

Decision Notice

Decision 061/2017: Mr William Chisholm and Scottish Borders Council

Reports to the Council about a waste treatment contract with New Earth Solutions Group

Reference No: 201601354

Decision Date: 28 April 2017



Scottish Information
Commissioner

Summary

Scottish Borders Council was asked for reports laid before committee meetings which referred to its waste treatment contract with New Earth Solutions Group. The Council disclosed six reports, but redacted information which, in its view, would prejudice substantially the confidentiality of commercial or industrial information if disclosed. The Commissioner did not agree and ordered the Council to disclose the information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available); 13(b) and (c) (Refusal to make information available)

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. In February 2015, Scottish Borders Council (the Council) announced that it was not proceeding with a 24-year contract (worth £80 million) for an integrated waste management facility at Easter Langlee near Galashiels, which it had agreed with New Earth Solutions Group Ltd (NESG).
2. On 20 May 2016, Mr Chisholm made a request for information to the Council. Amongst other requests not the subject of this decision, he asked for the reports laid before any Council committee meeting (including the executive committee) in 2011, 2012 and 2013 which referred to the waste treatment contract with NESG.
3. On 9 June 2016, NESG was purchased by DM OPCO Ltd (DM OPCO)¹, two days after going into administration.
4. The Council responded to Mr Chisholm’s request on 1 July 2016. It disclosed redacted versions of six reports. It withheld information from these reports under the exception in regulation 10(5)(e) of the EIRs, as it considered disclosure of this information would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information.
5. On 3 July 2016, Mr Chisholm emailed the Council requesting a review of its decision. He considered that the information should have not been withheld.
6. The Council notified Mr Chisholm of the outcome of its review on 28 July 2016. It upheld its initial response without modification.
7. On 1 August 2016, Mr Chisholm applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it

¹ <http://www.recyclingwasteworld.co.uk/news/financial-structuring-specialist-buys-new-earth-companies/142089/>

applies to the enforcement of FOISA, subject to specified modifications. Mr Chisholm told the Commissioner that two of the redacted reports were duplicates of the information the Council had disclosed to him over a year ago. Given that NESG had gone into administration, he did not consider the information should be withheld.

8. In October 2016, Panda Green (a company within the Panda Group) acquired NESG from DM OPCO.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr Chisholm made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
10. On 4 August 2016, the Council was notified in writing that Mr Chisholm had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Chisholm. The Council provided the information and the case was allocated to an investigating officer.
11. 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 Mr Chisholm's application and answer specific questions. These questions focused on the searches which the Council had carried out to identify information covered by the request; the exception in regulation 10(5)(e) of the EIRs; and the status of the NESG waste contract. The Council responded on 4 October 2016.
12. The investigating officer found that some of the withheld information had been published on the internet. The Council was asked to comment on this.
13. On 30 November 2016, the Council disclosed further information from the six reports to Mr Chisholm. It did not explain why it had now decided to disclose this information when it had previously considered the information to be excepted from disclosure.
14. On 16 January 2017, the Council was asked, given that NESG had gone into administration, how disclosure of the information would, or would be likely to, prejudice substantially the successors to NESG. The Council provided further submissions on this point.
15. Mr Chisholm has confirmed he is not interested in the personal information that was withheld from the reports. Accordingly, the Commissioner has not considered whether the Council was correct to withhold this information.

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 Chisholm and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

17. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) to (c) of the definition of "environmental information"). The information relates to discussions about the

implementation of a contract which would have resulted in the construction of a new waste treatment facility.

18. Mr Chisholm has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

Information falling in scope

19. The Council provided the Commissioner with copies of six documents, which it considered to fall within the scope of Mr Chisholm's request. Redacted versions of these documents were disclosed to Mr Chisholm by the Council when it initially responded to his request. Further information from the six documents was disclosed by the Council to Mr Chisholm during the investigation.
20. Only personal information has been withheld from the version of document 4 disclosed to Mr Chisholm during the investigation. As he has confirmed that he does not want the personal information in the reports, this document will not be considered further by the Commissioner.
21. The Commissioner received no submissions to explain why the Council disclosed information during her investigation which it had previously withheld. As a result, she must conclude that this information was wrongly withheld when the Council responded to Mr Chisholm's request and that the Council failed to comply with regulation 5(1) of the EIRs in this respect.

