

Decision Notice

Decision 123/2018: Company A and Moray Council

Elgin Transport Strategy

Reference No: 201701638

Decision Date: 15 August 2018



Scottish Information
Commissioner

Summary

The Council was asked for information relating to its “*Brief for preparation of transport strategy for Elgin 2017-2030*”.

The Council provided some information, but withheld certain cost estimates. The Commissioner investigated and found that the Council had properly responded to the request for information in accordance with the EIRs. This was because the information was excepted from disclosure as commercially confidential under regulation 10(5)(e) of the EIRs.

Relevant statutory provisions

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 available environmental information 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

1. On 27 March 2017, Company A made a request for information to Moray Council (the Council). The request was in six parts and was for information relating to the Council's document entitled “*Brief for preparation of transport strategy for Elgin 2017-2030*.”¹
2. The request was made on behalf of Company A by solicitors Burness Paull LLP, and the submissions referred to in this decision as being from Company A should be taken to include those from Burness Paull LLP on behalf of Company A.
3. The Council responded on 24 April 2017, disclosing some information but withholding other information under section 36 of the Freedom of Information (Scotland) 2002 (FOISA) (Confidentiality).
4. On 16 June 2017, Company A wrote to the Council, requesting a review of its decision on the basis that:
 - (i) the request should have been dealt with under the EIRs and
 - (ii) the Council should disclose the information being withheld at part 6 of the request, which read: “*All cost estimate documents produced pursuant to clause 2.5.5*”.
5. The Council notified Company A of the outcome of its review on 26 June 2017. The Council accepted that the request should have been dealt with under the EIRs and stated that it was withholding the information in question (i.e. that sought in part 6 of the request) under regulation 10(5)(f) of the EIRs (which relates to substantial prejudice to third party interests).

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<http://www.moray.gov.uk/minutes/data/XC20160607/Appendix%201%20Elgin%20Transport%20Strategy%20Brief.pdf>

6. On 14 September 2017, Company A wrote to the Commissioner and applied 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. Company A stated it was dissatisfied with the outcome of the Council's review because it believed the cost estimates should be disclosed to enable proper public scrutiny of the Council's actions.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Company A 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.
8. On 13 October 2017, the Council was notified in writing that Company A had made a valid application. The Council was asked to send the Commissioner the information withheld from Company A. The Council provided the information and the case was allocated to an investigating officer.
9. 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 explain fully its reliance on any provisions of the EIRs it considered relevant. Company A was also invited to provide submissions on the public interest test.
10. Both the Council and Company A provided submissions to the investigating officer.
11. During the investigation the Council stated that it also wished to rely on the exception at regulation 10(5)(e) of the EIRs (see below).
12. Also during the investigation, the Council disclosed some cost estimates to Company A, although these did not fall within the scope of the request as they were created after the request was made.

Commissioner's analysis and findings

13. 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 Company A and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

14. It is clear from the Council's correspondence with both Company A and the Commissioner, and from the information itself, that the information sought by Company A and under consideration here is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to plans for the development and roll-out of a transport strategy, which would clearly impact upon the environment. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (information on the state of the elements of the environment, including land and landscape) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements). The Council and Company A are agreed that the information is environmental. The Commissioner will therefore consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

15. 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.
16. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply, and then only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
17. The Commissioner will first consider the Council's application of regulation 10(5)(e) of the EIRs.

Regulation 10(5)(e) of the EIRs

18. The Council submitted that the withheld cost estimate information was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
19. Regulation 10(5)(e) 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.
20. 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)).
21. The Aarhus Convention: an Implementation Guide² (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (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.
22. 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?

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

- (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?

23. The Council stated that the withheld information was, by its nature, commercial information. It comprised a cost estimate, including detailed pricing information.
24. Having considered the Council submission on this point and scrutinized the withheld information, the Commissioner is satisfied that the information is commercial in nature.

