

Decision Notice



Decision 116/2011 Daniel Harvey and Transport Scotland

Four weekly reports and quarterly Review Panel meetings relating to the Edinburgh Tram Project

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Daniel Harvey requested from Transport Scotland reports, minutes and correspondence relating to the Edinburgh Tram Project (the Tram Project). Transport Scotland responded by providing some information to Mr Harvey, but withheld the remainder under the exceptions in regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs. Following a review, Mr Harvey remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Transport Scotland had dealt with Mr Harvey's request for information in accordance with the EIRs, by applying the exceptions in regulation 10(4)(e) and regulation 10(5)(e) to the withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b), (c) and (e) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2), (4)(e) and (5)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 26 April 2010, Mr Harvey emailed Transport Scotland requesting the following information:
 - the monthly reports on the Tram Project submitted by tie [the company responsible for delivering that project] to, and kept on file by, Transport Scotland between September 2008 and the present; and
 - the minutes of, and any correspondence relating to, the Tram Project quarterly review panel meetings attended by Transport Scotland between September 2008 and the present.
2. Transport Scotland emailed Mr Harvey on 28 April 2010, advising him that, in order to provide a response reasonably quickly, it would be helpful if he could provide more detail about the information he was seeking.



3. Mr Harvey responded by email on 29 April 2010, advising Transport Scotland that he was not interested in any specific piece of information, but wished to enhance his general understanding of the way the Tram Project had developed over the previous year. He indicated that he was particularly interested in the interactions between Transport Scotland and the City of Edinburgh Council (the Council).
4. Transport Scotland again emailed Mr Harvey on 24 May 2010, advising him that, as it considered the information under consideration to be environmental information, it was dealing with his request in terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs) rather than the Freedom of Information (Scotland) Act 2002 (FOISA). Transport Scotland also indicated that, as it considered the volume and complexity of the information requested made it impracticable for the request to be complied with within 20 working days, it wished to extend the period for compliance in terms of regulation 7(1) of the EIRs.
5. Transport Scotland emailed Mr Harvey on 23 June 2010, providing its response to his request. It provided some information to Mr Harvey (in the form of redacted copies of the four-weekly Period Progress Reports (the PPRs), but advised him that it considered the remainder of the requested information (including both the information redacted within the PPRs, and all information relating to the quarterly review panel meetings) to be excepted from disclosure in terms of regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs.
6. On 24 July 2010, Mr Harvey wrote to Transport Scotland requesting a review of its decision. In particular, Mr Harvey considered that the information should be disclosed as the meetings concerned took place between public sector bodies, the scheme involved a large sum of public money and it was in the public interest for an understanding of the difficulties surrounding the Tram Project to be gained.
7. Transport Scotland notified Mr Harvey of the outcome of its review on 25 August 2010. Transport Scotland disclosed an additional email, which it explained had been inadvertently missed from its initial response, but upheld its decision to withhold the remaining information under the exceptions in regulations 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs.
8. On 21 September 2010, Mr Harvey wrote to the Commissioner, stating that he was dissatisfied with the outcome of Transport Scotland's review and applying 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 certain specified modifications.
9. The application was validated by establishing that Mr Harvey had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

10. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 5 October 2010 that an application had been received from Mr Harvey and were asked to provide the Commissioner with any information withheld from him. The Ministers, on behalf of Transport Scotland, responded with the information requested and the case was then allocated to an investigating officer. Subsequent references to communications with Transport Scotland should be read as relating to communications with the Ministers acting on Transport Scotland's behalf.
11. The investigating officer subsequently contacted Transport Scotland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. Transport Scotland was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested, with particular reference to regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs.
12. In its response, Transport Scotland stated that it wished to apply the exemption in section 39(2) of FOISA to the withheld information and provided submissions on its application of the exceptions in regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs.
13. The investigating officer also contacted Mr Harvey during the investigation seeking his submissions on the matters to be considered in the case. Mr Harvey's submissions, along with those of Transport Scotland, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Harvey and Transport Scotland and is satisfied that no matter of relevance has been overlooked.

