

Decision Notice



Decision 139/2014 Mr John Carson and City of Edinburgh Council

Cost information for Edinburgh Trams

Reference No: 201302482

Decision Date: 20 June 2014

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 27 August 2013, Mr Carson asked for information about the costs of the Edinburgh Tram project, which he described as missing from the Governance, Risk and Best Value Committee meeting papers of 15 August 2013. The Council informed Mr Carson that it did not hold any relevant information. Following a review, the Council identified relevant information, but withheld it on the basis that it was commercially confidential.

Following an investigation, the Commissioner found that the Council was entitled withhold the information on that basis.

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) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 27 August 2013, Mr Carson wrote to the Council to request the following in relation to the Edinburgh tram project:
... the information contained in Item 8.3 Trams missing from the Governance, Risk and Best Value Committee Papers of 15 August 2013 ...
2. The Council responded on 25 September 2013, informing Mr Carson that it was dealing with his request under the EIRs. (Having considered the nature of the information, in the context of the tram project, the Commissioner considers the Council to have been correct in dealing with the request under the EIRs.) It stated that it did not hold any information falling within the scope of his request, as only a verbal update on the tram project was given at the meeting of 15 August 2013. Consequently, it applied the exception in regulation 10(4)(a) of the EIRs. The Council provided Mr Carson with a link to help him access the webcast of the meeting.



3. On 25 September 2013, Mr Carson wrote to the Council, requesting a review of its decision. He explained why he believed the Major Projects Manager had access to a detailed cost breakdown when updating the meeting.
4. The Council notified Mr Carson of the outcome of its review on 23 October 2013. It explained that it was now applying the exception in regulation 10(5)(e) of the EIRs to withhold information which would fulfil Mr Carson's request. The Council considered the information to be confidential, and that disclosure would reveal its negotiating position and thus substantially harm its ability to get the best deal for its citizens. It explained why it believed the public interest favoured withholding the information.
5. On 23 October 2013, Mr Carson wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.
6. The application was validated by establishing that Mr Carson made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 30 October 2013, the Council was notified in writing that an application had been received from Mr Carson and was asked to provide the Commissioner with the information withheld from him. The Council provided the information and the case was then allocated to an investigating officer.
8. Mr Carson argued that he could not see why the figures for control period 5 (which he understood to be the subject of his request) should be withheld, when the Council had published the figures for control period 6.
9. The investigating officer contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. It was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested. The Council was also asked to clarify which period's figures were relevant to the update given to the Governance, Risk and Best Value Committee meeting on 15 August 2013, and also to comment on its publication of the control period 6 figures.



10. Before responding to the investigating officer, the Council disclosed to Mr Carson the cost summary information for control period 4, noting that considerations of commercial confidentiality no longer applied to this information. It confirmed that this was the cost summary prepared for the Governance, Risk and Best Value Committee meeting of 15 August 2013.
11. Following receipt of the cost summary for control period 4, Mr Carson remained of the opinion that the relevant information for the purposes of his request was that for control period 5.
12. The Council provided submissions in response to the investigating officer's questions.

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 her by both Mr Carson and the Council. She is satisfied that no matter of relevance has been overlooked.

Information covered by the investigation

14. In both his information request and his requirement for review, Mr Carson made it clear that he was seeking the detailed cost breakdown applicable to the Governance, Risk and Best Value Committee's consideration of the tram project at its meeting on 15 August 2013.
15. Having viewed the webcast of the meeting of 15 August 2013 (a link to which was provided to Mr Carson in the Council's response to his request) and having compared the financial information referred to there with the figures in the cost summary for control period 4, the Commissioner is satisfied that these correspond.
16. The Council explained that a formal report was not produced for the committee meeting on 15 August 2013. It explained that the Major Projects Manager made only a verbal update to the Committee, for which he prepared the control period 4 information. Control period 5 had not concluded at that time, so equivalent information was not available for that period.
17. Having considered the webcast, the information for control period 4 and the Council's submissions, the Commissioner is satisfied that the only information which could fall within the scope of Mr Carson's request is the information for control period 4. This is the information she must consider in the remainder of this decision.

Regulation 10(5)(e)

18. 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.



19. 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 released 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)).
20. The Aarhus Convention: an Implementation Guide (second edition)¹ (which offers guidance on the interpretation of the Aarhus Convention) notes (at page 82) that the first test for considering this exception is that the national law must expressly protect the confidentiality of the withheld information, 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.
21. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*² and the Commissioner does not intend to repeat that consideration in detail here. There, the Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information industrial or commercial in nature?

22. The Council submitted that the withheld information related to associated costs of the construction of the Edinburgh tram system. It considered the costs to be inherently commercial in nature.
23. Having considered the nature of the information, the Commissioner is satisfied that it can be described as commercial, given the nature of the Edinburgh tram project.

