

Decision Notice 073/2020

Headstone testing programme

Applicant: The Applicant

Public authority: Scottish Borders Council

Case Ref: 201901109



Scottish Information
Commissioner

Summary

The Council was asked about its headstone testing programme.

The Council told the Applicant it did not hold some of the information he had asked for. It also told the Applicant it was withholding information on the basis that it was commercially confidential.

By the end of the investigation, the Commissioner was satisfied that the Council had carried out appropriate searches, and had identified all of the information falling within the scope of the requests.

The Commissioner agreed that the Council did not hold some of the information, and that it was entitled to withhold some information on the basis that it was commercially confidential. However, he found that the information provided to the Applicant during the investigation should have been disclosed earlier.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations (5)(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(a) 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. Both Appendices form part of this decision.

Background

1. Scottish Borders Council (the Council) contracted out its headstone safety programme to Memsafe Ltd (Memsafe) in July 2018 and published details about the programme on its website¹. This contract was in connection with all Council maintained cemeteries and was not exclusive to Peebles Cemetery. The purpose of the programme within Peebles Cemetery was not to repair damaged headstones, but to ensure that they were safe.
2. On 23 April 2019, the Applicant asked the Council for a range of information about its headstone safety programme at Peebles Cemetery. The Applicant sought details about the contract, evidence of how decisions were made and amount paid, or was due to paid, to the Memsafe. The requests are set out in full in Appendix 2.
3. The Council responded on 3 May 2019. In response, the Council:
 - withheld the contract between it and Memsafe on the basis that regulation 10(5)(e) applied (part 1)
 - stated that no information was held (part 2)
 - confirmed that a visual inspection was undertaken; listed the qualifications of the individual that conducted the inspection, but withheld the individual's name on the

¹ https://www.scotborders.gov.uk/info/20013/environment/869/headstone_testing/2

basis it was personal data and confirmed that it did not hold a full report of the inspection (part 3)

- provided the information requested (part 4)
 - directed the requester to its contracts register and confirmed the amount paid to Memsafe between the two dates specified by the Applicant (part 5).
4. On 9 May 2019, the Applicant emailed the Council requesting a review of its decision. The Applicant argued that the public interest favoured making the contract available. He also believed the Council had failed to provide all of the information falling within the scope of his request.
 5. The Council notified the Applicant of the outcome of its review on 3 June 2019. The Council upheld its initial response, but also relied upon regulation 10(5)(c) (Intellectual property rights) of the EIRs to withhold the information requested in part 1 of the request. It also confirmed that it did not hold information relating to the decision to inspect all headstones, providing notice in terms of regulation 10(4)(a). In response to part 5, the Council stated that, at the date of the request, there were no further payments due to Memsafe.
 6. On 29 June 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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.
 7. The Applicant was dissatisfied with the Council's response to parts 1, 2 and 5 of his request.

Investigation

8. 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.
9. On 16 August 2019, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
10. The Council confirmed, on 6 September 2019, that it had disclosed to the Applicant (in response to a related request) the Council's Invitation to Quote, Memsafe's Quick Quote response and Memsafe's testing spreadsheet with the exception of the summary section and the Bill of Quantities containing the detailed unit pricing. The Council explained that the summary section and Bill of Quantities contained commercially sensitive information to which regulation 10(5)(e) applied. The Council stated that no other contractual information was held.
11. 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 answer specific questions about the information it held and about the searches it had conducted. The Council responded on 17 October 2019.
12. During the investigation, the Council detailed its reasons for withholding the information and agreed that further information could be provided to the Applicant.

13. On 24 October 2019, the Council confirmed that it continued to withhold one document which fell within scope of part 1 of the request under regulation 10(5)(e), but withdrew its reliance on regulation 10(5)(c) of the EIRs.
14. On 21 November 2019, the Council provided the Applicant with further explanation and information in response to part 5 of the request (costs and payments made).

Commissioner's analysis and findings

15. 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.

Information falling in scope

16. Regulation 5(1) of the EIRs (subject to the various qualification 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.
17. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by a public authority to explain why it does not hold the information, and any reason offered by an applicant to explain why an authority is likely to hold information. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

Searches

18. The Council provided details of the searches (including screen shots of the results of its searches) that had been conducted by its employees which deal with cemeteries and the procurement of contracts. It stated that the locations identified were the only ones where officers record or save information with regard to the matter.
19. The Council stated that discussion of the headstone restoration programme started early 2018; the invitation to quote was issued on 16 May 2018 and works commenced at the Peebles Cemetery on 15 January 2019. Therefore, relevant searches were carried out from 15 January 2019 to the date of the request.
20. Having considered all relevant submissions and the terms of the Applicant's request, the Commissioner accepts that the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of the request, and he is satisfied that the Council has identified and / or disclosed all relevant information falling within scope of the request.

