

# Decision Notice



Decision 243/2011 Ms Suzanne Kelly and Aberdeen City Council

Property and land transactions

Reference No: 201100822

Decision Date: 9 December 2011

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**Kevin Dunion**

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## Summary

Ms Suzanne Kelly asked Aberdeen City Council (the Council) for various pieces of information regarding property and land transactions between the Council and companies associated with Stewart Milne. The Council responded by giving Ms Kelly a notice, in line with section 17(1) of the Freedom of Information (Scotland) Act (FOISA), that it did not hold certain of the information requested. The Council refused to respond to part of part (a) of her request on the basis that the cost of doing so would exceed £600 (and so section 12(1) of FOISA applied). In relation to part (b) of the request, the Council disclosed some information, but it withheld other information on the grounds that it was exempt from disclosure under section 33(1)(b) of FOISA. Following a review, Ms Kelly remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Commissioner took the view that the information which the Council had withheld under section 33(1)(b) of FOISA was environmental information, and asked the Council to consider whether this part of Ms Kelly's request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council agreed that this information was environmental information and indicated that it now considered the exception in regulation 10(5)(e) of the EIRs to be applicable to that information. Some of the information that the Council had previously withheld was disclosed to Ms Kelly during the course of the investigation.

Following an investigation, the Commissioner found that the Council had failed to deal with Ms Kelly's request for information in accordance with Part 1 of FOISA by claiming that it was not obliged to comply with part of part (a) of Ms Kelly's request by virtue of section 12(1) of FOISA. The Commissioner also found, in failing to provide Ms Kelly with reasonable advice and assistance, the Council failed to comply with section 15(1) of FOISA.

The Commissioner found that the Council should have dealt with part (b) of Ms Kelly's request under the EIRs and that, in initially failing to do so; it had failed to comply with the EIRs. The Commissioner also found that the Council breached the EIRs by withholding certain information within scope of part (b) of the request. The Commissioner found that this information was not excepted from disclosure under regulation 10(5)(e) of the EIRs, and so the Council breached regulation 5(1).

The Commissioner also found that the Council breached sections 10(1) and 21(1) in FOISA and regulations 5 and 13 of the EIRs in not responding to Ms Kelly's request and requirement for review within the statutory timescales.

The Commissioner requires the Council to take the action detailed in the decision section.



## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 12(1) and (4) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 21(1) (Review by Scottish public authority) and 39(2) (Health, safety and the environment)

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

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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

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1. On 9 December 2010, Ms Kelly wrote to the Council requesting the following information (emphasis added):
  - a. A list of property (including but not limited to land, buildings, building services, material goods, etc) Aberdeen City ***sold to*** the Stewart Milne Group, Stewart Milne Homes and/or any associated companies, and/or directly to Mr Stewart Milne.

Ms Kelly indicated that the list should show property name/description, date of sale, sale price, minutes/reports of the City Council approving/recommending the sale, and if available the market value at the time of sale.
  - b. A list of property or services (including but not limited to land, buildings, building services, material goods, etc), the Stewart Milne Group, Stewart Milne Homes and/or any associated companies, and/or directly to Mr Stewart Milne ***sold, managed or built for*** Aberdeen City Council.

Ms Kelly again indicated that the list should show property name/description, date of sale, price, reports/minutes of the City Council recommending the purchase, and if available the market value at the time of sale.
2. On 23 December 2010, the Council asked Ms Kelly to clarify her request by confirming which companies should be considered to be associated with Stewart Milne. The Council also asked Ms Kelly to confirm the time period (financial year) that she was interested in.



3. Ms Kelly responded by email on the same day and provided a list of the companies that she wished to be considered as those associated with Stewart Milne. She also explained that there was no particular time frame for her request, as she was interested in all properties sold to Mr Milne and/or the companies she had listed. She indicated, however, that if a time frame was definitely required, this should be 1980 to the date of her request.
4. The Council responded to Ms Kelly's request on 9 February 2011.
5. In response to part (a) of her request (which sought a list of properties or services sold to the listed companies or Stewart Milne), the Council notified Ms Kelly that it did not hold any relevant information for the period 1980 to 1996. For the period from 1996 to the time of Ms Kelly's request, the Council indicated that it could not supply this information because the cost of doing so had been calculated as exceeding £600. The Council notified Ms Kelly that it was therefore refusing this part of her request on the basis that section 12(1) of FOISA was applicable. (Section 12(1) of FOISA provides that a public authority is not obliged to respond to a request where the cost of complying with the request would exceed £600.)
6. In response to part (b) of her request (which sought a list of properties or services that the listed companies or Stewart Milne sold, managed or built for the Council), the Council notified Ms Kelly that it held no information about properties sold for the Council in the period 1980 to 1996. It confirmed that in the period from 1996 to the time of Ms Kelly's information request, no properties had been sold for the Council by Stewart Milne.
7. With respect to properties managed or built for the Council, it confirmed that Stewart Milne Construction was appointed in March 2010 to undertake construction works within the Council's new house building programme. It confirmed the number and type of properties to be built in three project areas, the total contract sum for each of the areas, and the planned completion date. The Council refused to supply reports to or minutes of the Council relating to the procurement of the contracts to build these properties on the grounds that this information was exempt from disclosure under section 33(1)(b) of FOISA.
8. The Council also confirmed that Stewart Milne had been contracted to carry out work/repairs on Council owned properties. It asked Ms Kelly to confirm whether she wished to access this information in relation to properties "managed" for the Council.
9. On 11 February 2011, Ms Kelly wrote to the Council requesting a review of its decision. In particular, Ms Kelly commented that, in her view, public assets should be bought and sold in a fully transparent manner, and as such she expected the Council to hold a register showing what assets had been sold, and to whom.
10. The Council notified Ms Kelly of the outcome of its review on 26 April 2011. It upheld its decision that it did not hold information relating to property sales to Stewart Milne and related companies or sold by these parties for the Council from 1980 to 1996. It also upheld its decision that the cost of complying with part (a) of the request, insofar as it related to property sales from 1996 to the date of Ms Kelly's request, would exceed £600, and so section 12(1) of FOISA applied.



