

# Decision Notice

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**Decision 100/2017: Mr William Chisholm and Scottish Borders Council**

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**Waste treatment contract with New Earth Solutions Group**

Reference No: 201601353

Decision Date: 28 June 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for a range of information regarding a waste treatment contract with New Earth Solutions Group (NESG).

The Council disclosed information from a large number of documents, but withheld 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

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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)

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

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

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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. He referred to a letter he had received from the Council on 16 May 2016 in connection with a previous information request, and asked for the following information:
  - (i) the reports listed in the letter, namely:
    - Nevin Associates Ltd Financial Evaluation Report (22 November 2010)
    - SLR – Tender Evaluation (Technical) Report (November 2010)
    - Brodies LLP – Report on Evaluation of Contractual Responses (22 November 2010)
    - Willis Ltd – Insurance Commentary prepared for Scottish Borders Council (19 October 2010)
  - (ii) the private Council report of 25 October 2012 to which the letter referred.
  - (iii) any documents that formed part of the monthly updates to which the letter of 16 May 2016 referred (i.e. NESG updates to the Council] including any reports, emails, minutes of meetings). Mr Chisholm specified that he was seeking information produced between November 2012 and December 2013.

- (iv) any documents that formed part of the monthly updates referred to in the letter, including any reports, emails, minutes of meetings etc. produced between January 2014 and February 2015.
3. On 9 June 2016, NESG was purchased by DM OPCO Ltd. (DM OPCO)<sup>1</sup>, two days after going into administration.
  4. The Council responded to Mr Chisholm's request on 29 June 2016. It apologised for the delay in responding to the request. It provided Mr Chisholm with a CD containing information covered by his request. It withheld information in these documents under the exception in regulation 10(5)(e) of the EIRs (confidentiality of commercial or industrial information) and under regulation 11 of the EIRs (personal data).
  5. On 1 July 2016, Mr Chisholm emailed the Council requesting a review of its decision. He considered that the information should have not been withheld, especially as NESG had gone into administration. He complained that there was no index to the documents, and that they were not in chronological order. He commented that an initial reading gave the impression that he had been given a random selection of documents, not all of which had any bearing on his request. He stated that, given the sheer volume of documents, it was not possible to formulate a detailed case for review.
  6. The Council notified Mr Chisholm of the outcome of its review on 28 July 2016. It provided Mr Chisholm with an index of files, but 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 FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Chisholm considered that, as NESG had gone into administration, the information should not be withheld.
  8. In October 2016, Panda Green (a company within the Panda Group) acquired NESG from DM OPCO.

## Investigation

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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 5 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 exception in regulation 10(5)(e) of the EIRs and the status of the NESG waste contract. The Council responded on 5 October 2016. Its submissions largely duplicated those made in

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

relation to another case (now the subject of *Decision 061/2017: Mr William Chisholm and Scottish Borders Council*<sup>2</sup>).

12. Having considered the documents that fell within scope of Mr Chisholm's request (calculated by the Commissioner to be 201 in total), it was not clear to the Commissioner what information had been withheld or disclosed from some of the documents. In a series of discussions with the investigating officer, the Council clarified what information had been withheld.
13. The investigating officer found that some of the withheld information had been published on the internet by another Scottish public authority. On 7 November 2016, the Council was asked to comment on this. It did not respond directly to this request. It disclosed some parts of the information it had withheld in the case considered in *Decision 061/2017*, but did not disclose any additional information covered by the request under consideration here.
14. As noted above, NESG went into administration in June 2016. On 16 January 2017, the Council was asked how disclosure of the withheld information would, or would be likely to, cause substantial prejudice to the successors of NESG. The Council provided further submissions on this point.
15. Mr Chisholm confirmed that he did not require the personal data that was withheld from the documents. Accordingly, the Commissioner has not considered whether the Council was correct to withhold this information under regulation 11(2) of the EIRs.

## **Commissioner's analysis and findings**

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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 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 Commissioner notes that 115 of the 201 documents containing withheld information can be excluded from consideration in this decision. In some, only personal data was withheld, which Mr Chisholm does not require. In others, no information was withheld; the information has been published elsewhere; or the document is a duplicate of another (withheld) document. This leaves information in 86 documents to be considered in the Commissioner's decision. These documents range in date from November 2010 to November 2014, with the majority of documents created in 2013.

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201601354.aspx>

20. The withheld information includes 24 monthly reports from NESG to the Council, other correspondence between NESG and the Council, tender evaluations and correspondence from third parties including from the Scottish Environment Protection Agency (SEPA).