Regulation 10(5)(e) - prejudice to confidentiality of commercial or industrial information

22. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
23. As with all of the exceptions contained in regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
24. The Council applied this exception to all of the information withheld from Mr Chisholm.
25. *The Aarhus Convention: An Implementation Guide [Second Edition 2013]*², which offers guidance on the interpretation of the Convention from which the EIRs are derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
26. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - (i) Is the information commercial or industrial in nature?

² http://www.unece.org/env/pp/implementation_guide.html

- (ii) Does a legally binding duty of confidence exist in relation to the information?
- (iii) Is the information publicly available?
- (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

(i) *Is the information commercial or industrial in nature?*

27. The Council submitted that the information withheld from Mr Chisholm was commercial or industrial in nature: it related to commercially sensitive issues, both in terms of financial arrangements and in respect of the technology which NESG intended to implement at Easter Langlee.
28. The Council also referred the Commissioner to the submissions it had made in previous, related cases.^{3,4,5}
29. The Commissioner accepts that the withheld information is commercial or industrial in nature for the purposes of regulation 10(5)(e) of the EIRs.

(ii) *Does a legally binding duty of confidence exist?*

30. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
31. Mr Chisholm argued that any previous requirement on the Council to maintain confidentiality in relation to NESG fell away when the company went into administration.
32. In response, the Council noted that the contract with NESG specifically recognises that:
the obligations contained therein will enure for the benefit of both the parties to the contract and their successors.
33. The Council submitted that, although NESG had gone into administration, DM OPCO had succeeded to the contractual rights and obligations of NESG. In turn, Panda Green was now successor to those rights. The information had been withheld on the basis of ongoing legal duties of confidentiality to NESG, and now to its successor. The legal right to confidentiality continued in force beyond the life of the contract with NESG. The Commissioner is satisfied that, in the circumstances, it is still necessary to consider the wording of the contract, despite NESG having gone into administration.
34. Clause 50.1 of the contract between the Council and NESG defines confidential information as:
any and all information of a confidential nature relating to the other Party (whether before or after the Commencement Date), either in writing, orally or in any other form, directly from or pursuant to discussions with the other Party...
35. In its submissions in previous, related cases (to which the Council has referred in relation to the current case), the Council stated that the withheld information was provided to the Council by NESG. It argued that the withheld information was confidential as it related to the financial health of NESG and its ability to meet a regulatory requirement of the project.

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201501199.aspx>

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501162.aspx>

⁵ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501461.aspx>

36. Clause 50.2 of the contract states that, except in specified circumstances as set out in the clause (none of which are relevant here):

Each Party shall hold in confidence any Confidential Information.

37. Clause 50.3 goes on to list other situations where the obligation to maintain confidentiality shall not apply. One of these (clause 50.3.3), states that:

... the obligation to maintain confidentiality does not apply to Confidential Information to the extent that any person is required to disclose such Confidential Information by Law (other than under [FOISA] or the [EIRs], disclosure pursuant to which is governed by Clause 50.3.7. and Clause 51.5) or any regulatory or government authority (but only to that extent).

38. Clause 51.5 states that:

The Council may disclose pursuant to a Request for Information or otherwise publish pursuant to [FOISA] or the [EIRs] any Information (whether Confidential Information, Commercially Sensitive Information or otherwise) which it considers, at its absolute discretion, that:

51.5.1 it is required in terms of [FOISA] or the [EIRs] to so disclose or publish; or

51.5.2 it would otherwise be in the public interest to so disclose or publish,

provided that in so doing the Council acts in accordance with the guidance set out in the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004], including by consulting with [NESG] prior to any such disclosure or other publication, if and to the extent necessary to comply with that guidance.

39. The Council took the view that clause 50 of the contract requires it to keep confidential the information which it has withheld from Mr Chisholm. It acknowledged that clause 50.3.3 (as read with clause 51.5) recognises the existence of FOISA and the EIRs, but took the view that this reference related to:

the entire scope of those legislative interventions. In other words, where an exemption applies, the Council should seek to preserve the integrity of the confidentiality agreement and act in accordance with that exemption.

40. As with *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*⁶, the Commissioner does not accept that the existence of a confidentiality agreement will, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look beyond the confidentiality clause and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.