11. The Council did, however, provide a weblink to enable Ms Kelly to access the minutes of a meeting at which the decision was taken to appoint Stewart Milne Construction Ltd to undertake construction works for the Council's new house building programme. The Council did not indicate whether it had continued to withhold further relevant information on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA.
12. On 4 May 2011, Ms Kelly wrote to the Commissioner, stating that she 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. Ms Kelly indicated that she wished to access the information she had originally requested, or as much of it as possible. She commented that she did not accept that the provision of a list of properties sold to Stewart Milne and associated companies would be as arduous as the Council suggested. Ms Kelly also expressed dissatisfaction with the Council's failure to respond to her request for review timeously.
13. The application was validated by establishing that Ms Kelly 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

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14. On 26 May 2011, the Council was notified in writing that an application had been received from Ms Kelly, and was invited to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA).
15. The Council was asked to respond to specific questions in relation to its reliance on section 12 of FOISA in relation to part (a) of Ms Kelly's information request. It was also invited to respond to comments made by Ms Kelly, in which she had noted that, as the Council held a spreadsheet containing a complete record of all the property it owns, it should, as a consequence, hold one detailing property that has been disposed of.
16. The investigating officer also invited submissions in relation to part (b) of Ms Kelly's information request, particularly insofar as this sought any reports or minutes regarding the decision to award the contracts to Stewart Milne Construction Ltd to build new homes for the Council. The Council was asked to confirm whether the minute to which Ms Kelly was directed following the Council's review was all of the relevant information that it held falling within scope of her request. If the Council did hold other relevant information, it was asked whether it would disclose this to Ms Kelly and, if not, to provide this to the Commissioner together with any evidence or arguments to support its application of the exemption in section 33(1)(b) of FOISA (if this was still considered to be applicable).



17. The Council was also asked if it had considered whether any or all parts of Ms Kelly's information request should have been considered under the EIRs rather than FOISA. If it had not done so already, the Council was asked to consider whether the information requested by Ms Kelly constituted environmental information as defined in regulation 2 of the EIRs and, if so, whether any exceptions in the EIRs would apply to information covered by this request. The Council was also asked whether it wished to apply the exemption in section 39(2) of FOISA, which applies to information that is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
18. A response was received from the Council on 24 June 2011, addressing the questions raised by the investigating officer. The Council provided submissions to explain its application of section 12(1) of FOISA to part (a) of Ms Kelly's request. It explained that the information requested was contained only in paper files, and it explained how it had calculated the time and cost of locating the information. It commented that its asset management database did identify properties which had been sold, but did not identify to whom they had been sold. As such, this would not allow the identification of the properties sold to Stewart Milne or associated companies.
19. In relation to the reports and minutes sought in part (b) of Ms Kelly's request, the Council advised that the committee meeting minute for which it had provided a link to Ms Kelly was the only minute relevant to this part of her request. However, the Council explained that it did hold three reports relating to the award of the construction contracts falling within the scope of this part of Ms Kelly's request. The Council provided copies of these reports and indicated that it considered them to be exempt from disclosure under section 33(1)(b) of FOISA. It provided a submission to explain its reasoning.
20. The Council also gave consideration to whether it should have processed Ms Kelly's request for information under the EIRs rather than FOISA, and noted that, as it had historically dealt with requests for property information under FOISA, it had not considered applying the EIRs to this request. The Council did explain that it was reviewing its use of the EIRs.
21. Following further correspondence, in which the investigating officer noted that the content of the three reports appeared to constitute environmental information, the Council agreed with this assessment. It confirmed that it wished to apply the exemption in section 39(2) of FOISA to the withheld reports falling within the scope of part (b) of Ms Kelly's request, and indicated that it considered this information to be excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. The Council advised that it was relying on the arguments advanced for its application of the exemption in section 33(1)(b) of FOISA to support its view that regulation 10(5)(e) applied.
22. During the course of the investigation, the Council also informed the Commissioner that it no longer wished to withhold the information in the reports in their entirety, but it now considered only the information contained in section 9 of each of the three withheld reports (which in each case was headed "Procurement") and the appendices referred to in each of these sections to be exempt. It disclosed the rest of the withheld reports to Ms Kelly.



