

Decision Notice 084/2022

Covid-19 related compensation payments to construction firm

Applicant: the Applicant

Public authority: East Renfrewshire Council

Case Ref: 202100745



Scottish Information
Commissioner

Summary

The Council was asked about Covid-19 related compensation payments made to a construction firm. The Council disclosed some information, but said that the remainder was excepted from disclosure under the EIRs. During the investigation, the Council disclosed further information, but continued to withhold four documents. The Commissioner found that the Council was entitled to withhold the remaining information under the EIRs, on the grounds that it was legally privileged.

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 sections 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information") (Interpretation); 5(1) and 2(2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 20 January 2021, the Applicant made a request for information to East Renfrewshire Council (the Council). The information requested was:

All information on Covid-19 related compensation payments made to Heron Bros in connection with their work on five nurseries in the East Renfrewshire area.

This should include correspondence from the company and anything held that indicates the need for such payments to be made.
2. The Council responded on 4 March 2021. It apologised for the late response, and notified the Applicant (having applied the exemption in section 39(2) of FOISA) that it was withholding the information under regulations 10(5)(d) and 10(5)(e) of the EIRs.
3. On 5 March and 19 April 2021, the Applicant wrote to the Council requesting a review of its decision on the basis that it had failed to indicate if it had considered the public interest test, as set out in regulation 10(2)(b) of the EIRs, and had failed to provide him with the information he had requested.
4. The Council notified the Applicant of the outcome of its review on 17 May 2021. It apologised again for failing to respond to his initial request within the statutory timescale and provided the Applicant with some of the information he had requested, with personal data redacted under regulation 11 of the EIRs. The Council also notified the Applicant that it was withholding the remaining information he had requested under regulations 10(4)(e) and 10(5)(e) of the EIRs.
5. On 15 June 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant was dissatisfied with the outcome of the Council's review because it had not provided him with all of the information he had requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 23 June 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to its reasons for withholding information under regulation 10(4)(e) and 10(5)(e) of the EIRs.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Scope of the investigation

10. During the investigation, the Council disclosed all of the information which it had previously withheld under regulation 10(5)(e) of the EIRs. The Council explained that, as the contracts and the construction of the nurseries (to which those contracts related) had concluded, the commercial interests of both the contractor and the Council were no longer threatened by release of this information.
11. The Council noted that it was still withholding four documents under regulation 10(4)(e) of the EIRs, as they comprise legally privileged information, in the form of communications between Council officers and legal advisers. The Council noted that, if the Commissioner decided that the information in these four documents was non-environmental (and required to be handled under FOISA), it would seek to withhold the information under section 36(1) of FOISA.
12. Following this disclosure, the Applicant notified the Commissioner that he only wanted him to consider the four documents that the Council was continuing to withhold; he did not require the Commissioner to reach a decision on the documents that were disclosed to him during the investigation.
13. As a result, the Commissioner will not comment on whether the Council was correct to initially withhold information that it later disclosed to the Applicant, but only whether the Council was correct in withholding the information it claims to be legally privileged.

Application of the EIRs

14. In its correspondence with the Applicant, the Council identified all of the information requested as being environmental information, as defined in regulation 2(1) of the EIRs. Having reached this conclusion, it applied section 39(2) of FOISA.
15. The Commissioner is satisfied that the information covered by this request (information regarding the delays affecting a construction project) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered

the information in question, along with paragraphs (a), (b) and (c) of the definition of environmental information (reproduced in Appendix 1), and he agrees that the Council was correct to have categorised the information as environmental. (The Applicant has also argued that the information was environmental and he has not disputed the Council's decision to handle the request under the EIRs.)

16. 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 information withheld in this case, given his conclusion that it is properly classified as environmental information.
17. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
18. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA, and consider the Applicant's information request wholly under the EIRs. In what follows, the Commissioner will consider this case solely in terms of the EIRs

Regulation 5(1) of the EIRs

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

Regulation 10(4)(e) of the EIRs (internal communications)

21. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
22. 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 disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

The Council's view

23. The Council submitted that the information it was withholding constituted internal communications between officers and legal advisers. It argued that this information was subject to legal professional privilege, specifically legal advice privilege.

24. The Council explained that the persons involved in the withheld correspondence were the senior solicitor of the Council, officers of the Council's project team and solicitors (Partner and associate) of external legal advisers acting on behalf of the Council. The content of the communications was considered to constitute legal advice, provided by solicitors in the course of their professional duties.
25. The Council argued that all of the information reflecting communication with its internal or external legal advisers comprised communications with professional solicitors engaged in providing legal advice to clients. The solicitors were registered with the Law Society of Scotland and were subject to professional duties of confidentiality to clients.
26. In this context, the Council submitted that the solicitors were approached and thereafter provided advice to the Council and its agents on the legal implications of existing contractual terms, the prospect of claims in connection with Covid-19 delay costs and the appropriateness of voluntary compensation payments to the contractor. The Council contended that all of the communication occurred in the context of the relationship between a solicitor (internal or external) and their client (the Council) and the communication involved the request and provision of legal advice.
27. The council submitted that legal privilege had not been waived. It argued that the detailed content of the advice had not been put into the public domain and remained confidential to the Council officers and its advisers