41. Even if the duty of confidence does stand, the Commissioner must go on to consider the other tests in regulation 10(5)(e) before determining whether information should be withheld or made available. It is not enough that the information is subject to a duty of confidence.

⁶ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

42. Clause 51.5 of the contract underlines this approach. It recognises that, regardless of the agreement entered into by the Council and NESG, there will be times when information must be disclosed by the Council in order to allow it to comply with its statutory duties under the EIRs (or, as appropriate, FOISA).
43. The Commissioner will now consider whether a duty of confidence is in fact owed by the Council.
44. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
 - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already;
 - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
 - (iii) there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

Necessary quality of confidence

45. To have the necessary quality of confidence, the withheld information should not be generally accessible.
46. In this case, the Commissioner notes that some of the information is in the public domain, either published on websites, or through disclosure under the EIRs. The Commissioner does not accept that this information has the necessary quality of confidence. Therefore she has found that this information was wrongly withheld under regulation 10(5)(e) of the EIRs.
47. With respect to the remaining withheld information, she accepts that it has the necessary quality of confidence, in that it has not been placed in the public domain and is not generally accessible.
48. She will now go on to consider whether there is an obligation for the Council to maintain confidentiality.

Obligation to maintain confidentiality

49. For a duty of confidence to be owed under the common law, the Council must have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
50. The Council provided copies of correspondence with NESG and its successor, which confirm that the confidentiality clause in the contract is still binding.
51. Having considered the information which the Council has withheld in this case, the Commissioner is not persuaded that it is all covered by the confidentiality agreement in the contract. The Council has not explained clearly why the information withheld from the five reports is covered by the confidentiality clause. It has not explained why the information is commercially sensitive, and has only provided general arguments in relation to the harm that would, or would be likely to be caused by disclosure. The Commissioner notes that the Council has not provided NESG or its successors with copies or details of the actual information which, it asserts, is covered by the confidentiality agreement in the contract.

52. Even where the withheld information might fall within the scope of the confidentiality agreement between the Council and NESG, the Commissioner is not satisfied that this is enough to show that the Council is still bound by an obligation to maintain confidentiality. The Council has not shown why it would be prevented from disclosing any part of the withheld information by an existing duty of confidence under common law.
53. The Commissioner therefore does not accept that the Council has shown that it has an obligation to maintain confidentiality, in relation to the information withheld from the five reports under consideration. This means that the exception in regulation 10(5)(e) cannot apply.
54. Given that Mr Chisholm has made a separate application involving the contract with NESG which will consider the same arguments from the Council (but a much wider set of information), the Commissioner will go on to consider the third requirement for a duty of confidence to be owed under common law.

Unauthorised disclosure would cause detriment

55. The third requirement, for a duty of confidence to be owed under common law, is that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it. Detriment need only be potential for the test to be met.
56. The Council noted that disclosing the withheld information would place it in the public domain. The information was considered to be of market value. It could, in its view, be used not only for the advancement and exploitation of the innovative technology, but for future contract bids within the waste industry.
57. The Council told the Commissioner that it is impossible to determine when specific harm would occur. However, as soon as the information is placed in the public domain, it would strip the owner of the information of the benefit it is entitled to as owner. Therefore, to that extent, the harm would be immediate.
58. The documents from which information has been redacted range in date from 24 March 2011 to 25 October 2012. The Council has not explained why the information withheld from these documents is still sensitive (and therefore capable of causing detriment, if disclosed). The Council's arguments focus on the detriment which the successor company to NESG would suffer, if technological information was placed in the public domain, allowing competitors to benefit. It has not addressed the fact that most of the information withheld from the five reports does not consist of technical data.
59. The Commissioner considers it reasonable to assume that the sensitivity of information relating to NESG is likely to have reduced substantially in the intervening period, given that the contract with NESG was terminated in February 2015 and NESG has gone into administration and been bought out twice. Not all the withheld information relates directly to NESG, and the Council has not explained why information relating to its own matters is still sensitive.
60. Having considered the redactions made by the Council, it is unclear what approach it took in deciding what information should be withheld from Mr Chisholm. In three of the documents, some financial figures have been withheld, while others have been disclosed. The Council has not explained why one set of figures is more sensitive than another set which has been disclosed. It has not specified what harm that would follow disclosure of this information.