23. The investigating officer also contacted Ms Kelly during the investigation seeking her submissions on the matters raised by this case. Her submissions were received on 1 August 2011. Ms Kelly's submissions, along with those of the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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24. 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 Ms Kelly and the Council and is satisfied that no matter of relevance has been overlooked.

### FOISA v EIRS?

25. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007: Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. However, the central point set out therein is that when a person requests information which would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
26. In this case, the Council initially handled all parts of Ms Kelly's request for information in terms of FOISA. During the investigation, the Council was advised that the Commissioner was likely to conclude that the withheld information within the three reports relating to the award of the construction contracts fell within the definition of environmental information. Having reconsidered this matter during the investigation, the Council indicated that it accepted that this information was environmental information.
27. Having had regard to the subject matter of the withheld information, the Commissioner has found that it falls within the scope of part (c) of the definition of environmental information, since the information concerns measures (including plans and options for the award of contracts for building programs, and the associated and activities), which are likely to affect the elements of the environment (especially land and landscape) detailed in part (a) and the factors (particularly noise, energy and waste) detailed in part (b) of the definition in regulation 2(1).
28. The Commissioner is therefore satisfied that this information falls within the definition of environmental information in regulation 2(1) of the EIRs.



29. While the Commissioner is pleased to note that the Council accepted this in the course of the investigation, he must note that it did not do so when responding to Ms Kelly's information request and subsequent request for review. Consequently, the Commissioner finds that, in failing to identify the information withheld in response to part (b) of Ms Kelly's information request as environmental information (as defined in regulation 2(1)) and deal with this part of the request under the EIRs, the Council failed to comply with regulations 5(1) and (2)(b) of the EIRs.
30. The Commissioner does not consider that the information sought in part (a) of Ms Kelly's request constitutes environmental information, however, and so he finds that the Council was entitled to consider this part of Ms Kelly's information request solely in terms of FOISA.

### **Section 39(2) of FOISA – environmental information**

31. 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, however, subject to the public interest test required by section 2(1)(b) of FOISA.
32. The Commissioner finds that the Council was entitled to apply the exemption in section 39(2) to the information withheld in response to part (b) of Ms Kelly's information request, given his conclusion that it is properly considered to be environmental information.
33. 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 the information withheld by the Council which is relevant to part (b) of Ms Kelly's request solely in terms of the EIRs.
34. As the Commissioner has not found the information covered by part (a) of Ms Kelly's request to be environmental information, he has considered this part of Ms Kelly's information request in terms of FOISA.

### **Part (a) - Section 12 of FOISA – Excessive cost of compliance**

35. As noted above, Ms Kelly asked for information as to a list of property (including but not limited to land, buildings, building services, material goods, etc.) the Council sold to Mr Stewart Milne or associated companies. She indicated that this list should show the property name/description, date of sale, sale price, minutes/reports of the Council approving/recommending the sale, and if available the market value at the time of the sale. Ms Kelly indicated that the timescale that she wanted her request to cover was from 1980 to the date of her request (9 December 2010).
36. The Council indicated that it no longer held information falling within the scope of this request for the period from 1980 to 1996. The Council refused to comply with the request for information for the period from 1996 on the basis that section 12(1) of FOISA applied.



37. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. The amount is currently set at £600 in terms of regulation 5 of the Fees Regulations.
38. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
39. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour.
40. Ms Kelly commented that she did not accept the Council's claims that supplying a list of the property sold would be too arduous and too expensive. This was particularly so, given that we live in an "Information Age", and Ms Kelly considered that as public assets should be bought and sold in a fully transparent manner, especially in such a cash strapped city, that the Council should hold a fully searchable electronic register showing what assets have been sold, and to whom.
41. Ms Kelly also commented that she is aware that the Council holds an Excel Spreadsheet detailing the property that it owns, and she considered it likely that the Council would have a similar list of what it has disposed of.
42. When invited to comment on these points, the Council provided the Commissioner with a copy of the spreadsheet referred to by Ms Kelly and explained that, while it lists the properties that have been sold, it does not identify to whom they have been sold. The Council concluded that this list would be meaningless to Ms Kelly as it would not identify properties sold to Stewart Milne.
43. The Council explained that there is no longer a comprehensive database which records all transactions, and so in order to identify the relevant sales, searches would have to be carried out of records relating to all property sales since 1996. The Council estimated that there were approximately 10 disposals per year, and so 140 covering the period from 1996.
44. It indicated that locating the information sought by Ms Kelly would require the checking of records relating to each property disposed of to ensure the identity of the final purchaser and identifying those where the Council had sold property to Stewart Milne or one of the companies of interest to Ms Kelly. The Council stated that its Asset Management Team would have to liaise with both the Heads of its Legal and Democratic and Finance Services to ensure that all property sales to any of the relevant parties were correctly identified.
45. Once relevant files (i.e. those involving sales to Stewart Milne) had been identified, it would be necessary for an officer to extract the requested information about the sale of that property.