Handling under the EIRs

15. In this case, Transport Scotland has considered Mr Harvey's request as one seeking environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.



16. Having had regard to the subject matter of Mr Harvey's request (information concerning the progress of a major infrastructure project) and the withheld information, the Commissioner acknowledges that it concerns measures and activities affecting, or likely to affect, the state of the elements of the environment (in particular land and natural sites) and factors (in particular noise and emissions), which would in turn affect, or be likely to affect, the elements of the environment. Furthermore, the information relates to financial assumptions to be used within the framework of these measures and activities. The Commissioner therefore concurs with Transport Scotland that the information falls within definitions (c) and (e) of environmental information in regulation 2(1) of the EIRs.
17. Therefore, the Commissioner considers that Transport Scotland correctly identified Mr Harvey's request as one covered by the EIRs.

Section 39(2) of FOISA – environmental information

18. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In this case the Commissioner finds that Transport Scotland was entitled to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
19. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(4)(e)

20. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
21. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
22. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication. However, the regulation does not expand upon what is meant by internal communications.



23. In this case, the Commissioner has considered the guidance contained in *The Aarhus Convention: An Implementation Guide*¹ which states:
- "The public authority may refuse to disclose... materials 'concerning internal communications,' but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties "customary practice" may apply only to those materials covered by evidence of established norms of administrative practice."*
24. Transport Scotland applied this exception to all of the information contained in the quarterly review notes, which contain records of quarterly meetings attended by the Review Panel itself (comprising representatives of Transport Scotland) and by representatives of the Council and tie.
25. Transport Scotland explained that the administrative and legal status of the quarterly review reports was established by their requirement by the grant agreement between Transport Scotland (and the Scottish Government) and the Council. Transport Scotland stated that representatives of tie are only present at the meetings by invitation of the Council (which owns tie). Transport Scotland also pointed out that there is no formal relationship between it and tie.
26. The Commissioner notes that, while three distinct legal personas were involved in these meetings, the reports carry a disclaimer that the views contained in the notes are those of the Transport Scotland Review Panel and not of the Council or tie (who are simply in attendance). The Commissioner is aware that the information contained in the notes is, however, shared with the Council and tie. This is confirmed in the minutes of two of the meetings where it is noted that the minutes of previous meetings have been agreed by all present, including representatives of the Council and tie.
27. The Commissioner's opinion is that, on balance, this information can be regarded as internal communications for the purposes of the exception. He notes that the information is created by Transport Scotland and its purpose is to be circulated internally to provide advice to wider management within Transport Scotland and the Scottish Government. The Commissioner also notes that the information contains a disclaimer stating that the views contained therein are those of the Review Panel only. As such, neither the Council nor tie can oblige Transport Scotland to amend the notes of the meetings, nor could they refuse to approve them.
28. The Commissioner's view is that the information is shared with the Council and tie in order to allow them to see, in good faith, what has been communicated with Transport Scotland and the Scottish Government regarding the Tram Project and what has been said by the Review Panel to the Council and tie at the quarterly meetings. In the Commissioner's opinion, the fact that these notes are shared with those in attendance at the Review Panel meetings does not cease to make them internal communications when in the possession of Transport Scotland.

¹ <http://www.unece.org/env/pp/acig.pdf>



29. The Commissioner considers that the sharing of the information with the Council and tie does not detract from the fact that the information is created and used by Transport Scotland for the purposes of internal management reporting within Transport Scotland. The Commissioner does not consider that the involvement of a third party in the discussions leading to the creation of the information means that the information ceased being an internal communication for the purposes of the exception.
30. The Commissioner is therefore satisfied that the quarterly review notes can properly be considered to be internal communications for the purposes of the exception. He therefore concludes that the exception was properly applied to this information.

