

# Decision Notice

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**Decision 010/2019: Ms E and City of Edinburgh Council**

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**Contract for development of the Royal High School**

Reference No: 201800057

Decision Date: 30 January 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked for information withheld from the published version of its contract with the developer of the former Royal High School site.

The Council withheld the information, stating that the information was excepted from disclosure because of the harm this would cause in terms of its own economic interests and those of the developer.

The Commissioner investigated and found that the Council had partially breached the EIRs in responding to the request. The Commissioner did not accept that all the withheld information was excepted from disclosure, although some was. He required the Council to disclose some parts of the withheld information.

## Relevant statutory provisions

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

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

## Background

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1. On 30 September 2016, Ms E asked the City of Edinburgh Council (the Council) for the contract between the Council and Duddingston House Properties (DHP) relating to the former Royal High School, Calton Hill, Edinburgh. The Council provided a redacted version of the Developer Agreement, the Offer and the Schedule, and published these documents on its website.
2. On 16 October 2017, Ms E asked the Council to provide the full, unredacted contract documentation. She stated that DHP seemed to have contravened the confidentiality provisions of the contract by asserting that they had absolute power to block any development of the Royal High School site to 2022. She believed there was a strong public interest in disclosure of the full contract.
3. As background to the matters considered in this decision, the Council has explained that the contract with DHP puts a structure in place for the development of the Royal High School building and for a long lease to be entered into. Two planning applications had been submitted by DHP, neither of which had been granted by the Council. A public inquiry relating to these applications started in September 2018.
4. The Council responded on 13 November 2017. It stated that the contract documents were commercially sensitive information, and public knowledge of the full contract details could have an adverse impact on the Council’s ability to market the property, should this be required in future. It could also “commercially prejudice future activities of both the Council and DHP across the City as a whole on future transactions”. The Council stated that if DHP had breached the contract, this did not have the effect of nullifying the entire contract or even

the individual confidentiality clause within it. The Council withheld the unpublished parts of the contract documentation under regulation 10(5)(e) of the EIRs.

5. On 19 November 2017, Ms E requested a review of the Council's decision. She took the view that the public interest in disclosure outweighed any commercial confidentiality (confidentiality which she believed had not been observed by DHP).
6. The Council notified Ms E of the outcome of its review on 18 December 2017. It stated that a legally binding duty of confidence remained in relation to the information she had asked for. It explained why it considered that disclosure would cause substantial harm to a legitimate economic interest (as required for the exception in regulation 10(5)(e) to apply). It also explained why it considered that the public interest in disclosing the information was outweighed by the public interest in withholding it. The Council confirmed its decision to withhold the information under regulation 10(5)(e) of the EIRs.
7. On 6 January 2018, Ms E applied 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 specified modifications. Ms E explained why she did not accept the position taken by the Council regarding the confidential status of the information and why disclosure would be in the public interest (her reasons are detailed later in this decision).

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that Ms E 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.
9. On 12 February 2018, the Council was notified in writing that Ms E had made a valid application. The Council was asked to send the Commissioner the information withheld from Ms E. The Council provided the information and the case was allocated to an investigating officer.
10. 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, including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

## **Commissioner's analysis and findings**

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11. 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 Ms E and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

12. The Council responded to Ms E's request in terms of the EIRs, rather than FOISA, and Ms E has not disputed this.
13. The Commissioner is satisfied that the information requested is environmental information as defined in regulation 2(1) of the EIRs. It relates to the development of a site and building which is a key feature of the Edinburgh landscape, and falls within paragraph (c) of the definition of environmental information, being information on measures and activities

affecting or likely to affect the state of the elements of the environment referred to in paragraph (a).

### **Regulation 10(5)(e) of the EIRs**

14. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available where 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. The Council relied on this exception to withhold all unpublished information in the contract documentation.
15. A Scottish public authority applying an exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). 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)).
16. *The Aarhus Convention: an Implementation Guide*<sup>1</sup>, which offers guidance on the interpretation of the Convention from which the EIRs are derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
17. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
  - (i) Is the information commercial or industrial in nature?
  - (ii) Does a legally binding duty of confidence exist in relation to the information?
  - (iii) Is the information publicly available?
  - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

*Is the information commercial or industrial in nature?*

18. The Council submitted that the information was commercial, relating to a commercial agreement with another party and the commercial terms within that agreement.
19. The Commissioner accepts that the contract documentation is commercial information, and that both the Council and DHP have commercial interests in relation to the development of the former Royal High School.

