

Decision Notice



Decision 138/2012 Mr David Cruickshanks and Transport Scotland

Procurement of a photography contract

Reference No: 201200519

Decision Date: 17 August 2012

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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



Summary

Mr Cruickshanks asked Transport Scotland to provide information relating to the short list criteria and weighting for a tendering bid relating to the Forth Bridge Replacement Crossing. Transport Scotland advised Mr Cruickshanks that it did not hold the information he was seeking.

Following an investigation, the Commissioner was satisfied that Transport Scotland did not hold any information falling within the scope of Mr Cruickshanks' request.

Relevant statutory provisions

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) (definitions (a), (b) and (c) of "environmental information") and 2(2) (Interpretation); 5(1) and 2(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (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 19 December 2011, Mr Cruickshanks wrote to Transport Scotland requesting information in relation to the procurement of a contract for event photography for the Forth Replacement Crossing contract and, in particular:
 - the criteria/weighting required for those selected for the short list
 - the schedule questions and pricing methodology used in awarding the contract
 - how the long list of 104 notes of interest was reduced to a short list, and the size of the shortlist
 - evidence that a dual stage process was followed in the procurement.



The contract of interest to Mr Cruickshanks was awarded by Morrison Construction (a member of the consortium awarded the main contract to design and build the Forth Replacement Crossing), after being advertised on the Procurement Contracts Scotland website.

2. Transport Scotland responded on 19 January 2012, having considered the request as one seeking environmental information under the EIRs. It advised Mr Cruickshanks that it did not hold the information he was seeking, and so this was excepted from disclosure under regulation 10(4)(a) of the EIRs.
3. Transport Scotland added that the awarding of subcontracts by the Forth Replacement Crossing contractors is a matter for each contractor. It added that the contractors are required to advertise any subcontracts on the Public Contracts Scotland Portal, but the management of their procurement process is for the contractor, and the details of considered subcontractors and the selection process are not shared with Transport Scotland.
4. On 31 January 2012, Mr Cruickshanks wrote to Transport Scotland requesting a review of its decision. In particular, he expressed concerns by the tendering process followed in relation to the relevant contract, and requested that Transport Scotland ask the private contractor for the information to answer his questions.
5. Transport Scotland notified Mr Cruickshanks of the outcome of its review on 29 February 2012, upholding its original decision.
6. On 8 March 2012, Mr Cruickshanks 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.
7. The application was validated by establishing that Mr Cruickshanks 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. The case was then allocated to an investigating officer.

Investigation

8. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, on 20 April 2012, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr Cruickshanks and invited to comment on the application, as required by section 49(3)(a) of FOISA.



9. The Ministers were asked to provide details of searches undertaken by Transport Scotland to establish whether it held any of the information requested by Mr Cruickshanks. They were also asked to provide a copy of the contract between Transport Scotland and Morrison Construction, and highlight any clauses laying out obligations in relation to the appointment of subcontractors.
10. The Ministers responded to this request on 14 May 2012. Subsequent references to contact with or submissions from Transport Scotland are references to contact with or submissions made by the Ministers on behalf of Transport Scotland.
11. Mr Cruickshanks was also asked by the investigating officer for his comments on the matters under consideration, which he provided.
12. The relevant submissions received from both Transport Scotland and Mr Cruickshanks will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Cruickshanks and Transport Scotland and is satisfied that no matter of relevance has been overlooked.

Handling of the request under the EIRs

14. In this case, Transport Scotland responded to Mr Cruickshanks' request as one seeking environmental information as defined in the EIRs. It accordingly considered the request under the provisions of the EIRs and applied the exemption in section 39(2) of FOISA.
15. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
16. Mr Cruickshanks' request relates to the award of a subcontract (for event photography) that forms part of a major infrastructure project which that will have a significant effect on the state of the elements of the environment (land, water and the built environment) and the factors that affect these elements (such as noise, waste and emissions).
17. Given the subject matter of the request, and the fact that the contract of interest to Mr Cruickshank forms part of the overall project to design and build the Forth Replacement Crossing, the Commissioner agrees with Transport Scotland that the information requested would, if held, fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition (the relevant parts are set out in the Appendix below).



18. As she is satisfied that Transport Scotland was correct to conclude that any information falling within the scope of the request would be environmental information, she is also satisfied that the information would be exempt under section 39(2) of FOISA.
19. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner 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 disclosure of the information under FOISA.
20. Consequently, the Commissioner accepts that Transport Scotland was correct to withhold the information under section 39(2) of FOISA and deal with the request under the EIRs. She has therefore proceeded to consider this case in what follows solely in terms of the EIRs.