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

21. 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.
22. As with all exceptions under 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)).
23. The Council applied this exception to all of the information withheld from Mr Chisholm and under consideration in this decision.
24. *The Aarhus Convention: An Implementation Guide [Second Edition 2013]*<sup>3</sup>, 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.
25. 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?
  - (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?*
26. 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.
27. The Council also referred the Commissioner to the submissions it had made in previous, related cases<sup>4,5,6</sup>

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<sup>3</sup> [http://www.unece.org/env/pp/implementation\\_guide.html](http://www.unece.org/env/pp/implementation_guide.html)

<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201501199.aspx>

<sup>5</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501162.aspx>

<sup>6</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501461.aspx>

28. In summary, the Council considered that the withheld information was industrial as it contained details about the technology processes proposed by NESG, the level of technological testing and proving which had taken place, and the extent to which technological solutions had not yet been achieved. The Council stated that information which details the project, and where it had failed, and why it should not be pursued, is information of high commercial sensitivity.
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.
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*<sup>7</sup>, 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.

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.

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<sup>7</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

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 documents originally withheld by the Council contain information which is in the public domain, either because it has been published online, or because it has already been disclosed under the EIRs. This information is generally accessible.
47. In its submissions of 5 October 2016, the Council stated that disclosure would cause detriment to the unsuccessful bidder in the procurement process. However, the Commissioner notes that information already disclosed by the Council (the tender evaluation technical report) includes details of the unsuccessful bidder's tender. The Commissioner concludes that information about the unsuccessful tender (including the identity of the tenderer) is information which is generally accessible.
48. The Commissioner does not accept that the information described above has the necessary quality of confidence. Therefore, this information was wrongly withheld under regulation 10(5)(e) of the EIRs.
49. With respect to the remaining withheld information, the Commissioner 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.
50. She will now go on to consider whether there is an obligation for the Council to maintain confidentiality.

#### Obligation to maintain confidentiality

51. 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.
52. The Council provided copies of correspondence with NESG and its successor, which confirm that the confidentiality clause in the contract is still binding.
53. The Commissioner notes that the information being withheld came not only from NESG, but from other parties too. The Council has not referred to these other parties in its submissions.
54. 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 parts of the documents containing withheld information are covered by the confidentiality clause. It has not explained why the information is commercially sensitive, and has provided only 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.

55. 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.
56. 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 remaining documents under consideration. This means that the exception in regulation 10(5)(e) cannot apply.
57. The withheld information in this case includes details of an innovative technical process which NESG intended to use in the Easter Langlee waste disposal plant. The Commissioner acknowledges that the confidentiality agreement between the Council and NESG is likely to have been drawn up with this kind of information in mind. Therefore, for completeness, 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

58. 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.
59. The Council stated that disclosing the withheld information would place it in the public domain. The information was considered to be of market value. It could be used not only for the advancement and exploitation of the innovative technology, but for future contract bids within the waste industry.
60. The Council submitted that it is impossible to determine a timescale as to when specific harm would occur, if the information was disclosed. However, as soon as it was placed in the public domain, it would strip the owner of the benefit to which they were entitled, as owner. Therefore, to that extent, the harm would be immediate.
61. It is not clear what approach the Council took in deciding which information should be withheld from Mr Chisholm. The Council has not addressed or acknowledged the fact that most of the withheld information consists of technical terms, or relates to technical processes which were described in detail in NESG's PPC [Pollution Prevention and Control] permit variation application to SEPA<sup>8</sup>. There also appears to be little consistency about what has or has not been withheld. For example, information about the time taken to test the waste processing system has been withheld throughout, except in one document where it was disclosed.

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<sup>8</sup> [https://www.sepa.org.uk/media/131308/easter\\_langlee\\_ppc\\_variation\\_application.pdf](https://www.sepa.org.uk/media/131308/easter_langlee_ppc_variation_application.pdf)