46. It is the Council's submission that it would take 30 hours to identify the relevant files, and a further 50 hours to extract the relevant information. The Council provided details of the grades of staff required to carry out this process, at hourly costs of £12.25 (to identify relevant files) and £18.32 (to extract the information sought by Ms Kelly from relevant file) per hour.
47. Given that the latter staff cost exceeds the maximum of £15.00 per hour allowed by the Fees Regulations, the Council calculated this staff time for the extraction of the information at the £15 maximum allowed rather than the actual cost. Overall, the Council calculated that it would cost a total of £1,117.50 to provide the requested information to Ms Kelly.
48. During the investigation, the Council was asked to provide further details of the work that would be required in order to identify relevant files and then extrapolate the relevant information. The Council referred the Commissioner back to its original submission, and noted additionally that:
  - (a) detailed discussions between Council Services would be necessary in order to identify relevant files;
  - (b) retrieval from archive storage would be required; and
  - (c) the relevance of each file would be required to be verified prior to it being passed to a more senior colleague for extraction of the information.
49. The Council provided the Commissioner with a sample of the type of file that would have to be reviewed in order to identify the information sought by part (a) of Ms Kelly's request. A copy of one complete file was provided in the form of two PDF documents. The information therein related to the sale of property or land which included copies of committee meeting minutes and reports, together with other relevant documentation.
50. Although the Commissioner is surprised that the Council is unable to establish the identity of the purchaser in relation to individual property disposals in a less labour intensive manner, he accepts that the Council does not have simple access to the information requested by Ms Kelly in part (a) of her request. While it might have ready access to a list of its property transactions, the Commissioner accepts that this would not identify those involving sales to Stewart Milne or the companies of interest to Ms Kelly. As such, the existence of a spreadsheet of the type referred to by Ms Kelly does not provide a simple route to access the information she has requested.
51. Having considered the Council's submissions, the Commissioner accepts that it has identified a reasonable method of locating and retrieving the information Ms Kelly has requested. This involves two distinct stages: firstly identifying those property sales in which the purchaser was one of the parties of interest to Ms Kelly and then secondly locating and providing, for only those transactions involving relevant purchasers, the particular pieces of information requested by Ms Kelly about that transaction. The Commissioner is satisfied that the information requested could all be located within the file relating to the property sale.



52. Turning to the Council's estimates of the staff time required to complete this process, the investigating officer reviewed the copy of a file provided by the Council. Although this contained over 780 pages of information, the investigating officer was able to identify the purchaser of the land or property within two minutes of opening the electronic file. Although, in this case, the purchaser was not one of interest to Ms Kelly, the investigating officer went on to locate the types of information about the sale she had requested. The investigating officer was able to identify and extract the relevant information from this file within a further 15 minutes.
53. Having considered the Council's (somewhat limited) submissions and the investigating officer's review of the sample file, the Commissioner is unable to accept the Council's estimate that it would take 30 hours to establish which files involved sales to relevant parties. This suggests that this initial stage would take an average of just under 13 minutes per file. However, once a file has been retrieved, the Commissioner considers that it should take no longer than four minutes to identify the purchaser of the land or property, and thus establish whether the transaction was one relevant to Ms Kelly's request.
54. The Commissioner notes that the Council has referred to the need to discuss and check the findings of this review with more senior colleagues, and also to retrieve files from archives, but it has not provided any further explanation to show if and how this had also been factored into its calculation of costs.
55. The Commissioner recognises that there would be some staff time involved in locating and retrieving the relevant files prior to this initial review. Although the Council has indicated that some would have been archived, it has provided no indication of the proportion of the 140 files that would be stored in its archives, or how much time would be spent in retrieving these. In the absence of any further comments on this point, the Commissioner has assumed that, on average (across both the Council's archives and current storage), 30 files could be retrieved within an hour. He considers that a reasonable estimate would be a period of five hours to retrieve all of the relevant files.
56. The Council has indicated that it would need to consult senior staff to verify and check that relevant sales had been correctly identified. However, the Commissioner does not consider this to be a necessary step in locating and retrieving the relevant information, given the process suggested by the Council. He notes that the Council does have simple access to a list of all disposals, and also that the identity of the purchaser will be clear from the content of each file. Given the simplicity of the task, the Commissioner considers that the initial steps identifying which of the Council's property disposals involved a sale to a party of interest to Ms Kelly could be undertaken by an administrator without specialised knowledge. While the Council may wish to check and verify this work with a senior officer, he considers this to fall outside of the costs of simply locating and retrieving the relevant information. For those files identified as involving a relevant transaction in the initial stage, the second stage (in which information about that transaction is located by a more senior official) would allow checking that the sale was indeed relevant.