61. In any case investigated by the Commissioner, it is made clear to the public authority that it is responsible for providing submissions to support its position and that, where information has been withheld, these submissions must explain why the exception (or exemption) applies to the specific information. In investigating this case, the Commissioner's staff spent many hours considering the information withheld from Mr Chisholm and trying to establish why, in the Council's view, it was considered to be sensitive, especially where similar information had been disclosed.
62. The majority of the withheld information refers to the contracting process and various costs, terms and termination clauses that would apply, as presented to Council committee members for information and discussion.
63. There is comparatively little information in the five reports about the financial status of NESG or details of the technology it was developing. The Commissioner notes that very detailed technical information about the waste recycling solution proposed by NESG has been published online.^{7,8,9,10} By comparison, she finds that the small amount of technical description in the five withheld reports is of a general, non-specific nature.
64. In earlier decisions relating to the Council's decision to withhold information relating to NESG, the Commissioner accepted that disclosure of information about the financial or technical aspects of the project would be likely to be detrimental to NESG. These decisions were made before NESG went into administration. By the time Mr Chisholm made his request for review, NESG had been purchased by DM OPCO. The Commissioner accepts that DM OPCO (and now Panda Green) has succeeded to the rights and obligations in the contract which NESG had with the Council. However, despite being asked, the Council has not explained in specific terms what detriment would come to NESG's successors, if the information in the five reports was now disclosed.
65. In the circumstances, the Commissioner cannot accept that disclosure of the information would cause detriment.
66. This means that the Council has failed to satisfy the Commissioner that the exception in regulation 10(5)(e) applies. For the reason set out above, the Commissioner will, despite this finding, consider the remaining tests in regulation 10(5)(e).

(iii) Is the information publicly available?

67. As already noted, some of the withheld information had already been disclosed by the Council, in other documents provided to Mr Chisholm. Additionally, during the investigation, it was discovered that SEPA had published a substantial volume of information relating to the technical processes which NESG hoped to implement at Easter Langlee. The Council was informed of this.
68. The Commissioner finds that the information which was publicly available when the Council responded to Mr Chisholm's request and request for review, is not excepted from disclosure under regulation 10(5)(e).

⁷ <http://www.newearthsolutions.co.uk/wp-content/uploads/2011/12/Energy-boards-booklet-web.pdf>

⁸ https://www.sepa.org.uk/media/131308/easter_langlee_ppc_variation_application.pdf

⁹

http://apps.sepa.org.uk/disclosurelog/?ctl00_ContentPlaceHolder1_Disclosurelog1_RadGrid1ChangePage=32_20#

¹⁰ <https://eplanning.scotborders.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=ML1DHZNT08G00>

(iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

69. As noted above, for the exception in regulation 10(5)(e) to apply, disclosure of the information must cause, or be likely to cause, substantial prejudice: in other words, the prejudice must be of real and demonstrable significance.

The Council's submissions

70. The Council commented that the Commissioner had accepted previously that NESG would be likely to suffer substantial harm if the information under consideration was to be disclosed into the public domain. The Council referred the Commissioner to the arguments it had provided in those earlier cases.

71. The Council submitted that the purchase of NESG by DM OPCO in June 2016 (and, subsequently, by Panda Green) did not change the circumstances of the case, as they are the successors to the entire contractual rights and obligations of NESG.

72. The Council took the view that the withheld information, in relation to financial arrangements, but more particularly in respect of the technology developed by NESG, remains as commercially sensitive and as confidential as ever. Specifically, the Council commented that the technological advances are not in the public domain. It argued that it is the commercial right of the successors of NESG to be able to exploit these technologies and to obtain the benefits which would accrue from that. They would suffer severe detriment if the technical information was placed in the public domain, allowing competitors to access that data.

The Commissioner's view

73. In its submissions, the Council refers to the technical innovations which had become the property of NESG's successors, and anticipated that disclosure of such information would result in significant harm to their economic interests if disclosed. The Commissioner accepts that there is a legitimate economic interest associated with the technology developed by NESG, but she must consider whether disclosure of the information withheld from the five reports would, or would be likely to, cause substantial harm to this legitimate economic interest.