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

24. The Council submitted that it was party to contracts including an express duty of confidentiality, which applied to the withheld information. The Commissioner has considered these contracts and the related submissions, and accepts these arguments

¹ http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_text_only.pdf

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.asp>



Is the information publicly available?

25. In response to Mr Carson's request, the Council provided him with a link to its own website, to facilitate him in accessing the webcast referred to above. Through the webcast, it is possible for Mr Carson, or any other member of the public, to obtain total figures from elements of the cost summary information for control period 4. As such, these elements of the information were publicly available at the time Mr Carson made his request for information, and remain so. In its response to Mr Carson's request for review the Council recognised this to be the case. This information has not, on any reasonable interpretation, been withheld.
26. In his submissions to the Commissioner, Mr Carson asserted that the cost summary figures for control period 4 were available online. From online searches carried out, the investigating officer has been unable to locate cost summary figures for control period 4 on the Council's website, or elsewhere, other than as part of the cost summary figures for control period 6 (which were not publicly available until after the Council carried out its review).
27. The Commissioner therefore finds that the withheld information was not publicly available at any time while the Council was dealing with Mr Carson's request information or his requirement for review.

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

28. The term "legitimate economic interest" is not defined in the EIRs. The interest in question will be financial, commercial or otherwise "economic" in nature and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
29. The Council argued that disclosure of the withheld information would have revealed the figures it intended to use in the final account negotiations, in advance of those negotiations being concluded and the accounts finalised. It explained that the relevant negotiations with the contractors were not concluded until December 2013, some time after it concluded its review in relation to Mr Carson's request.
30. The Council explained, by extension, that disclosure would have placed its negotiating position in the public domain. It could therefore have been used by the contractors to their commercial advantage, to secure the best financial deal possible on the best commercial terms. The Council commented that this would have impacted considerably on its own ability to maintain a robust position, to extract the best possible outcome for the public purse.
31. In making a decision as to whether disclosure of the withheld information would have caused (or would have been likely to cause) substantial harm to the Council's legitimate economic interests, the Commissioner can only make her decision based on the circumstances at the time the Council responded to Mr Carson's requirement for review.



32. Having considered all relevant submissions, the Commissioner accepts that, if the withheld costs had been disclosed, this would have prejudiced the Council's negotiating position in the way it has argued. This would, in turn, have caused harm (which was likely to be substantial in the circumstances) to the Council's legitimate economic interests in getting the best deal for the tram project and its tax payers. For these reasons, the Commissioner accepts that disclosure of the withheld information would have been likely to cause substantial prejudice to the Council's legitimate economic interests, and that the Council was therefore entitled to withhold this information under regulation 10(5)(e).

Public interest test

33. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Mr Carson, the Commissioner is required to 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.
34. Although he was given the opportunity to do so, no submissions were provided by Mr Carson as to why he considered the public interest to favour disclosure of the information.
35. The Council acknowledged the high level of public interest in the tram project. It recognised the general public interest in ensuring financial transparency by public authorities, the proper management of contracts and understanding the continuing financial impact of the tram project on the Council and its tax payers.
36. However, the Council considered the imminent negotiations with contractors regarding the final accounts for the project to be a strong factor favouring the information being withheld. In this context, it highlighted the risk of giving contractors insight into the Council's thinking and financial position. Given the resultant threat, in its view, to its negotiating position and ability to secure the best deal for the project, the Council submitted that public interest in withholding the information (that is, in maintaining the exception) outweighed that in making it available.
37. Given the history of the project, the Commissioner recognises the long-standing (and considerable) public interest in scrutiny of the Edinburgh tram project. In this context, she acknowledges a public interest in disclosure of the detailed cost information which has been withheld.
38. That said, again bearing in mind the history of the project, the Commissioner also acknowledges the significant public interest in ensuring that the Council gets best value for public money in relation to the tram project.
39. The Commissioner has already recognised that disclosure of the withheld information would be likely to cause substantial prejudice to the Council's legitimate economic interests, and in particular its ability to obtain the best deal for tax payers during the final account negotiations with the contractors, without its negotiating position being made apparent.



40. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice might result, the Commissioner does not believe this to be the case here. In all the circumstances of this case, she finds the public interest in making the information available to be outweighed by the public interest in securing best value for money for the tax payer (and so maintaining the exception in regulation 10(5)(e)).
41. The Commissioner therefore finds that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

DECISION

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

Appeal

Should either Mr Carson or the City of Edinburgh 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
20 June 2014



Appendix

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.
- (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;
...

Decision 139/2014
Mr John Carson
and the City of Edinburgh Council