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

20. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.

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[https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

21. Ms E argued that DHP had contravened the contract provision requiring secrecy as to the terms of the deal between the Council and DHP. She stated that, since publication of the redacted contract documents, DHP had disclosed elements of the contract “in a manner which has (further) aroused public concern”.
22. In its review response (18 December 2017), the Council acknowledged Ms E’s belief that statements made by DHP negated the binding duty of confidentiality of the withheld information. However, it argued that a legally binding duty of confidentiality remained, as set out in the contract. It stated that this obligation, and expectation, of confidentiality would be subject to review, but remained active and in place at the time of writing.
23. The Council noted that clause 12.12.2 of the contract requires commercial terms to be kept confidential.
24. The Council was asked to comment further on the confidentiality clause, which makes it clear that the obligation to maintain confidentiality is subject to the terms of FOISA and the EIRs. Clause 12.12.2 confirms that the Council is committed to meeting its requirements under FOISA and the EIRs and requires DHP to identify any information it considers potentially exempt from disclosure, stating the period of sensitivity and providing justification for its views. It states that while the Council must acknowledge that certain terms of the Missives are commercially sensitive, and, in DHP’s view, exempt from disclosure under FOISA or the EIRs, it is not bound by DHP’s view and has discretion to disclose or publish any information to comply with FOISA or the EIRs.
25. The Commissioner finds this to be a clear statement that the confidentiality agreement with DHP is subject to the Council’s obligations under FOI law. However, he is concerned to see that another clause (12.12.1) is less clear on this issue. It begins:

“Subject always to the terms of [FOISA] or [the EIRs], but subject to the proviso below [the Council] shall not and shall ensure that it/or its employees do not without the written consent of DHP at any time during the duration of the Missives divulge to any third party any information concerning the commercial terms of the Missives...unless and until such information is already in the public domain...and PROVIDED ALWAYS THAT: (a) it is acknowledged by [the Council] that certain terms of the Missives are commercially sensitive and that disclosure of such terms, including the identity of the Funder, the Price and, during the period prior to Planning Submission Date, the Suspensive Conditions...are, in DHP’s view, exempt from disclosure under FOISA or EIR and as such need not be disclosed by [the Council].
26. The Commissioner takes the view that contractual provisions cannot make DHP the arbiter in determining whether information is exempt from disclosure under FOISA or the EIRs. While it is reasonable for DHP to make clear to the Council what information it regards as commercially sensitive, it is the Council which must comply with FOI law and the Commissioner who will make a decision following an application to him.
27. The Council submitted that, under the confidentiality provisions, the “commercial terms” of the Missives are commercially sensitive and, in DHP’s view, this information was exempt from the disclosure under the EIRs. The Council provided details of some of the information which comprised “commercial terms”, noting that the list of confidential information was not exhaustive.
28. The Council considered that there was an existing duty of confidentiality in relation to specific commercial elements of the contract documentation, and provided the Commissioner with a

list of the relevant information. It argued that there was a significant risk that, should the Council release information which would provide DHP's competitors with a commercial advantage, without any requirement to do so under the EIRs, DHP would seek to recover damages or loss from the Council.

29. As set out in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>2</sup>, the Commissioner does not accept that the existence of a confidentiality agreement will, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look beyond the confidentiality clause and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
30. Before the Commissioner can accept that there is a legally binding duty of confidence covering all parts of the withheld information, he must be satisfied that disclosure is not required under the EIRs. If the EIRs require disclosure (in other words, if the exception in regulation 10(5)(e) cannot be upheld), then the duty of confidence imposed by clause 12.12 falls away.
31. The Commissioner has therefore gone on to consider whether the other tests required for regulation 10(5)(e) to be upheld are met in the circumstances of this case.