74. When NESG was seeking approval from SEPA for the waste treatment project, it entered into detailed discussions with SEPA to ensure that the project would comply with strict environmental requirements. The application from NESG (including details of the proposed technology) and some of the correspondence has been published by SEPA. The Commissioner has concluded that the limited technical information withheld by the Council in the five reports is of a much more general nature than that provided to and published by SEPA.

75. The Commissioner notes again that much of the information withheld from the five reports relates not to NESG and its technological or financial assets, but to the Council's own financial or administrative matters.

76. The Commissioner's decision is based on the circumstances that existed at the date of the review response, which in this instance is 28 July 2016. The withheld information was by then several years old, and related to a project which had been cancelled, and (where it relates directly to NESG) concerns a company which had gone into administration. The Council has provided no arguments to persuade the Commissioner that the information retains the same sensitivity as it did in 2011/12 or that, at the time the Council reviewed its response to Mr Chisholm's request, it was capable of causing significant harm to the

economic interests of the company which had bought out NESG. The Council has provided no submission which indicates that NESG's successors were asked to consider the specific information withheld from the five reports, or expressed any view beyond confirming that (at least in relation to DM OPCO – Panda Green appear not to have been asked) that they considered the confidentiality clause in the contract remained binding upon the Council.

77. In relation to the technological processes which NESG intended to implement at Easter Langlee, the Commissioner has found that there is far more information in the public domain than the Council has acknowledged (or was perhaps aware of). It is generally accepted that technology changes and develops over time and what was once considered innovative and secret often becomes standard and widely known as time passes. While this may not yet be the case with the technology that NESG was developing, the Commissioner finds there is reason to question whether all details of that technology are now as secret as they were in 2011/12.
78. With respect to the financial information being withheld, the Council has not shown why disclosure of figures from 2011/12 would cause significant harm to the legitimate economic interest of any party.
79. As noted above, the Commissioner has already concluded that the exception in regulation 10(5)(e) cannot apply to the information withheld by the Council. Even if she accepted that a relevant duty of confidence exists, she would still find that the Council has not demonstrated to her satisfaction that disclosure would, or would be likely to, cause substantial harm to the legitimate economic interest in question.
80. As the exception does not apply, the Commissioner is not required to go on to consider the public interest test in regulation 10(1)(b). However, for the reason set out above, the Commissioner has considered whether the public interest in disclosure would have been outweighed by the public interest in maintaining the exception in regulation 10(5)(e), had it been found to apply.

The public interest test

Mr Chisholm's submissions

81. Mr Chisholm provided reasons why information relating to the project with NESG should be disclosed, in the public interest.
82. In relation to the current case, Mr Chisholm submitted that it was in the public interest for people to know "why their elected members agreed a radical Deed of Variation on a contract which cost millions of pounds before it was abandoned."
83. In his earlier applications to the Commissioner, Mr Chisholm has explained why he considered that disclosure of information relating to the project would be in the public interest. He commented that, when the Council entered into the contract with NESG, taxpayers were told it was a £65 million contract over 24 years which would divert 80% of waste from landfill, provide heat and power for hundreds of homes in Galashiels, and make the Council the leading waste management authority in Scotland. Instead, the Council had written off £2.4 million of public money on a project which could not be funded and did not have the necessary technology to guarantee success. Mr Chisholm told the Commissioner that the Council is now at, or near, the bottom of the Scottish recycling league.

84. Mr Chisholm's other comments on the public interest in disclosure of information relating to the Council's contract with NESG can be found in the Commissioner's earlier decisions.^{11,12}

The Council's submissions

85. The Council also repeated the arguments it had made in relation to Mr Chisholm's previous applications to the Commissioner. It acknowledged that there is a public interest in the disclosure of environmental information in respect of the project with NESG, given that "a significant sum" of public money was expended in pursuing the project, and that the sum so spent had to be written off as the project did not complete. (The Council added that its conduct through the project had been audited by external auditors and found to be robust.)
86. The Council submitted that there is significant public interest in a local authority "being able to maintain the confidentiality of commercial partners as it enters into significant and long term contracts". It referred to previous decisions of the Commissioner, in which she acknowledged that, should there be a real risk that confidential information would find its way into the public domain, commercial partners would be likely to be less frank in the provision of sensitive commercial information to that local authority. This, in turn, would mean the local authority would not have the ability to exercise scrutiny or due process.
87. The Council argued that there is a significant public interest in a local authority being able to have full sight of all relevant commercial information as, only in this way, will that authority be able to properly assess and carry out all necessary due diligence to protect the public purse on an ongoing basis. It argued that public interest in maintaining this ability outweighs the public interest in disclosing the information in this case.