57. Given the Commissioner's observations above, he notes that the total time taken to review 140 files (the Council's estimate) based on an average of four minutes per file would be nine hours and 20 minutes. If calculated in line with the cost given by the Council of £12.25 an hour, the cost of this would be £114.33. This, taken together with the five hours that the Commissioner considers to be a reasonable estimate of the time that it would take to locate and retrieve these 140 files, would make a total cost of £175.58. This is significantly less than the cost of £367.50 estimated by the Council. As a consequence, the Commissioner does not consider that the Council's estimate of the costs associated with identifying the property transactions relevant to Ms Kelly's request is reasonable.
58. Turning to the second step in the process described by the Council, the Commissioner recognises that only a subset of the 140 files would relate to a sale of land or property to Stewart Milne or the companies specified by Ms Kelly, and so the second stage in locating and retrieving the relevant information would involve a smaller number of files.
59. As noted above, it took the investigating officer 15 minutes to locate the relevant information within an electronic copy of the sample file. The Commissioner recognises that some further time would be taken in preparing to provide the requested information (e.g. in the form of a table containing the requested information regarding each relevant transaction) to Ms Kelly. However, he considers that, particularly since an experienced and specialised council officer would be carrying out this task, and would be more au fait with the likely content and structure of these files, the information requested by Ms Kelly could be identified within a period of 20 minutes per file.
60. In the circumstances, the Commissioner does not accept that the estimated cost of £750.00 for 50 hours work on this stage is a reasonable estimate. Even if it were the case that 75 of these files (more than half of all disposals - on the Council's estimate - over the relevant period) contained information falling within the scope of Ms Kelly's request, the amount of work involved would amount to 25 hours. The estimated cost, based on the maximum hourly rate of £15.00 an hour would therefore be £375.00. The Commissioner considers it highly unlikely that so many files would need to be considered.
61. Taking all of the above into account, the Commissioner does not accept that the Council has provided a reasonable estimate of the costs involved in locating, retrieving and providing the information sought by Ms Kelly, and he is not able to accept that it would cost the Council in excess of £600 to fulfil Ms Kelly's request.
62. For the reasons outlined above, the Commissioner has concluded that the Council was not entitled to refuse to comply with part (a) of Ms Kelly's request in terms of section 12(1) of FOISA. Consequently, the Commissioner requires the Council to respond to this part of her request in terms of than section 12(1) of FOISA.

### **Section 15 – Duty to provide advice and assistance**

63. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.



64. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling". It might also be appropriate to suggest ways of narrowing a request in order to reduce the associated cost (e.g. to cover a shorter time period).
65. In this case, having concluded that section 12(1) was applicable, the Council offered no advice and assistance to Ms Kelly on how she might reduce the scope of her request, or access some of the information within its scope within the cost limit. In its submissions, the Council stated that it did not take any steps to help Ms Kelly to reduce the costs, as it considered that there was no alternative to providing the information other than the method set out in consideration of section 12(1) above.
66. In her submissions, Ms Kelly remarked on the failure by the Council to provide her with advice or guidance or to invite her to narrow the scope of her request, so that the requested information could be found more easily or affordably.
67. With hindsight, the Council accepted that it may have been helpful to provide Ms Kelly with a copy of the spreadsheet listing the properties that have been sold, but without identifying the purchaser. The Council considered that it could have also given Ms Kelly advice that the information in the spreadsheet could have been used in conjunction with a search of the Registers of Scotland to possibly access the requested information.
68. Given that the Council provided no advice or assistance to Ms Kelly in either narrowing the scope of her request, or accessing some of the information of interest to her, the Commissioner finds that the Council failed to comply with its duty under section 15(1) of FOISA.
69. However, having found that the Council was wrong to refuse Ms Kelly's requests on the basis that section 12(1) applied, he does not require the Council to take any action in response to this breach of section 15(1).

#### **Part (b) – information withheld under Regulation 10(5)(e) of the EIRs**

70. As noted above, when responding to part (b) of Ms Kelly's request, the Council confirmed that Stewart Milne Construction Ltd was appointed in March 2010 to undertake construction works within the Council's new build Council housing development programme. It disclosed the number and type of properties to be built in three project areas, the total contract sum for each of the areas, and the planned completion date. However, the Council refused to supply reports to or minutes of the Council relating to the procurement of the contracts to build these properties on the grounds that this information was exempt from disclosure under section 33(1)(b) of FOISA.
71. Following its review, the Council provided a link to a minute of a Council committee meeting at which the decision was taken to approve the award of the contracts to Stewart Milne Construction Ltd. However, it continued to withhold three committee reports.