Commissioner's view

28. Under the EIRs, provided the information comprises internal communications, the exception will apply.
29. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communication and is therefore subject to the exception in regulation 10(4)(e). The information is, as the Council describes, internal legal advice. To the extent that third parties have been included in what are essentially internal exchanges, the Commissioner is satisfied that they have been included as advisers to the Council and that their inclusion does not affect the quality of the Communications in question as "internal".
30. He must, therefore, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The Applicant's comments on the public interest

31. The Applicant argued that, even if the exception had been correctly applied, information should be disclosed after consideration of the public interest test. He submitted that the Covid-19 pandemic had had an unforeseen impact on traditional contractual arrangements. Companies dealing with local authorities had encountered costs not previously anticipated, simply by observing the new rules and guidelines established by government to ensure social distancing.
32. However, the Applicant contended that this did not give these companies carte blanche to claim these additional costs from a local authority they were contracted to. He argued that the public had a right to know how these extraordinary disputes were being handled and the terms upon which they are being settled. He also submitted that the public have a right to know if the public purse is being sufficiently safeguarded from inflated or unreasonable claims from contractors.

33. The Applicant contended that the benefit to the public in disclosing this information outweighed any benefit in withholding it. He submitted that the coronavirus pandemic caused this dispute and it was of great public interest to learn how a publicly-funded organisation responded to the unique challenges this presented.
34. The Applicant noted that officials and Councillors might have been working from home at the time. He questioned whether this home working had affected the way they dealt with hundreds of thousands of pounds of public money. The Applicant submitted that Council tax bills were at their highest ever level and a source of concern and alarm to council tax payers, particularly those on fixed incomes. The Applicant argued that it was vital that those who paid the bills run up by councils are entitled to see if sums paid beyond what was initially agreed could be fully justified.
35. To ensure good governance and public confidence in the Council's ability to handle extraordinary events, the Applicant contended that consideration of the public interest test should result in publication of all the advice.

The Council's comments on the public interest

36. The Council argued that the public interest in maintaining the confidentiality of legal advice outweighed that in making such advice available. It acknowledged that there was a public interest in making the information available, as this would enable the public to understand the legal rationale on which decisions are made. However, counter to this would be the public interest in authorities being able to seek and receive legal advice confidentially, in order to ensure the legitimacy of their actions and bring about the optimal result in any given case, all to the benefit of the public purse.
37. The Council argued that it was in the general public interest that an authority, in fulfilment of its public functions, can communicate with its legal advisers freely and frankly, and in confidence, in order that it can obtain the most comprehensive legal advice about proposed actions and defend or pursue its position adequately as required.
38. The Council argued that the process of obtaining legal advice might highlight weaknesses in the authority's position which might be relevant, not only to the matter at hand but also to similar analogous situations (and so disclosure could prejudice the authority's ongoing interests). The threat of disclosure of such advice, therefore, prompted either a sanitised discussion between agent and client (giving rise to incomplete advice) or full instruction and advice which would make the authority vulnerable to further claims in that or similar situations.
39. The Council submitted that withholding the legal advice was in the public interest inasmuch as potential liabilities could be avoided and costs (which would ultimately be borne by the public in terms of local taxation or service costs) minimised. It contended that the public interest in knowing that such advice had been obtained (as opposed to knowing the detail of that advice) was considered to provide adequate transparency of the business of the Council. In the present case, it noted that this was communicated via the initial Council report on the issue.

The Commissioner's comments on the public interest

40. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).

41. The Council has argued that the public interest should favour maintaining legal professional privilege. The Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client.
42. As noted in previous decisions involving both FOISA and the EIRs, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case [Three Rivers District Council and others v Governor and Company of the Bank of England \[2004\] UKHL 48](#)¹ and in [Department for Business Enterprise & Regulatory Reform v O'Brien & Anor \[2009\] EWHC 164 \(QB\)](#)². The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
43. The Commissioner accepts that disclosure of the advice would help fulfil a public interest in understanding why the Council made compensation payments to the construction firm, in response to delays caused by the Covid-19 pandemic. He acknowledges the public interest in knowing why significant sums of public money were expended by the Council, particularly when local taxpayers are part-funding the Council through Council Tax payments. In the Commissioner's view, there is a clear and strong public interest in understanding how the Council are making decisions in relation to the expenditure of public funds.
44. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Council (as any Scottish public authority) can seek and receive legal advice in confidence, to facilitate the discharge of their functions as thoroughly and effectively as possible.
45. The Commissioner accepts that making such advice available could discourage staff in a Scottish public authority from seeking internal legal advice, or would deter frankness and openness by parties involved when seeking advice if there was knowledge that the advice might be then disclosed. If, for this reason, the Council was unable to obtain impartial, full and objective legal advice in respect of its actions, this would not be in the public interest.
46. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of disclosure presented by the Applicant are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure, and accepts that the information was properly withheld under regulation 10(4)(e) of the EIRs.
47. In this case, the Council submitted that if the Commissioner did not agree that the entirety of the four documents comprised internal communications, it would seek to withhold the information under section 36(1) of FOISA. As noted above, the Commissioner has concluded that the information is environmental and that it does fall under the exception contained in regulation 10(4)(e) of the EIRs. However, he would note that even if he had

¹ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

² <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

considered some or all of the information to be non-environmental, he would have found it to be exempt under section 36(1) of FOISA, for the same reasons he has outlined above.

Decision

The Commissioner finds that, in the respects specified by the Applicant, East Renfrewshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

22 July 2022

Appendix 1: 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.

...

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

...

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

...

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