Consideration of the public interest test

31. Having upheld the use of the exception contained within regulation 10(4)(e) to the information contained in the quarterly review notes, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. As noted above, the test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
32. In its submissions to the Commissioner, Transport Scotland noted that the Council and tie are currently involved in sensitive negotiations aimed at resolving an ongoing contractual dispute concerning the Tram Project and that these negotiations are likely to be ongoing for some months.
33. Whilst acknowledging that there is rightly a high level of public interest surrounding the Tram Project, Transport Scotland submitted that there is a need to maintain a balance of responsibility between the rights of the public to such information and the danger and potential for financial damage that would result from the release of the information.
34. Transport Scotland submitted, therefore, that it believed the public interest in maintaining the exception outweighed that in disclosure of the information at the relevant time on the basis that disclosure would be likely jeopardise the Council's financial position until either negotiations or mediation were concluded.
35. In his submissions, Mr Harvey put forward a number of reasons why he believed the public interest would be best served by putting the withheld information in the public domain. In particular, he argued that maintaining the exception was not in the public interest as this would mean that the public continued to be kept ignorant of the details of the contractual dispute. As a consequence, the public would be unlikely to be in a position to comment on what should be done to take the Tram Project forward or to lobby councillors or other representatives until after decisions about the Tram Project had been taken.



36. Mr Harvey submitted that it was unreasonable for the information to be withheld indefinitely and that disclosure of the information might provide an alternative approach to resolution. He also argued that there was already a contract in place for the Tram Project with no bidding round or similar in progress where a requirement for commercial information to be kept confidential might be understandable.
37. Mr Harvey considered that, ultimately, this case was about whether the public should have the right to scrutinise management of the Tram Project and the conduct of the contractors. He argued that, if the information is withheld, the public will continue to be denied access to basic information about the Tram Project.
38. In considering the public interest test, the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in internal debate and decision making.
39. He also recognises that since the Tram Project is a large infrastructure involving significant public funds, there is a real and substantial public interest in understanding how that project has been managed. However, this must be balanced against any detriment to the public interest as a consequence of disclosure.
40. In all the circumstances of this case and having considered the withheld environmental information along with all relevant submissions, the Commissioner concludes, on balance, that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers that Transport Scotland was justified in withholding the information to which it applied this exception.
41. It is the Commissioner's view that the disclosure of this information may harm the candour with which comments can be made and discussions about the progress of the Tram Project can take place in future. He also considers that release of the information may harm or prejudice ongoing negotiations on a matter of commercial sensitivity and its release therefore would be detrimental to the public interest.
42. The Commissioner therefore concludes that Transport Scotland complied with the EIRs by withholding under regulation 10(4)(e) the information contained in the quarterly review notes.

Regulation 10(5)(e)

43. 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.
44. In this case, Transport Scotland applied the exception in regulation 10(5)(e) to the remaining withheld information i.e. the information redacted from the PPRs. Transport Scotland argued that the disclosure of the information would cause substantial harm to the economic interests.



45. The Aarhus Convention Implementation Guide notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information: it must, the guidance states, 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.
46. The Commissioner has taken this guidance into consideration when considering this exception, for example in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*. His view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

47. As indicated above, the information withheld under this exception is contained within the PPRs. These reports are compiled by tie and submitted to Transport Scotland. The withheld information comprises (inter alia) updates on the Infraco contract between tie and Bilfinger Berger UK Limited and Siemens plc. (this contract concerns the delivery of the infrastructure for the Tram Project), updates on cost estimates and financial milestones, updates on time schedules and milestones and reviews of the project risk register.
48. Transport Scotland argued that there was a clear commercial nature to this information on the basis that it was particularly relevant to issues of cost and programmes of works and contained information on commercial strategies and reported problems with progress.
49. Having considered all of Transport Scotland's representations and the nature of the information under consideration, the Commissioner is satisfied that the information withheld under this exception is commercial or industrial in nature as it comprises information on tie's business strategy, financial circumstances, relationship with its contractors and progress on the Infraco contract.

Does a legally binding duty of confidence exist in relation to the information?

50. Transport Scotland has stated that the information is provided by tie exclusively to Transport Scotland in line with the requirements of a grant agreement which exists between the Ministers and the Council in respect of the continued Scottish Government funding of the Tram Project. It submitted that the information was provided to Transport Scotland in the expectation that it would not be disclosed as it is clearly of a confidential and commercial nature.