72. During the investigation, the Council's submissions focussed on the harm that the Council considered would follow from disclosure of information relating to the bidders for the contracts, the financial information about the bids received, and the scores awarded to them. Following further discussions with the investigating officer, the Council confirmed that its concerns were focussed on section 9 within each of the reports, headed "Procurement". These sections each included references to two appendices to each report which have also been withheld.
73. The Council subsequently disclosed the remaining parts of the three reports to Ms Kelly, and these will not be considered in this decision.
74. During the investigation, the Council also accepted that the withheld information constituted environmental information, and it indicated that it considered the exception in regulation 10(5)(e) to apply for the reasons it had given for its application of section 33(1)(b) of FOISA. The Commissioner has therefore considered the application of the exception in regulation 10(5)(e) in relation to the content of section 9 of each of the three reports (which includes the associated appendices).
75. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that 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.
76. The United Nations Economic Commission for Europe's Implementation Guide to the Aarhus Convention <sup>1</sup> (the Aarhus 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. In practical terms, this means that national law must explicitly protect the type of information in question as commercial or industrial secrets.
77. The Commissioner has taken account of this guidance when considering this exception. It is the Commissioner's view that before regulation 10(5)(e) can be engaged, authorities should 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 prejudice to a legitimate economic interest?

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



*Is the information commercial or industrial in nature?*

78. The information withheld under this exception comprises the details of the procurement process for the three phase 1 house building contracts, including the identities of the companies which bid for the contracts, together the costs associated with each bid, the Council's evaluation scores, and further commentary relating the winning bidder. It also includes appendices detailing the evaluation criteria adopted by the Council in each tendering process, and the outcome of the tender evaluation process in each case, including the Council's scoring and ranking of the bids received.
79. The Council submitted that it considered this information to be commercial information.
80. The Commissioner has reviewed the information withheld in each of the three reports, and is satisfied that this information is commercial in nature, relating to the procurement process, the bids received, and the Council's evaluation of these, for each of the relevant contracts.

*Does a legally binding duty of confidence exist?*

81. The Commissioner considers that "provided by law" in terms of regulation 10(5)(e) will include confidentiality imposed by any person under the common law duty of confidence, under a contractual obligation or by statute. There is no need, under the exception in regulation 10(5)(e), for the information to have been obtained from another person and in that respect it differs from the "confidentiality" exemption in section 36(2) of FOISA. The exception can therefore cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party.
82. In the circumstances of this particular case (and in line with a number of previous decisions) the Commissioner accepts that the inherent nature of the tendering process implies an obligation of confidentiality with respect to certain types of information, at the time of submission of tenders and their evaluation by the procuring organisation. The Commissioner therefore accepts that the Council was under an obligation to maintain confidentiality with respect to some of the information contained in section 9 of the three reports, including information identifying the bidders in the tendering process, financial and other information received as a result of their bids, and information revealing the Council's evaluation of individual bids.
83. However, the Commissioner notes that some of the information in section 9 of each report simply explains the procurement process followed and the nature of the contracts awarded. The Commissioner does not accept that the Council would owe a duty of confidence in relation to this information either during the tendering process or since. This includes the information contained in paragraphs 9.1, 9.2, the heading and first sentence in paragraph 9.4, and paragraphs 9.6 to the end of the section. He is also unable to accept that the Council owed a duty of confidence to any party in relation to the content of Appendix 1 to each report.



84. The Commissioner went on to consider whether the obligation of confidentiality that would have been held in relation to the information identified in paragraph 82 around the time of the tendering process remained in force at the time that the Council considered Ms Kelly's request and requirement for review. In previous decisions, the Commissioner has noted that the obligation of confidentiality will not remain in place in perpetuity following an award of contract, and that the bidding companies will be aware that details of their bids may be the subject of requests under FOI, and any sensitivity in the information will diminish over time.
85. As in any case, the Commissioner must make his decision based on the circumstances that existed at the point when the public authority notified the applicant of the outcome of its review. In this case, the relevant date is 26 April 2011, more than one year after the tendering process was completed, and when the building projects were nearing completion.
86. The Council has indicated that it considered that the withheld information remained commercially sensitive because tendering remained ongoing in relation to the award of contracts for phases 2 and 3 of its house building programme, and given the likelihood that the same companies might bid for these contracts. The Commissioner accepts that the implied obligation of confidentiality in relation to the information detailed in paragraph 82 would have remained in place until the award of the contracts relating to phases 2 and 3 of the building programme. However, the contracts for phases 2 and 3 were awarded in October 2010 and February 2011 respectively. In both cases, this is prior to the date when the Council notified Ms Kelly of the outcome of its review.
87. The Commissioner notes also that, following the award of the three contracts relevant to this case, the identity of each bidder, the overall quality scores (listed in ascending order rather than associated with the bidder) and the value of each bid had been provided to each unsuccessful bidder.
88. Given the comments from the Council, the Commissioner considers that the only information to which it might be maintained that a duty of confidence might be owed at the date when it notified Ms Kelly of the outcome of its review was the information in paragraph 9.4 and Appendix 2 of each report, which identifies prices and information about the evaluation of each bid, and comments on particular features of the tenders.
89. Considering this information, the Commissioner has noted that the Invitation to Tender for each phase of the new build Council housing development programme stated that whilst the Council will use its best endeavours to hold confidential any information provided in the tenders submitted, this is subject to the Council's obligations under FOISA and it invites bidders to highlight to it any information contained within their bid which they consider to be of particular sensitivity. The Council has not identified to the Commissioner any particular information that bidders had identified in response to this request.
90. Although the Invitation to Tender document also indicates that it will consult with the tenderer in considering any FOI request that it receives prior to it replying to such a request, the Council has confirmed that it did not seek the views of any of the bidders before deciding to withhold the information under consideration.