Part 1 – copy of all contracts since 2015

21. The Council stated that there has only been one contract with Memsafe since 2015.
22. In its submissions of 15 November 2019, the Council accepted that it had been wrong to rely on regulations 10(5)(c) and 10(5)(e) in its review response of 3 June 2019 to withhold the majority of the information falling within scope of this part of the request. The Commissioner

therefore finds that the Council was not entitled to rely on regulation 10(5)(e) and/or 10(5)(c) to withhold the information it disclosed during the investigation to the Applicant.

23. The Council maintained that regulation 10(5)(e) applies to the unit pricing in relation to the works at the cemetery.

Regulation 10(5)(e): confidentiality of commercial or industrial information

24. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information, where such confidentiality is provided for by law to protect a legitimate economic interest.
25. As with all exceptions under regulation 10, a Scottish public authority applying this 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)).
26. The Aarhus Convention: an Implementation Guide², 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 Aarhus Convention, but its meaning is considered further below.
27. 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?

28. The information withheld is Memsafe's unit rate costs provided to the Council related to key activities in the headstone testing process provided within its Bill of Quantities. The Council submitted that it was Memsafe's commercial interests that would be harmed by disclosure of this information.
29. Having considered the withheld information, with the Council's submissions, the Commissioner is satisfied that the information is clearly commercial in nature for the purposes of regulation 10(5)(e) of the EIRs.

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http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Does a legally binding duty of confidence exist in relation to the information, and is the information publicly available?

30. The Council explained that, in response to the Quick Quote exercise, Memsafe asked it not to disclose the information it had provided in response to an FOI request for five years. The Council stated that, after receiving the Applicant's request, it had contacted Memsafe to discuss its position. Memsafe maintained that the information should be withheld.
31. The Commissioner does not accept that a request from a third party to withhold the information will, in itself, mean that all information identified 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 focus on the nature of any withheld information to determine whether the duty of confidence should stand.
32. The Council submitted that the confidentiality of proceedings (in this case, negotiations with a third party) are protected by the common law duty of confidence.
33. The Commissioner accepts, in the circumstances, that this information (unit rate prices), provided to the Council during a tendering process, was subject to an obligation of confidentiality. He also accepts that the information was not available in the public domain at the time of the request.

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

34. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
35. The Council provided a copy of Memsafe's consultation response. In summary, Memsafe explained that virtually all of its work is received via local authority tenders. They do not sell memorials or work for members of the public. Memsafe explained that they are one of the largest among a small number of companies carrying out work of this nature.
36. Memsafe explained that, historically, there was no specific Code of Practice anywhere in the UK to carry out headstone testing and it had taken years of effort and research to develop its procedures which address the duty of care.
37. Memsafe considered that, if information relating to its costings and pricing becomes publicly accessible, then Memsafe's pricing could be undercut in future tendering exercises. Memsafe described an incident where, its pricing and process details were inadvertently published online, resulting in their subsequent bids for a period of time afterwards being undercut.
38. At the date of the review response, just over one year had passed since the conclusion of the Council's tender process and it was considered by the Council that the disclosure of the information into the public domain was likely to be detrimental to Memsafe.
39. The Council also stated that there is a possibility that Memsafe could raise a court action against the Council if it disclosed the information despite an express request not to do so.

The Commissioner's view

40. The Commissioner has considered carefully the arguments presented by both the Council and the Applicant.
41. In the Commissioner's view, disclosing the withheld information in response to the Applicant's request would, or would be likely to, cause substantial harm to a legitimate economic interest. The Commissioner accepts that the disclosure of the unit pricing would cause significant detriment to Memsafe's economic interests. The Commissioner notes that the contract was ongoing at the time of the request and the information therefore retained some currency and, in turn, commercial sensitivity.
42. Disclosing Memsafe's unit rate costs would allow competitors to have a commercial advantage and to undercut Memsafe in future projects. In the Commissioner's view, this would place Memsafe at a disadvantage in future competitions, thereby causing substantial prejudice to its commercial interests.
43. The Commissioner is therefore satisfied that the disclosure of this information, in response to the Applicant's request, would, or would be likely to, cause substantial harm to a legitimate economic interest. Consequently, he is satisfied that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld by it.

Public interest

44. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This 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.

The Council's submissions

45. The Council considered that disclosing the information into the public domain at this time would not be in the public interest as it would prejudice Memsafe's commercial interests through the loss of control of the confidential trade information.

The Applicant's submissions

46. In the Applicant's view, the contract had been mismanaged. It was therefore essential that the contract between the Council and Memsafe be disclosed (in full).

The Commissioner's view on the public interest

47. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the expenditure of public funds.
48. On the other hand, the Commissioner accepts there is a public interest in ensuring that there is fair competition in the commercial environment in which the contracting bodies are operating.
49. The Commissioner notes that the Council has disclosed a substantial volume of information about the contract, including the contract price agreed and the total amount paid to Memsafe. The only information not disclosed it is the unit pricing provided by Memsafe in response to a competitive tendering exercise.