*Is the information publicly available?*

32. The Commissioner asked the Council whether some elements of the withheld information were already in the public domain. The Commissioner also queried certain inconsistencies in the redaction of information from the published contract documentation.
33. The Council agreed that any information which had been redacted inconsistently should be disclosed. It did not accept that certain information was in fact in the public domain.
34. The Commissioner notes that the Council has agreed to the disclosure of information which has been redacted in one part of the document but disclosed in another, and has not considered this information further in this decision. He accepts the Council's view that the remaining withheld information is not publicly available.

*Would disclosure of the information cause substantial harm to a legitimate economic interest?*

35. The Council submitted that it has a commercial interest in ensuring that it can enter into sales and projects and achieve best value for the citizens of Edinburgh in doing so. It stated that it must be able to enter into commercial agreements with other parties and provide assurance that commercial terms can be kept confidential.
36. The Council provided the Commissioner with some submissions relating to its economic interests which, because of their commercial sensitivity, are not discussed in this decision notice but which have been considered during the investigation of this case.
37. The Council also submitted that disclosure of the contractual terms would prejudice DHP's ability to negotiate with sub-contractors, and would be unfair to DHP.

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

38. The Commissioner asked the Council for more detailed reasons why disclosure of the specific withheld information would cause harm. The Council described four main concerns, and explained which of the four applied to each part of the withheld information.
39. Again, because of the commercial sensitivity of the submissions provided, the Commissioner will provide details only of two of the concerns identified by the Council:
- (a) If commercial terms were disclosed, there was a significant risk that rival contractors would know what terms DHP and the Council are willing to accept, what financial approach has been adopted for this contract, and what attitude to risk the parties display. This would give competitors of DHP an advantage in any future tender or dealings with the Council or other public authorities, or with private sector organisation where DHP is likely to be a bidder.
- (b) Disclosure risks creating the impression that contracting with the Council on a confidential basis is not possible. This creates the significant risk that contractors will be put off from future tenders with the Council and there will be fewer bidders for Council tenders, minimising the opportunity for the Council to obtain best value.
40. The Commissioner has considered all four concerns put forward by the Council, in relation to its submissions as a whole and the withheld information. Given that some of the Council's arguments relate to the commercially sensitive relationship with DHP, the Commissioner cannot include detailed consideration in this decision.
41. In relation to the concerns outlined at (a) and (b) above, the Commissioner is not persuaded that the Council has made a compelling argument to accept that all information withheld for this reason would, if disclosed, be capable of causing commercial disadvantage to DHP or the Council, or that disclosure would inhibit other companies from entering into contracts with the Council in future. He notes that DHP was not deterred by the possibility of disclosure under FOISA and the EIRs, as indicated by its acceptance of the confidentiality clause of the contract.
42. The Commissioner finds the other concerns outlined by the Council to be more persuasive, as they relate to the particular circumstances of this contract and the relationship between the parties.
43. In relation to each part of the withheld information, the Council has listed which of its four key concerns are reasons why disclosure would, or would be likely to cause substantial harm to its own and DHP's legitimate economic interests. The Commissioner has considered each part of the information and the reasons cited by the Council.
44. As noted, the Commissioner finds concerns (a) and (b) to be generally less persuasive than the other concerns raised by the Council. Where (a) and (b) are the only concerns listed by the Council in relation to withheld information, the Commissioner has generally not accepted that disclosure of the information would be likely to cause substantial prejudice to a legitimate economic interest. In some instances, the information is of a kind which would be standard to most contracts for such a long lease, or appears innocuous.
45. However, the Commissioner accepts that some parts of the withheld information would, if disclosed, be likely to cause substantial prejudice to the economic interest of the Council and/or DHP. In relation to this information, he accepts that the harm identified by the Council is a real threat, not just a hypothetical possibility.

46. The Commissioner is unable to explain fully his reasoning on this point, as to do so may reveal information which is commercially sensitive and capable of causing harm to economic interests. (The need for such restraint by the Commissioner has been acknowledged by the courts. In the case of *Scottish Ministers v Scottish Information Commissioner (William Alexander's Application)* [2007] CSIH 8<sup>3</sup>, the Court of Session commented that, in giving reasons, the Commissioner is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.)
47. The Commissioner therefore finds that the exception in regulation 10(5)(e) is engaged by some but not all of the withheld information. Where the exception is engaged, he will go on to consider the public interest test in regulation 10(1)(b) of the EIRs.