91. In the absence of evidence to suggest that the bidding companies would wish the Council to withhold the information under consideration, and given the passage of time since the award of the relevant contracts (and the award of contracts for phases 2 and 3 of the home building programme), the Commissioner considers that any legally binding duty of confidence that had existed in relation to the withheld information had fallen away by the time relevant for the Commissioner's consideration in this decision.
92. Having reached this conclusion, the Commissioner is satisfied that the exception in regulation 10(5)(e) of the EIRs did not apply to the information withheld within part 9 of the three reports under consideration.
93. For the sake of clarity and completeness, however, he has gone on to set out his views on the remaining tests relevant when considering this exception, when considered in relation to the withheld information.

*Is the information publicly available?*

94. As noted above, the Council has explained that certain information from section 9 of the reports was been made available to the unsuccessful bidders in each tendering process, but this was not made publicly available.
95. The Commissioner is aware, that as a consequence of the information that has been disclosed to her in response to her request and by way of the Committee Meeting Minute, Ms Kelly is aware of who the successful company was in relation to each of the three contracts, and also how much the successful bid was in each case, together with the number of properties being built under each contract.
96. The Commissioner is also aware that it would normally be expected that contract award notices published in the official journal of the EU would include details about the contract. The Council provided copies of the notices prepared in this case, which included the date of award of each contract, the number of properties being built under each contract, the total value of each contract and the quality assessment criteria used by the Council and the weightings attached to these criteria. The Council has indicated that, due to an oversight, these notices were not sent for publication on this occasion (but have since been sent). However, it is clear that this information *should* have been published by the time when the Council reviewed its handling of Ms Kelly's information request.
97. Taking this into account, together with the information withheld in section 9 of each of the three reports, the Commissioner has also found that certain of the information is publicly available regarding the profile of the successful company.
98. The Commissioner is also aware that certain information from the profiles of the other companies who have tendered for the contracts is in the public domain; however, knowledge of who these other companies were was not available in the public domain at the relevant time.



99. In the light of these observations, the Commissioner is unable to accept that all of the information withheld in section 9 of the three reports was available in the public domain at the time when the Council responded to Ms Kelly's request for review.

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

100. 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.
101. The Council submitted that if the financial information about the bidders together with the evaluation scores were to be released, this would prejudice the commercial interests of both the Council and the bidders.
102. With respect to its own commercial interests, it considered that disclosure would weaken its position when negotiating future contracts for the provision of works, goods and services, by resulting in bidders not bidding for work, or withholding information with the expectation that if a request for that information were received, full disclosure would occur.
103. With respect to the bidders, the Council considered that if the information were to be disclosed, it would be advantageous to competitors and the unsuccessful bidders, as it would mean that others would be aware of the level of pricing and commercial ability of a particular bidder. It noted that the nature of the construction sector was such that the bidders for the contracts for phase 1 of the Council's building programme would also bid for those offered in relation to phases 2 and 3.
104. The Council maintained that details of the value of each bid before checking, and the score, together with a note of which exclusions apply, taken together with the evaluation criteria set out in the Invitation to Tender would allow a competitor to work out the pricing level that another bidder is working at.
105. In her submissions on this matter, Ms Kelly has commented that she understands that during negotiations finances may be confidential, but they are no longer so once the deal has been concluded.
106. When considering the submissions summarised above and the information withheld by the Council, the Commissioner has first of all noted that the Council's comments have focussed on the effect of disclosure of pricing and evaluation scores. The Council has provided no arguments suggesting that disclosure of general information about the tendering process, or the companies bidding (which have already been identified to each other) as set out in paragraphs 9.1, 9.2, 9.3, 9.6, 9.7, 9.8, 9.9, and Appendix 1 to each report would be likely to harm the commercial or other legitimate economic interests of either to the Council or any of the bidding companies. The Commissioner can see no reason why disclosure of the content of these paragraphs would prompt the harm described by the Council.