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

25. The Council submitted that while no written confidentiality agreement existed between itself and its contractor, there was a verbal agreement (as recognised under Scots law) that the information was subject to a binding duty of confidence.
26. The Council argued that this duty of confidence existed in relation to the withheld cost estimates and that the information was only provided by Jacobs UK Ltd., the company which prepared the report in question, to the Council after, and on condition of, agreed confidentiality. The duty of confidence was agreed between the Council and Jacobs verbally at a meeting on 17 August 2016, that being the only basis on which the contractor would provide the information: there was no written record of this, but it was the clear recollection of those present. Statements to this effect were provided by individuals from both parties who had been at the meeting.
27. The Council stated that at no point were detailed costs requested as part of the contracted works for the Elgin Transport Strategy. At the meeting mentioned above, Jacobs intimated that it had undertaken, at its own discretion, some detailed costing works to help with their own confidence levels in the high level cost estimates they had committed to provide to the Council. The Council representatives at the meeting requested sight of the detailed costing works as it was believed this information would be informative. Initially this request was refused on the very grounds that the information was confidential and had not been part of the scope of works agreed, and to release it to the Council could be prejudicial to the contractor's commercial interests. However, following further consideration, Jacobs agreed to release the information on the grounds that it would also assist with the Council's confidence levels in the cost estimates being prepared. It was made clear at the time that the information would only be shared with the Council on a confidential basis, which the Council agreed. The Council was not charged for this information as it was supplied on a goodwill basis, outside the terms of the contractual arrangements in place.
28. The Council also made reference to *Decision 202/2006 Angus Macdonald and Greater Glasgow NHS Board*³, in which the Commissioner accepted that a verbal agreement could constitute a legally binding duty of confidence.
29. The Commissioner accepts, in the circumstances, that the information was provided to the Council subject to an obligation of confidentiality. While the Commissioner is surprised that a matter of this importance was not recorded at the time, he acknowledges that a written agreement is not an essential requirement for an obligation of confidentiality to be valid. Given the consistent recollections of the attendant parties, the Commissioner accepts that the information was intended to be confidential.

³ <http://www.itspublicknowledge.info/UploadedFiles/Decision202-2006.pdf>

Is the information publicly available?

30. The Council stated that the information was not publicly available and the Commissioner has no reason to doubt that this is the case: the nature of the information is such that it is not something that would generally be expected to be publicly available. The Commissioner accepts that the information is not in the public domain.

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

31. The Council submitted that the confidentiality agreement was designed to protect the legitimate economic interests of the contractor (Jacobs) which produced the cost estimate. The Council stated that harm could arise from the following:

- The cost estimate could be used by a competitor to understand how the contractor priced its services, which could allow competitors to unfairly improve their own services or distort fair tendering for future contracts.
- The cost estimate could also be used by a competitor to gain unfair insight into the techniques and processes employed by the contractor in building a cost estimate.
- In addition, release of the cost estimates to the public could cause reputational damage to the contractor if the cost estimates were presented out of context. The estimate was put together at a very early stage in the overall project, and so might not have reflected the ultimate cost, which would be through no fault of the contractor. An unfair loss of reputation or an unfair perception of error in the contractor's work would constitute substantial prejudice which would seriously affect their commercial interests. The Council submitted that a loss of reputation in a competitive industry would be a significant barrier to the contractor's ability to attract business and continue its current contracts.

The Commissioner's findings on substantial prejudice

32. Having taken all relevant submissions into account, and having considered the withheld information and the circumstances of its creation, the Commissioner is satisfied that disclosure of the information would cause, or would be likely to cause, substantial prejudice to the legitimate economic interests of the contractor. Essentially, the Commissioner accepts the harm claimed by the Council, particularly in relation to the insight it would offer to the contractor's pricing and processes and its value to competitors, as likely and significant.

33. Consequently, the Commissioner is satisfied that the Council was entitled to apply regulation 10(5)(e) of the EIRs to the withheld information.

The public interest

34. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to the withheld information, the Commissioner is required to consider the public interest test set out 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

35. The Council accepted that there was a public interest in disclosure of the cost estimates to ensure effective oversight of the expenditure of public funds. In this particular case, however, less detailed cost estimates had been prepared and published. These earlier,

detailed, cost estimates had been intended to allow the Council to gain confidence in the cost estimates, without the commercially sensitive information being made public. The Council accepted that releasing the cost estimates could give greater insight into the decision-making during the process of creating the Elgin Transport Strategy, as costs would be a significant factor in deciding the strategy. On the other hand, it noted that the decisions and recommendations made by the contractor were well explained in publicly available material.

36. Additionally, the Council submitted that contractors would be unwilling to share such sensitive information in the future unless compelled to, should they believe it would be disclosed, or was very likely to be disclosed. The Council believed there was a public interest in its being able to agree confidentially in order to view information deemed useful, in rare, specific cases such as this.
37. There was also a public interest, the Council argued, in it having good professional relationships with contractors, to allow for free and frank exchange of information, including commercially sensitive information. These relationships allowed better partnership work and represented greater value, the Council submitted.
38. The Council highlighted the benefits of a public authority being able to gain insight into the processes of contractors: this was likely to lead to best results and best value for the Council and the taxpayer, ensuring relationships ran smoothly with good information available to all parties. The Council argued that there was a public interest in non-disclosure of commercially sensitive information which could be used to disrupt fair tendering. Should such information be disclosed to the public, including competitors, it could be used to disrupt fair tendering and lead to a less competitive market with higher prices for public services, private businesses and commissioning services.

