

## IP/IT

December 2009

### Freedom of Information & PFI/PPP

#### Withholding the Financial Model

##### Background

In our Alert of September 2009 ([Alert!](#)) we looked at the significant decision between the Scottish Information Commissioner ("**SIC**") and the Scottish Prison Service. In this decision, the SIC ruled that Unison Scotland should receive the financial model relating to the PFI contract for Kilmarnock Prison, which Unison had requested pursuant to The Freedom of Information (Scotland) Act 2002 ("**FOISA**").

In a decision published recently ([Decision](#)), the SIC agreed with the decision of South Lanarkshire Council ("**the Council**") to withhold a financial model relating to the Council's Public Private Partnership schools project (the "**Project**"). Following a review of the Council's decision, the SIC found that the information was properly withheld from the applicant, on the basis that it was information supplied by a third party and disclosing it would constitute an actionable breach of confidence. In other words, the SIC upheld the application of the exemption to disclosure, found in Section 36(2) of FOISA.

##### The Financial Model

The financial model is an essential part of a PFI/PPP project and a finely-tuned financial model can mean the difference between winning and losing a bid. The financial model contains inputs, outputs and assumptions of the contractor which are then used to forecast results. The financial model (which often takes the form of a spreadsheet of complex formulae) enables returns to investors to be calculated, as well as debt cover ratios.

##### The Findings of the Scottish Information Commissioner

Although the applicant had previously received a copy of the Project Agreement and Schedules (the "**Contract**") between the Council and InspirED (the successful bidder) relative to the Project, he had requested the financial model for the purpose of

calculating the unitary charge and unitary charge adjustment referred to in the Schedule to the Contract. The Council submitted that the financial model had been developed for InspirED by CICB World Markets plc ("**CICB**") who had invested considerable time, expense and effort in its creation. The Council also submitted that the financial model was the copyright of CIBC, who had developed, refined and checked it over a period in excess of 10 years. Thus, the Council argued that the financial model was exempt under Section 36(2) of FOISA.

##### An Actionable Breach of Confidence? – The "Test"

Significantly, the SIC considered that the two-stage test (to be met for the application of the exemption in Section 36(2)) was satisfied. This two-stage test is as follows:

- (1) the information must have been obtained by a Scottish public authority from another person/party; and
- (2) disclosure of the information would constitute an actionable breach of confidence, i.e.:
  - (i) the information has the necessary quality of confidence;
  - (ii) the Scottish public authority received the information in circumstances which imposed an obligation of confidence; and
  - (iii) unauthorised disclosure would be to the detriment of the person who communicated the information.

Of significance to part (1) of the above test was that the Council did not consider itself to have played any role in the preparation of the financial model, particularly in relation to the formulae and information about the cost projections of InspirED. The financial model had been developed for InspirED by CICB. This fact was particularly important given the earlier decision of the SIC in Decision

088/2007 (the **“VisitScotland decision”**): [“VisitScotland”](#). In the VisitScotland decision the SIC did not accept that the terms of a contract (which had been *negotiated* between VisitScotland and a third party) had been “provided by a third party” for the purposes of part (1) of the above test. However, unlike the Council in the recent decision, VisitScotland had not argued that any part of the contract had been supplied by a party which itself was *not* a party to the contract. Thus, in the recent decision, the fact that the financial model had been developed independently by CICB was very relevant.

Of significance to part (2)(i) of the above test was that the request was for the financial model “as updated from time to time” and thus the information retained commercial significance at the time of the request. This appears to be a very important factor – especially when considering the SIC’s reasoning in the earlier decision with the Scottish Prison Service. In that earlier decision, the SIC considered to be extremely relevant the passage of time between the creation of the financial model and the date of Unison’s request – where the financial model was created approximately nine years prior to Unison’s request.

Of significance to part (2)(iii) of the above test were the arguments of the Council that the financial model could provide a competitor with the means to replicate and/or produce a more competitive model, or be used to gain a competitive commercial advantage, which would prejudice substantially the commercial interests of InspirED and its shareholder organisations. Further, the Council submitted that information within the model, such as investors’ Internal Rate of Return (**“IRR”**), was commercially sensitive and could be used by InspirED’s competitors to gain a competitive advantage by undercutting the IRR, thus prejudicing its commercial interests substantially. Notably, the SIC recognised that the financial model consists of very lengthy detailed computer spreadsheets and details of assumptions, calculations, methodologies and projections applicable over the term of the Contract.

Finally, the law of confidence recognises that, in certain circumstances, the obligation of confidence can be outweighed by the competing public interest arguments for disclosing the information. However, on balance, the SIC noted the strong public interest in the maintenance of confidences. Also relevant was the fact that the unitary charge, which represents the level of public expenditure on the Project, was already available to the public by the Council.

### Comment

This is an interesting decision in which the financial model was successfully withheld. Noteworthy is the fact that, although the information was requested approximately two years after the Contract was concluded, the SIC recognised that the financial model was still a “living document” and, as such, part of the operation of the Contract; thus the information concerned had retained commercial significance at the time of the request.

The application of the exemption within Section 36(2) (which can be very difficult to invoke successfully) is noteworthy and welcomed. The SIC’s distinction with the facts in the earlier VisitScotland decision is also of significance.

Further, as the SIC applied the exemption found within Section 36(2), it was not necessary for him to consider the exemption found within Section 33(1)(b) of FOISA – that disclosure would prejudice substantially a party’s commercial interests. This exemption may equally apply to a request for the financial model. Therefore, usefully, this decision is without prejudice to the future application by Scottish public authorities of the exemption within Section 33(1)(b).

Although each request for information must be considered on its own facts and circumstances (having regard, for example, to the timing of the request and the extent to which the information has been negotiated/created by a party to the contract), this decision is a welcomed one and one which will give some comfort to those bidding in PFI/PPP contracts.

This Bulletin is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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If you would like any further information on this Bulletin, or any other IP/IT or Projects issues, please call the person at D&W with whom you normally liaise, or one of the following specialists:

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