107. Turning to the more detailed content in paragraphs 9.4, 9.5 and Appendix 2 in each report, the Commissioner is unable to accept that disclosure would harm the commercial interests of any of the bidding companies in relation to the tendering processes for phases 2 and 3 of the Council's house building programme, since all the relevant contracts had been awarded by the time when the Council notified Ms Kelly of the outcome of its review.
108. The Commissioner went on to consider whether the disclosure would or would be likely to prejudice the commercial or other legitimate economic interests of either the Council or the bidders in relation to other future tendering processes. However, he has concluded that the Council has not demonstrated that disclosure would be likely to have such an effect.
109. The Commissioner notes that the information under consideration provides limited information about the content of the bids put forward by each bidder. The Commissioner is unable to accept that a competing company would be able to gain significant insights into the relevant companies capabilities, pricing or bidding strategies from the disclosure of this information. He notes that the commercial sensitivity of that information will have diminished with the passage of time, and in particular with the award of the contracts in the subsequent phases in the Council's home building programme. The Council has provided no evidence to support its submission regarding the continued risk or harm following from the disclosure of that information.
110. The Commissioner is also unable to find that the disclosure would (at the relevant time) have been likely to prevent the Council from achieving successful outcomes in future tendering processes. While the Commissioner accepts that the Council does have commercial interests in relation to the procurement exercises it carries out for goods and services that it is unable to provide through its in-house capabilities, he does not consider that the Council has demonstrated that release of the withheld information in this case would affect its wider ability to receive bids and award contracts for work in future. This is particularly so given that the procurement process for all phases of these particular contracts had finished, and the information under consideration concerns three contracts which had been finalised and were over a year old. For these same reasons, the Commissioner does not accept that the Council has demonstrated that release of the information in this case would deter companies from submitting bids in future.
111. For the reasons given above the Commissioner has therefore concluded that, even if he had accepted that the Council was subject to an obligation to maintain confidentiality in relation to the withheld information, he would not have accepted that its disclosure would or would be likely to cause substantial prejudice to the legitimate economic interests of either the Council or the bidding companies.
112. As set out before, he finds that the Council was not entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld in section 9 (and the associated appendices) of the three reports.
113. As the Commissioner has not upheld the use of the exception contained within regulation 10(5)(e), he is not required to consider the public interest test required by regulation 10(1)(b) of the EIRs in relation to this exception.



114. He therefore requires the Council to disclose the information contained in section 9 of each of the three reports (and the associated appendices) to Ms Kelly.

#### **Failure to comply with timescales in FOISA and EIRs**

115. Section 10(1) of FOISA and regulation 5 of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not applicable in this case.
116. Section 21(1) of FOISA and regulation 13 of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case.
117. It will be evident from the timescales set out in the “Background” paragraphs above that these requirements were not met by the Council in this case, with the result that the Council failed to comply with Part 1 of FOISA and regulations 5 and 13 of the EIRs in these respects.
118. As Ms Kelly has received a response to her request and requirement for review, the Commissioner does not require the Council to take any action in relation to these breaches in respect of this application.

### **DECISION**

The Commissioner finds that Aberdeen City Council (the Council) failed to deal with Ms Kelly’s request for information in accordance with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA), by claiming that it was not obliged to comply with part (a) of her request by virtue of section 12(1) of FOISA. He now requires the Council to comply with this part of Ms Kelly’s request in accordance with Part 1 (other than in terms of section 12(1)) by 23 January 2012.

The Commissioner also finds that, by failing to provide Ms Kelly with reasonable advice and assistance under section 15(1) of FOISA, the Council failed to deal with Ms Kelly’s request in accordance with Part 1 of FOISA. However, the Commissioner does not require any action to be taken in relation to this failure.

The Commissioner also finds that the Council should have dealt with part (c) of Ms Kelly’s information request under the Environmental Information (Scotland) Regulations 2004 (EIRs) and that, in initially failing to do so, the Council failed to comply with regulations 5(1) and 2(b) of the EIRs.

The Commissioner also finds that in failing to respond to Ms Kelly’s request and requirement for review within 20 working days, the Council failed to comply with sections 10(1) and 21(1) of FOISA and regulations 5 and 13 of the EIRs. Given that Ms Kelly did receive a response to her request and requirement for review, the Commissioner does not require any action to be taken in relation to these failures.

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Ms Suzanne Kelly  
and Aberdeen City Council



The Commissioner also finds that the Council acted in breach of regulation 5(1) of the EIRs by withholding information falling within the scope of part (c) of Ms Kelly's request. Having found that this information was not excepted from disclosure under regulation 10(5)(e) of the EIRs, the Commissioner now requires the Council to disclose the information contained in section 9 of the three reports discussed above (including the associated appendices) also by 23 January 2012.

## Appeal

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Should either Ms Kelly or the 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**9 December 2011**



## Appendix

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### 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.

...

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...



## 12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

....

- (4) The regulations may make provision as to-
- (a) the costs to be estimated; and
  - (b) the manner in which those costs are to be estimated.

....

## 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

## 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

## 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)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (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-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- ...

### **Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004**

#### **3 Projected costs**

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
  - (a) no account shall be taken of costs incurred in determining-
    - (i) whether the authority holds the information specified in the request; or



- (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
- (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

## **5 Excessive cost - prescribed amount**

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.