

Decision Notice 191/2021

District heating service details

The Applicant

Public authority: Wheatley Housing Group

Case Ref: 202001330



Scottish Information
Commissioner

Summary

WHG was asked for details of the arrangement between Cube Housing, Glasgow on behalf of the Wheatley Group and Scottish and Southern Energy (Heat Networks) who provide hot water and heating to the Wyndford Estate, Glasgow.

Although WHG initially said it was withholding information in relation to part of the request, during the investigation, it notified the Applicant that no information was held in relation to all parts of the request appealed.

The Commissioner found that, by initially withholding information that did not fall within the scope of the request, WHG failed to comply with the EIRs. By the end of the investigation, the Commissioner was satisfied that no information was held in relation to parts two, three and six of the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information” and paragraph (d) of definition of “Scottish public authority”) and (2)(a) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (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 16 March 2020, the Applicant made a request for information to Wheatley Housing Group (WHG). He requested details on the arrangement between Cube Housing, Glasgow acting on behalf of WHG and SSE (Heat Networks) who provide hot water and heating to the Wyndford Estate, Glasgow. The Applicant asked:
 - When were SSE (Heat Networks) appointed the sole provider of hot water and heating to the Wyndford Estates? (part one)
 - Who was the previous provider of this service? (part two)
 - What are the names of all the other companies who were involved in the tender process when SSE (Heat Networks) were appointed the contract by Cube Housing Association to provide heating and hot water to the Wyndford Estate, Glasgow? (part three)
 - What is the length of the contractual arrangement for SSE (Heat Networks) to provide heat and hot water to the Wyndford Estate, Glasgow and therefore when is the contract due to be renewed and tenders can be submitted to provide the same? (part four)
 - On behalf of WHG and Cube Housing Association, Glasgow, which public officer individual signed the contract between Cube Housing Association, Glasgow acting on behalf of the Wheatley Group and SSE (Heat Networks) for SSE (Heat Networks) to provide heating and hot water to the Wyndford Estate, Glasgow? (part five)

- What financial incentives did SSE (Heat Networks) offer Cube Housing Association, Glasgow acting on behalf of the Wheatley Group and Wheatley Group in order to provide and maintain the provision of heat and hot water supply to the Wyndford Estate, Glasgow? (part six)
2. WHG responded under the EIRs on 14 April 2020. WHG advised the Applicant that the arrangements for the investment programme to install a district heating system took place prior to the Cube Housing Association's partnership with Glasgow Housing Association and the subsequent establishment of WHG in 2013. WHG explained that the information has been destroyed in line with its retention schedules. WHG advised that these schedules state that information relating to investment works are held for six years and then destroyed. WHG therefore notified the Applicant that the information requested was not held, in line with regulation 10(4)(a) of the EIRs. WHG explained that it was required to consider the public interest when applying this exception and confirmed that there was no public interest in disclosure of information that it did not hold.
 3. On 20 May 2020, the Applicant wrote to WHG requesting a review of its decision. The Applicant sought a review on the basis that each part of his request had not been responded to and he did not accept the application of the public interest test.
 4. WHG notified the Applicant of the outcome of its review on 25 June 2020. WHG explained why it was required to consider the public interest test and maintained that regulation 10(4)(a) applied. However, following further searches, WHG located information and provided this to the Applicant. WHG responded to each part of the Applicant's request as follows:
 - Part one: WHG explained that SSE Heat Networks Limited was appointed to design, build, finance, operate and maintain a combined heat and power and district heating scheme for the Wyndford Estate under a project agreement dated 8 and 9 December 2011.
 - Part two: WHG explained that there was no previous sole provider as, prior to installation of the combined system, properties used their own heating and hot water suppliers.
 - Part three: WHG explained that it had interpreted the request to be one for details of other parties who submitted a tender for the works. WHG confirmed that the information had been destroyed in line with its retention schedules and confirmed that regulation 10(4)(a) applied.
 - Part four: WHG confirmed that the project agreement was in place for a period of 30 years and the earliest date the contract would be due for renewal was 9 December 2041.
 - Part five: WHG confirmed that the agreement was signed on behalf of Cube by its then Chief Executive.
 - Part six: WHG interpreted the request (financial incentives offered by SSE (Heat Networks) as seeking details of payments of money made by SSE Heat Networks to Cube for the provision and maintenance of heat and hot water supply. WHG stated that this information was excepted from disclosure as disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information (regulation 10(5)(e) of the EIRs).