Is the requested information held by Transport Scotland?

21. Transport Scotland has indicated that it does not hold any of the information requested by Mr Cruickshanks (and did not at the time when the request was received), and so it was applying the exception in regulation 10(4)(a) of the EIRs to that information.
22. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. However, by virtue of regulation 2(2), information is "held" for the purposes of the EIRs if it is held on a public authority's behalf by another person.
23. In its submissions, Transport Scotland advised the Commissioner that in searching for any information held, the request was discussed with its Forth Replacement Crossing Project Director to understand what information had been supplied to Transport Scotland regarding the subcontracting process by the consortium delivering the project to design and build the bridge. Transport Scotland advised that the Project Director confirmed that no information had been requested from or been supplied voluntarily by the contractor.
24. Following this, Transport Scotland submitted, the document control system (Business Collaborator, a web-based project collaboration system) which logs all correspondence from the contractor to Transport Scotland for any relevant topics relating to procurement information was also checked for relevant information. In addition, a search of the system using specific keywords was undertaken, but no documents or information relevant to Mr Cruickshanks' request was found.
25. Transport Scotland advised that each month the consortium supplies it with a list of sub-contractors and suppliers, but that no information is supplied to Transport Scotland on the form of the sub-contract procurement process.



26. Transport Scotland explained that the only requirement it places on the consortium regarding those sub-contracts which are not regarded as “Key Sub-contractors and Suppliers” is that all sub-contracts not already identified in the tender should be advertised on the Procurement Contracts Scotland website. Transport Scotland highlighted the sections of the main contract which make clear that the sub-contract of interest to Mr Cruickshanks is not classed as a “Key Sub-contract”.
27. Therefore, Transport Scotland submitted, it does not hold, and is not required to hold, the type of information requested by Mr Cruickshanks as that information would be held by Morrison Construction.
28. During the investigation, Transport Scotland was asked questions to inform the Commissioner’s consideration of whether Morrison Construction held the information requested by Mr Cruickshanks on its behalf.
29. The Commissioner considered the contract between Transport Scotland and the consortium to establish whether Transport Scotland had particular rights or responsibilities with respect to the sub-contracting process, and whether there were provisions requiring contractors to provide information about the procurement of subcontracts to Transport Scotland.
30. Having reviewed the main contract, the Commissioner is satisfied that there are no contractual provisions suggesting that the information relating to this subcontract is held by the contractor on behalf of Transport Scotland, or that it would be under an obligation to provide it to Transport Scotland upon request.
31. The Commissioner is aware that Mr Cruickshanks believes that there should be an obligation on Transport Scotland to obtain the information he is requesting about the sub-contracting process from the Morrison Construction. She must emphasise, however, that there are no provisions within the EIRs which compel a public authority to obtain information to fulfil a response to a request. Under the EIRs, a public authority is only required to make available recorded information that it holds, subject to any exceptions or other provisions limiting the general right of access.
32. Having considered all the submissions made by Mr Cruickshanks and Transport Scotland, the Commissioner is satisfied that Transport Scotland carried out adequate and proportionate searches to ascertain whether it held any information falling within the scope of Mr Cruickshanks’ request. Taking these submissions into account, along with the terms of the contract between Transport Scotland and Morrison Construction, she accepts that Transport Scotland does not hold (either directly, or as a result of Morrison Construction holding it on Transport Scotland’s behalf) any recorded information which would fulfil Mr Cruickshanks’ request.
33. Consequently, the Commissioner is satisfied that the information is subject to the exception in regulation 10(4)(a) of the EIRs .



The Public Interest Test

34. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. In this case, the Commissioner is satisfied that Transport Scotland does not (and did not at the time of Mr Cruickshanks' request) hold information regarding the award of the sub-contract. Consequently, she does not consider there to be any conceivable public interest in requiring that further information be made available.
35. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs. Given this conclusion, she is satisfied that Transport Scotland was entitled to refuse Mr Cruickshanks' request under regulation 10(4)(a) of the EIRs.

DECISION

The Commissioner finds that Transport Scotland complied with the Environmental Information (Scotland) Regulations 2004 in responding to Mr Cruickshanks' request for information.

Appeal

Should either Mr Cruickshanks 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
17 August 2012



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;

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or
- (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

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
 - (a) it does not hold that information when an applicant's request is received;

...