51. In this case, the Commissioner is satisfied that all of the withheld information under consideration has been received under an implied obligation to maintain confidentiality. The Commissioner considers such an expectation to be normal practice in circumstances of this kind.

Is the information publicly available?

52. The Commissioner is satisfied that the redacted information will only have been viewed by a limited number of individuals and is not in the public domain.

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

53. As noted above, the term “legitimate economic interest” is not defined within the EIRs. The interest in question will however be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
54. In its submissions, Transport Scotland argued that disclosure of the information would cause substantial harm to tie which is presently embroiled in a contractual dispute with some of its contractors. Transport Scotland explained that extensive efforts have already been made by tie to maintain commercial advantage throughout the length of the dispute in order to protect a publicly funded project from excessive claims and charges from the contractors. It considered that this has proved successful to date in that claims and disputes were being settled at a rate which has substantially reduced the impact on public funds and that, consequently, premature release of the information would be of obvious benefit to the contractors. Transport Scotland argued that disclosure and publication of the information may jeopardise tie’s financial position until negotiations with the contractors are concluded.
55. The Commissioner has carefully considered Transport Scotland’s arguments and taken into account the wider context of tie’s relationship with its contractors, which includes disputes over the nature and extent of the work done under contract. Having done so, he is satisfied that the information contains highly sensitive financial, legal and performance information, the disclosure of which would impede tie’s ability to conclude the ongoing contractual mediation and negotiations with its contractors thereby causing substantial prejudice to tie’s legitimate economic interests.
56. Accordingly, the Commissioner is satisfied that Transport Scotland was entitled to apply the exception in regulation 10(5)(e) to the withheld information.



Consideration of the public interest test

57. Having upheld the use of the exception contained within regulation 10(5)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. As noted above, the test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
58. The submissions received from both Transport Scotland and Mr Harvey with regard to the public interest test are summarised in paragraphs 32 to 37 above. Neither party put forward separate arguments in relation to the public interest associated with the different exceptions under consideration.
59. Having considered these submissions in relation to the information found to be excepted from disclosure under regulation 10(5)(e), the Commissioner again acknowledges that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In this case, it would contribute to the public's understanding of a matter of substantial public interest and may allow the public to make a judgement as to the progress being made by tie and whether tie is obtaining best value in its negotiations with its contractors.
60. The Commissioner also accepts that there are relevant and valid arguments in this case which suggest that the public interest in making the information available is outweighed by the public interest in maintaining the exception. These include:
- the general public interest in confidences being maintained;
 - the likelihood of commercial damage being caused to tie through disclosure of the information under consideration;
 - the likelihood that disclosure would have a detrimental effect on the ability of the parties to the Infraco contract around their contractual obligations and liabilities to work effectively together on an ongoing basis; and
 - the possibility that by disclosing this information, the entire project may be placed in jeopardy.
61. Having carefully weighed up the arguments, the Commissioner has concluded that, in all the circumstances of the case, the public interest in making this information available in this instance is outweighed by the public interest in maintaining the exception. The Commissioner is mindful that the work on the infrastructure of the Tram Project remains unfinished and that there are sensitive ongoing negotiations between tie and its contractors.
62. The Commissioner therefore concludes that Transport Scotland was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the redacted information contained in the PPRs. Therefore, the Commissioner has concluded that Transport Scotland complied with the EIRs in withholding this information.



63. The information withheld by Transport Scotland under this exception was also withheld under regulation 10(5)(f) of the EIRs. However, given that the Commissioner has found the information to be entirely excepted under regulation 10(5)(e) of the EIRs, he does not consider it necessary to go on to consider the other exception cited by Transport Scotland.

DECISION

The Commissioner finds that Transport Scotland complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Harvey. He finds that Transport Scotland correctly relied upon regulation 10(4)(e) and 10(5)(e) of the EIRs to withhold the requested information and thereby complied with regulation 5(1).

Appeal

Should either Mr Harvey or Transport Scotland wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
10 June 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

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

2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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;
- ...
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

- (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;

...