The Commissioner's conclusions

88. The Commissioner recognises that the Council made a significant investment in the integrated waste management project in the belief that it would resolve some of the waste disposal issues in the Scottish Borders Council area. The Council and NESG expended considerable effort, time and money to ensure the project was a success. If the project had completed successfully, it would have increased the Council's household recycling performance by an estimated 2.6%¹³. However, the contract was terminated on 19 February 2015, leading to the Council having to write off at least £2.4 million.
89. The Commissioner accepts that there is significant public interest in understanding what steps the Council took to ensure that the project was robust. There is a strong public interest in understanding the measures that the Council had taken in order to limit its financial exposure in a project which had been on-going for four years and had involved substantial sums of public money.
90. In the Commissioner's view, disclosure of the withheld information would serve the public interest in informing the public about the actions and decisions taken by the Council, the basis for those actions and decisions, and the reasons why the project failed. As noted above, the project had involved many years of work, and substantial sums of public money.

¹¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501162.aspx>

¹² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501461.aspx>

¹³

https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj418vv76DSAhVBHxoKHcqHD50QFggaMAA&url=https%3A%2F%2Fwww.scotborders.gov.uk%2Fdownload%2Fdownloads%2Fid%2F2350%2Fintegrated_waste_management_strategy_2013_-_2025.pdf&usg=AFQjCNG0jCtcw7JzGC3AjUen84edslbOwA&bvm=bv.147448319,d.d2s

The integrated waste management project would have had a direct effect on the residents in the Council area.

91. The Commissioner has given weight to the particular circumstances of this case, which incurred the Council investing substantial time, money and resources, in a project that ultimately did not come to fruition. In these circumstances, the Commissioner finds it is legitimate for the public to seek to understand what happened, and in the public interest for this understanding to be as complete as possible.
92. The Commissioner accepts that there will be cases in which it is in the public interest for post-contract discussions and project discussions to be kept confidential. However, in the circumstances of this case, the Commissioner considers that the public interest in understanding the Council's role in the project is stronger, for the reasons outlined above.
93. Having considered all of the representations made by Mr Chisholm and the Council, the Commissioner has concluded that, even if she had found that disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information in line with the exception in regulation 10(5)(e) of the EIRs, she would have found, in all the circumstances, that the public interest in making the information available outweighed that in maintaining the exception.

Regulation 13 - Refusal to make information available

94. The Council's response to Mr Chisholm's request did not give him any specific reason why disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information.
95. Regulation 13(b) of the EIRs requires a Scottish public authority to specify the reasons for refusing a request. Regulation 13(c) requires the authority to state the basis on which any exception relied upon applies.
96. The Council was asked for its submissions on this apparent failure. It stated that Mr Chisholm "is fully aware of the concept of commercially sensitive information and how that exemption applies. He has had the benefit of seeing the exemption applied on many occasions and indeed seeing many decisions of the Scottish Information Commissioner regarding that very exemption in respect of this very project". The Council did not accept that it had failed to comply with regulation 13 of the EIRs, stating that it had specified the reason for withholding information (commercially sensitive).
97. The Commissioner does not consider that the Council's response provided Mr Chisholm with the level of detail required for him to understand why the exception applied to the information covered by his request. Accordingly, she has concluded that the Council failed to comply with the requirements of regulation 13(b) and (c) of the EIRs in responding to Mr Chisholm's request.

Decision

The Commissioner finds that Scottish Borders Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Chisholm.

The Commissioner found that the Council:

- failed to comply with regulation 5(1) of the EIRs, by failing to make available to Mr Chisholm information which it later disclosed during the investigation
- was not entitled to withhold information under regulation 10(5)(e) of the EIRs
- failed to comply with regulation 13(b) and (c) of the EIRs, by failing to provide Mr Chisholm with an explanation of its decision to rely on regulation 10(5)(e) when refusing his request.

The Commissioner requires the Council to disclose the withheld information in documents 1, 2, 3, 5 and 6, by **Monday, 12 June 2017**.

Appeal

Should either Mr Chisholm 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

28 April 2017

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;

...

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