62. The Council has not explained why the information withheld from these documents was still sensitive at the time of Mr Chisholm's request (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. As noted, the arguments put forward by the Council were not detailed, and did not take into account the information already in the public domain.
63. It is reasonable to assume that the sensitivity of information relating to NESG is likely to have reduced in the intervening period, given that the contract with NESG was terminated in February 2015, since when NESG has gone into administration and been sold twice. Accordingly, the likelihood that information relating to NESG is capable of causing detriment, if disclosed, has also reduced.
64. 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, or why this information is excepted from disclosure under regulation 10(5)(e).
65. 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, where information has been withheld, these submissions must explain why the exception or exemption applies to the specific withheld information. In investigating this case, the Commissioner's staff spent several weeks reviewing 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.
66. The Commissioner has concluded that there is comparatively little information in the withheld documents about the financial status of NESG or details of the technology it was developing which has not already been published. She notes that very detailed technical information about the waste recycling solution proposed by NESG has been published online<sup>9,10,11,12</sup>. By comparison, she finds that the technical descriptions in the withheld documents relate more specifically to the development and testing of the waste recycling system, as opposed to innovative technical processes that have not been made public.
67. In earlier decisions relating to the Council's decision to withhold information relating to NESG, the Commissioner has 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 at the time when NESG had not gone 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, the Council has not explained in specific terms what detriment would come to NESG's successors, if the information withheld in this case was now disclosed.
68. In the circumstances, the Commissioner cannot accept that disclosure of the information would cause significant detriment to NESG's successors (or any other party).

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<sup>9</sup> <http://www.newearthsolutions.co.uk/wp-content/uploads/2011/12/Energy-boards-booklet-web.pdf>

<sup>10</sup> [https://www.sepa.org.uk/media/131308/easter\\_langlee\\_ppc\\_variation\\_application.pdf](https://www.sepa.org.uk/media/131308/easter_langlee_ppc_variation_application.pdf)

<sup>11</sup> [http://apps.sepa.org.uk/disclosurelog/?ctl00\\_ContentPlaceholder1\\_Disclosurelog1\\_RadGrid1ChangePage=32\\_20#](http://apps.sepa.org.uk/disclosurelog/?ctl00_ContentPlaceholder1_Disclosurelog1_RadGrid1ChangePage=32_20#)

<sup>12</sup> <https://eplanning.scotborders.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=ML1DHZNT08G00>

69. 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?*

70. 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.

71. The Commissioner finds that 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).

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

72. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.

#### The Council's submissions

73. 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.

74. 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 these companies succeeded to the entire contractual rights and obligations of NESG.

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

#### The Commissioner's view

76. The Commissioner must be satisfied that disclosure would, or would be likely to, cause harm which is real, actual and of significant substance to a legitimate economic interest.

77. In its submissions, the Council refers to the technical innovations which had become the property of DM OPCO, and anticipated that disclosure of such information would result in significant harm to DM OPCO's economic interests if disclosed. (These arguments would now apply to the successor company, Panda Green.)

78. 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 with NESG has been published by SEPA. The Commissioner has concluded that the technical information withheld by the Council is of a much more general nature than that provided to and published by SEPA.

79. 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 a few 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 2014, 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 DM OPCO was asked to consider the specific information withheld from the documents, or expressed any view beyond confirming that it considered the confidentiality clause in the contract remained binding upon the Council.
80. 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 2014.
81. With respect to the financial information being withheld, the Council has not shown why disclosure of financial figures from 2013 would cause significant harm to the legitimate economic interest of any party.
82. 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.
83. 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*

84. Mr Chisholm provided reasons why information relating to the project with NESG should be disclosed in the public interest.
85. In relation to the current case, Mr Chisholm argued that there was an overwhelming case for release of all information relating to the Council's dealings with NESG, given the loss of at least £2.4 million that resulted from the collapse of the project. Mr Chisholm argued that the Council should have been aware that NESG was on the brink of insolvency when a Council delegation carried out a "due diligence" visit to NESG's headquarters in October 2014. He

did not accept that the level of redaction in the documents provided to him was justified, in these circumstances.

86. In his earlier applications to the Commissioner, Mr Chisholm has given other reasons why 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 per cent 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.
87. 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 <sup>13,14</sup>.

#### *The Council's submissions*

88. 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.)
89. 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 it was 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.
90. 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*

91. 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%<sup>15</sup>. However, the contract was terminated on 19 February 2015, leading to the Council having to write off at least £2.4 million.

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<sup>13</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501162.aspx>

<sup>14</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501461.aspx>

<sup>15</sup>

<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj4>

92. The Commissioner accepts that there is significant public interest in understanding what steps the Council had taken 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.
93. 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. The integrated waste management project would have had a direct effect on the residents in the Council area.
94. 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.
95. 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.
96. 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**

97. 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.
98. 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.
99. 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).

100. 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 actual 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

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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:

- 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, **Monday, 14 August 2017**.

## Appeal

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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

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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.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**28 June 2017**

## Appendix 1: Relevant statutory provisions

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### 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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