.
43. Recognising the general public interest in the disclosure of information held by Scottish public authorities, the Commissioner acknowledges that disclosure, in this case, would provide clarity on the costs involved, and satisfy the public interest in transparency and accountability, by allowing effective scrutiny of whether the public authority is obtaining value for money.

44. However, the Commissioner is also of the view that the disclosure of the information in question would give competitors a valuable insight into the specific rates charged by Gallagher Bassett, for the referral of individual claims, thus giving them unfair commercial advantage.
45. The Commissioner considers that there is no public interest in placing a particular organisation at a commercial disadvantage, simply as a result of having entered into a commercial contract with a public body to provide a service, as a result of a formal tender process, where disclosure of certain financial information has a consequential impact on its ability to continue to participate fairly in a competitive market.
46. The Commissioner has already acknowledged the submissions made by the Authority in support of maintaining the exemption, and has already concluded that disclosure of the withheld information in this case would, or would be likely to, prejudice the commercial interests of the insurers, the claims handler and the Authority. That would not be in the public interest.
47. Having balanced the public interest for and against disclosure, the Commissioner concludes that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure in respect of the withheld information under consideration here.
48. The Commissioner therefore finds that the Authority was entitled to apply section 33(1)(b) of FOISA to the withheld information.

Decision

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

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner

25th April 2024

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.

...

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

2 Effect of exemptions

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

...

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

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

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

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -

- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and

- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).