Company A's submissions

39. Company A submitted that it was important that decisions taken by public authorities could be effectively scrutinised and authorities held to account. In this case, Company A was of the view that the requested information was obtained by the Council with the intention that it would inform the preparation of a Transport Strategy for Elgin. Company A stated that decisions were made by the Council regarding which transport intervention options to incorporate into the Strategy, on the basis of the requested information.
40. Company A noted that the Strategy would inform major development decisions by the Council, including the route for new road infrastructure. Company A stated that the Council had acknowledged that the new road might require land in the control and ownership of third parties, including Company A itself. Company A submitted that it was in the public interest for information underpinning such decisions to be made available.
41. Company A went on to submit that there was a public interest in the disclosure of information which contributed towards ensuring:
 - (i) effective oversight of expenditure of public funds and
 - (ii) that the public obtained value for money.
42. The transport interventions forming part of the Elgin Transport Strategy would be funded by using taxpayer money. Company A stated that the Council had confirmed (in a meeting on 9 August 2017) that it did not have sufficient funds to deliver all proposed interventions, and would have to obtain funding from the Scottish Government or other funding bodies.

43. It was the view of Company A that it was essential that the requested information was disclosed, to ensure that the public was able to hold the Council to account, and to ensure that the transport interventions provided value for money, not only for people within the Council's area but also for those in the whole of Scotland (assuming additional funding would be required).
44. Company A stated that it was the Council's position that disclosure of the requested information would not be in the public interest as it would negatively impact the relationship between the Council and the information provider. However, Company A stated that it did not consider it in the public interest to allow the Council to withhold information on the basis of its potential impact on the Council's relationship with third parties. It was Company A's view that the information was provided to the Council by the third party in the knowledge that information held by the Council was subject to Freedom of Information legislation.
45. Company A also highlighted the legitimate economic interest of those who might be affected by a new road. It noted that powers of compulsory purchase, if required, would need to be justified in the public interest – which led it to suggest that it was not appropriate to invoke the public interest to justify withholding the information.

The Commissioner's conclusions on the public interest

46. The Commissioner can accept that Company A may have a specific interest in aspects of the Strategy, particularly if its land were to be required for a new road. On the other hand, there are separate processes for considering the public interest in relation to the compulsory acquisition of land. It does not follow from the possibility that compulsory acquisition may arise in future that there should not be a full and balanced consideration of the public interest in the context of this case.
47. While taking account of the points made by Company A (and acknowledged by the Council) about accountability for public funds, the Commissioner notes that there is other information available in the public domain (relevant cost estimates, albeit less detailed) as highlighted by the Council. The Commissioner notes that the Council also disclosed to Company A a set of cost estimates from July 2017, although these estimates fell outwith the scope of the request with regard to the timeframe.
48. The Commissioner also acknowledges Company A's point that the contractor gave the Council the information under consideration in the knowledge that it was subject to the EIRs. It does not follow, however, that there was a necessary expectation that the information would be disclosed. Regulation 10(2)(b) requires public authorities to apply a presumption in favour of disclosure when considering any exception in regulation 10(4) or (5), but that cannot operate to negate the potential application of an exception altogether. Here, the Commissioner has found that the information qualifies for exception in terms of regulation 10(5)(e), on grounds relating to the commercial interests of a third party. He cannot see how it would be appropriate to dismiss that same third party's relations with the Council as irrelevant when considering the public interest.
49. The Commissioner is satisfied in this case that weight needs to be given to the importance of public authorities maintaining effective working relationships with third party contractors. This impacts upon the public purse, with a view to securing mutual confidence, good performance and, ultimately, best value. In the circumstances, the Commissioner accepts the Council's argument that the public in such effective working would be furthered by not making the information available. He must also bear in mind that there is an inherent public interest in the maintenance of confidentiality.

50. On balance, having considered the withheld information in the context of all relevant submissions he has received, the Commissioner finds that the public interest in disclosing the requested information is outweighed by that in the maintenance of confidences and effective working relationships with contractors. On balance, therefore, in all the circumstances of this case, he concludes that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
51. The Commissioner finds that the Council was entitled to withhold the information under the exception in regulation 10(5)(e) of the EIRs.
52. As the Commissioner has upheld the application of regulation 10(5)(e), he is not required to go on to consider the Council's application of regulation 10(5)(f) of the EIRs.

Decision

The Commissioner finds that Moray Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Company A.

Appeal

Should either Company A 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

15 August 2018

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“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;

...

(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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