### **The public interest test**

48. Regulation 10(1)(b) of the EIRs specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### *Ms E's submission*

49. Ms E made several references to the importance of transparency in relation to matters affecting the future of the former Royal High School of Edinburgh. In her request for review (19 November 2017) she stated that the Council acts in the interests of the citizens of Edinburgh, who should have the right to know what actions it is taking and whether these are in the interests of the citizens.
50. In her correspondence with the investigating officer, Ms E complained that the public had been excluded from Council meetings when the contract was authorised, some four years previously (December 2013 and January 2014). She argued that, since then, a significant number of the City's councillors and the whole wider community had been denied access to transparent government. She compared this with the transparency over matters relating to the Royal High School prior to 2013. She stated that the lack of clarity in relation to the contract had caused widespread anxiety and concern.
51. In her application for a decision, Ms E stated that representatives of DHP have indicated that it has control of the Royal High School building until 2022. She believed there was an unspoken threat to those who fear for the condition of the fabric of this historic building; it would only be by letting DHP proceed with its development as quickly as possible that the safety of the building would be assured.

#### *The Council's submission*

52. The Council acknowledged that the former Royal High School is a building of significant interest to the public. It acknowledged the importance of disclosing information to demonstrate that the Council is acting in the best interests of the citizens of Edinburgh.
53. The Council also considered that there is a public interest in avoiding substantial harm to the legitimate economic interests of DHP and the Council before the development is concluded.

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<sup>3</sup> <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

It argued that there was a significant public interest in local authorities maintaining confidentiality and protecting the legitimate economic interests of commercial organisation where it has been agreed that information would be held confidentially.

54. The Council reiterated the argument that disclosure would make it less able to fulfil its duty to obtain value for money for the citizens of Edinburgh through the management of contracts, sales and projects if it breached a confidentiality agreement.
55. While the Council acknowledged the importance of disclosing information in order to demonstrate that it is acting in the best interests of the citizens of Edinburgh and that the former Royal High School is a building of significant interest to the public, it considered that the public interest in disclosure was outweighed by the public interest in avoiding substantial harm to its own economic interests and those of the developer, before matters were concluded.

#### *The Commissioner's view*

56. The Commissioner accepts that the development of the former Royal High School is a matter is of great concern to many people, for varying reasons. There has been much public discussion about the future of the building, and the plans put forward by DHP. The Council has rejected two planning applications from DHP, which are currently the subject of a planning inquiry by the Scottish Government<sup>4</sup>. In this context, the Commissioner accepts that there are reasons why transparency about the terms of the contract with DHP would be in the public interest.
57. However, the Commissioner cannot ignore the likely consequences of disclosing the commercially sensitive information to which the exception in regulation 10(5)(e) has been found to apply. He accepts that disclosure, in all the circumstances of this case, would have consequences which would not be in the public interest. As noted above, the Commissioner cannot give full details of some of the points raised in the Council's submissions without revealing information which he accepts to be commercially sensitive and not in the public interest to disclose.
58. After careful consideration, the Commissioner has accepted that, in all the circumstances, the public interest in disclosing the information to which regulation 10(5)(e) applies is outweighed by the public interest in maintaining the exception. In reaching this conclusion, he has taken into account that the contract is live, that it is not uncontroversial, and that much of the contract has already been disclosed.
59. The Commissioner therefore finds that the Council was entitled to withhold some information under regulation 10(5)(e) of the EIRs.
60. The Commissioner requires the Council to disclose information which was wrongly withheld under this exception to Ms E. He will provide the Council with marked up copies of the documents, showing what must be disclosed.

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<sup>4</sup> <https://www.dpea.scotland.gov.uk/CaseDetails.aspx?ID=118312>

## Decision

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The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms E.

The Commissioner finds that the Council was entitled to withhold some information under regulation 10(5)(e) of the EIRs, but wrongly withheld other information under this exception.

The Commissioner therefore requires the Council to provide Ms E with the information which was wrongly withheld (indicated on the enclosed copies) by **18 March 2019**.

## Appeal

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Should either Ms E 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.

## Enforcement

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If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**30 January 2019**

### 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

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(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;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

#### 10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

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