50. The Commissioner has already concluded that disclosure of the withheld information would, or would be likely to, cause substantial harm to a legitimate economic interest. Such harm would be contrary to the public interest.
51. In the Commissioner's view, it is in the public interest for organisations operating in a commercial environment to be able to trade fairly and provide a viable service in a competitive market. The Commissioner also considers it is in the public interest that Memsafe are not treated unfairly as a result of having entered contractual arrangements with the Council, with a consequential adverse impact on their ability to participate effectively in future competitive exercises.
52. The Commissioner has therefore concluded that, in all the circumstances of this case, and taking into account the information which has been disclosed and the timing of this request, the public interest in making the withheld information available is outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

Part 2 – decision to test *all* headstones

53. Under the EIRs, a public authority may refuse to make environmental information available if one or more exceptions in regulation 10 apply and, in all the circumstance of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.
54. In response to the requirement for review, the Council stated that regulation 10(4)(a) applied to part 2 of the request.
55. The Applicant was not satisfied with the Council's claim that it did not hold information.
56. The Council explained that its approach between 2014 and 2017 was very much reactive and tests would be carried out in a cemetery if concerns were raised. In 2017, the Council decided that a more planned approach towards headstone safety was required and decided to seek the services of a contractor. This resulted in the tender process and the subsequent engagement of Memsafe.
57. The Council provided supporting information to justify its response that no documentation exists relative to the decision making process which culminated in the tender process and the subsequent engagement of the Memsafe.
58. As stated above, the Commissioner is satisfied that the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of the requests.
59. In all the circumstances, and having considered the explanations and supporting information provided by the Council, the Commissioner is satisfied that the Council does not hold the requested information.

Public interest test

60. As with regulation 10(5)(e), the exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. The Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes, to the extent that he has accepted the information is not held, that the public interest in making the

requested information available it outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

61. The Commissioner is satisfied that the Council complied with regulation 5(1) of the EIRs when it responded to this particular request.

Part 5 – the amount paid/due to Memsafe

62. The Council provided the Applicant with the amount paid to Memsafe between 6 July 2018 and 31 March 2019. The Council explained that there were still cemeteries to be finalised as at 31 March 2019 and that payments were not made monthly, but after the completion of testing at a cemetery.
63. Having considered the explanations, in addition to the supporting information provided by the Council, the Commissioner is satisfied that the Council provided the Applicant with the information relating to the amount paid to Memsafe and confirmed, that at the time of his request, that no further payments were due..
64. The Commissioner is satisfied that the Council complied with regulation 5(1) of the EIRs in responding to this request.

Decision

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

The Commissioner found that the Council correctly relied on regulations 10(5)(e) of the EIRs to withhold unit price information and regulation 10(4)(a) in relation to part 2 of his request. However, the Commissioner finds that, by not disclosing all non-excepted information in response to the request, the Council failed to comply with regulation 5(1) of the EIRs.

By the end of the investigation, the Council had disclosed all of the information which was not excepted from disclosure. The Commissioner does not require the Council to take any action in respect of this failure in response to this application.

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

18 May 2020

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

5 Duty to make available environmental information on request

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

...

- (2) The duty under paragraph (1) –

...

- (b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

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

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

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

- (a) interpret those paragraphs in a restrictive way; and
(b) apply a presumption in favour of disclosure.

...

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

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

...

- (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;

...

Appendix 2: The Applicant's request

1. Copy of all contracts signed between Scottish Borders Council and Memsafe Ltd since 2015
2. The Council issued a statement that appeared on <https://www.itv.com/news/border/2019-04-05/more-than-700-gravestones-altered-after-safety-inspection/> on the 5th of April 2019

"The council took the decision to test all the headstones in the old section of Peebles Cemetery, regardless of size and age, following a risk assessment."

"So far the majority of unstable memorials tested across the Borders have been made safe by socketing, which means keeping the headstone upright with the majority of the inscription still visible for families and visitors to read. "

– Scottish Borders Council Spokesman

I need to have all documents, including emails, relating to how that decision was made (as previously only large or old stones were to be tested), the date that this decision was made, the name of the person who made that decision, who that person worked for (whether they were Council employees, or if not the name of the company they worked for), and how that decision was notified to the public.

3. Peebles Cemetery was reinspected on the 12th March 2019. I required the full report of this inspection, the name of the person or persons who carried out this inspection, whether they were Council employees, or if not the name of the company they worked for. I require to know how this inspection was carried out, whether by visiting the Cemetery or by use of previous notes, and the relevant qualifications of the person(s) doing this inspection.
4. Copy of the sign off sheet for the work done at Peebles Cemetery. (This could be a Job sign off sheet or a Project sign off sheet)
5. The total amount that Scottish Borders Council paid to Memsafe Ltd between the 06/07/2018 and 31/03/2019 inclusive. The amount of any further payments due to Memsafe Ltd. by Scottish Borders Council.

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