

Decision Notice



Decision 136/2013 Mr David Jamieson and City of Edinburgh Council

Minute of Variation – tram project

Reference No: 201300707
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www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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Summary

On 4 September 2012, Mr Jamieson requested from City of Edinburgh Council (the Council) details of a Minute of Variation relating to the Edinburgh Tram Project. The Council disclosed the Minute of Variation, having redacted information which it considered to be commercially confidential. Following an investigation, the Commissioner found that the Council was not entitled to withhold the redacted information and required its release.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “environmental information” – paragraphs (a) to (c)) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) 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 4 September 2012, following correspondence in relation to an earlier request for information, Mr Jamieson wrote to the Council requesting information which included a copy of a Minute of Variation referred to in the previous response. The Minute of Variation amended an existing agreement relating to the Edinburgh Tram Project.
2. On 9 October 2012, Mr Jamieson wrote to the Council, requesting a review on the basis that no response had been received.
3. The Council notified Mr Jamieson of the outcome of its review on 1 November 2012. The Council provided Mr Jamieson with the information requested. It explained that certain information had been redacted from the Minute of Variation in terms of regulation 10(5)(e) of the EIRs.
4. On 14 March 2013, Mr Jamieson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council'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.

Investigation

5. On 5 April 2013, the Council was notified in writing that an application had been received from Mr Jamieson and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was allocated to an investigating officer.
6. The investigating officer subsequently contacted the Council, 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. In particular, it was asked to justify its reliance on regulation 10(5)(e) of the EIRs.
7. During the investigation the Council disclosed the title of the redacted section of the Minute to Mr Jamieson. Mr Jamieson confirmed that he wished the remaining redacted information to be disclosed.
8. The Council then provided submissions in support of its reliance on section 39(2) of FOISA and regulation 10(5)(e) of the EIRs.



Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered the withheld information and the relevant submissions made to her by both Mr Jamieson and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

10. It is clear from the Council's correspondence with both Mr Jamieson and the Commissioner that it dealt with Mr Jamieson's request on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns development in connection with the Edinburgh Tram project and the Commissioner is satisfied in the circumstances that it falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraph (c) of that definition.

Section 39(2) of FOISA – environmental information

11. The exemption in section 39(2) of FOISA provides, in effect, 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. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that this is environmental information.
12. 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 in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 10(5)(e) of the EIRs

13. The Council submitted that the information was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
14. 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.
15. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception 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, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).



16. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention) 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.
17. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*² and the Commissioner does not intend to repeat that consideration in detail here. There, the Commissioner concluded 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?

18. It is apparent that the information relates to an agreement with a large commercial operator regarding development affecting that operator's land, and as such the Commissioner is satisfied that the information is commercial in nature.

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

19. The Council has presented the Commissioner with no specific submissions as to why a legally binding duty of confidence should exist in relation to the withheld information, other than to say that the Minute of Variation gives rise to an implied obligation of confidentiality between the parties through their completion and signature of the document.
20. The Commissioner points out that those entering into contracts with Scottish public authorities are well aware that information held may be subject to disclosure in terms of either FOISA or the EIRs. She does not believe that confidentiality can be said to be implicit in contracts of this nature involving Scottish public authorities, given the existence of FOISA and the EIRs and, in addition, the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs ("the Section 60 Code"). In the circumstances, she is not satisfied from the Council's submissions that an implied obligation of confidentiality exists (or has existed) in relation to the redacted information.

¹ <http://www.unece.org/env/pp/acig.pdf> (the version in force at the time the Council dealt with this request)

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.asp>



Is the information publicly available?

21. The Council submitted that the redacted information was not currently in the public domain. It was known only to the relevant parties, and restricted to a select number of individuals within those organisations who required to be aware of the information in order to carry out their roles.
22. Whilst noting that all other elements of the Minute of Variation have been disclosed, the Commissioner accepts that the withheld information was not publicly available when the Council dealt with Mr Jamieson's request for information, or when it dealt with his request for review (or, indeed, is it so available now). In other words, that information retained the essential quality of confidence.

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

23. 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, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
24. The Council submitted that disclosure would impact on its potential negotiating position of the Council when seeking to develop this area and in obtaining competitive bids from the contractors it engaged to carry out the necessary work. This would impact on achieving the best financial outcome for the citizens of Edinburgh.
25. In support of its position, the Council argued that the release of this information **could** severely compromise its commercial position at a later date. It claimed that disclosure **may** provide advantages to contractors it sought to engage in developing the area. The Council further added that disclosure of the information would also **potentially** create a number of speculative bids by developers, weakening the opportunities for the Council to achieve the best outcome for the citizens of Edinburgh. **[Commissioner's emphasis]**
26. The Council noted that the redacted information was time-sensitive and that its release might be possible in the future, when it would not result in a negative impact on the Council's negotiating position.
27. The Commissioner notes that the Council's submissions are more general in nature rather than specific to the information in question. The language used by the Council in its submissions is speculative, as exemplified by the use of the words '**could**', '**may**' and '**potentially**' as emphasised above. The Commissioner is not satisfied in the circumstances that the Council has fully explained how the relevant harm necessary would be brought about by disclosure of the information.



28. As mentioned above, the Commissioner has to be satisfied that the harm to the economic interest in question caused by disclosure is real, actual and of significant substance. She has to be satisfied that the disclosure would prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
29. Having taken all of the Council's submissions into consideration, with the information actually withheld, the Commissioner is not persuaded that disclosure of the information would, or would be likely to, result in the harm the Council has referred to. The Council has referred to the commercial sensitivity of the information and described the harm, but has given no further indication as to why this should be considered an actual or likely consequence of disclosure. In the circumstances, having considered the redacted information (and even accepting that it is time-specific), it is not evident to the Commissioner that disclosure of the information would necessarily have caused, or have been likely to cause, substantial prejudice to a legitimate economic interest.
30. Given that the Commissioner is not satisfied that a legally binding duty of confidence exists in relation to the information or that disclosure of the information would cause, or would be likely to cause, substantial harm to a legitimate economic interest, she must conclude that the exception in regulation 10(5)(e) does not apply.
31. The Commissioner therefore requires the Council to provide Mr Jamieson with the information redacted from the Minute of Variation.

DECISION

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Jamieson. She finds that the Council was not entitled to withhold the redacted information under regulation 10(5)(e) of the EIRs, and in doing so failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide Mr Jamieson with a copy of the redacted information by 26 August 2013.

Decision 136/2013
Mr David Jamieson
and City of Edinburgh Council



Appeal

Should either Mr Jamieson or City of Edinburgh Council 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.

Margaret Keyse
Head of Enforcement
11 July 2013



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 –

...

- (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;

...

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;

...