5. On 6 November 2020, the Applicant wrote to the Commissioner, applying 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. On 3 December 2020, the Applicant clarified that he was appealing parts two, three and six of his request. The applicant did not accept the application of regulation 10(5)(e) and argued that the public interest required disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. The Commissioner is satisfied that WHG is a Scottish public authority for the purposes of definition (d) of “Scottish public authority” in regulation 2(1) of the EIRs (see *Decision 118/2014 Dunbritton Housing Association Ltd*¹).
8. On 3 December 2020, WHG was notified in writing that the Applicant had made a valid application and was asked to send the Commissioner the information withheld from the Applicant. The case was then allocated to an investigating officer.
9. On 22 December 2020, WHG told the investigating officer that it did not hold information in respect of part six of the Applicant’s request.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. WHG was invited to comment on this application and to answer specific questions about what information it did – or did not – hold.

Commissioner’s analysis and findings

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

Application of the EIRs

12. It is clear from the topic of the request that the information sought is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to a contract to supply a community energy service and the Commissioner is satisfied that it falls within paragraphs (a), (b) and (c) of the definition in regulation 2(1) (the text of these paragraphs is reproduced in the Appendix).

Regulation 5(1) of the EIRs

13. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold.

¹ [Decision 118/2014 \(itspublicknowledge.info\)](https://itspublicknowledge.info)

14. 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, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(4)(a)

15. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, 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 the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
17. WHG explained that Cube Housing Association is a separate Registered Social Landlord, which joined in partnership to create WHG in 2013. Cube's integration to WHG focused on adopting group wide systems and services, and sharing approaches such as group wide procurement frameworks, when the need arose. Existing arrangements that Cube had in place prior to joining WHG (such as contracts that were procured prior to joining WHG) that were required for its business operation remained in place until they expired and were not transferred to WHG. The district heating system referred to in this case was set up in 2009, before the establishment of WHG. WHG confirmed that, as notified to the Applicant, it had never held some of the information requested as it was prior to the establishment of WHG in 2013.
18. The project agreements for this project were signed in 2012. WHG explained that all key staff involved in the project and the entire Senior Management Team from 2012 have since left the business. WHG also explained that only one member of staff is currently employed by Cube who was employed at the time this contract began.

Part two: Who was the previous provider of the service?

19. WHG explained that there was no previous sole provider of hot water and heating to the Wynford estate. WHG explained that, prior to the installation of the combined heat and power plant, the properties used their own electric heating and hot water systems and suppliers. WHG submitted that Cube Housing Association would never have held this information.

Part three: What are the names of all the other companies who were involved in the tender process?

20. WHG also reiterated that, as explained to the Applicant, all information held by WHG is held in line with WHG's retention policy. Under the retention schedules, unsuccessful tenderer documentation is destroyed either (i) six months from the date of contract award for unregulated tenders or (ii) three years from the date of contract award for regulated tenders. WHG supplied the Commissioner with a copy of its procurement retention schedule which confirmed this to be the case.

21. As this case is seeking details from a contract initiated in 2009 before the establishment of WHG, and following electronic and paper searches, WHG confirmed that this information is not held.

Part six: What financial incentives did SSE offer Cube Housing Association?

22. WHG explained that it interpreted this request as seeking details of financial inducement offered from SSE to Cube, over and above the normal course of business, for schemes of this sort.

23. WHG submitted that no financial incentives were paid from SSE Heat networks to Cube Housing Association in order to provide and maintain the provision of heat and hot water supply to Wynford Estate. As a result, WHG were not seeking to withhold any information from the Applicant in relation to this request. WHG acknowledged that this was contrary to the position outlined in the review response to the Applicant.

24. WHG explained that the project did qualify for funding from the Community Energy Saving Programme 2009-2012 (CESP Funding) launched by Ofgem. To access the funding, SSE was required to apply for this funding on Cube's behalf.

25. The financial arrangements for this this funding were set out in clauses seven and eight of the Project Agreement (the Agreement). These clauses were supplied to the Commissioner. WHG explained that the Agreement covers the district heating and a cladding project, as both were interlinked. The Agreement references a CESP contract which accounts for carbon savings across cladding, heating and window replacements. WHG did not consider grant funding available from Ofgem to be a financial inducement, falling within the scope of this request. WHG acknowledged that it could have been clearer in its review response to the Applicant.

26. WHG clarified this with the Applicant during the investigation.

Searches

27. The investigating officer was provided with details of the searches undertaken at different times throughout the process, including who was consulted and why. WHG explained that it was unable to undertake full searches at the time of the original request as all of its offices were closed and staff were working remotely with no access to some systems or to hard copy files. During the investigation, WHG was able to access the building and retrieve the hard copy folder containing the document identified as held in the review response and withheld, at that time, under regulation 10(5)(e).

28. Having reviewed the information identified, the Commissioner is satisfied that it does not contain information which would fall within the scope of part six of this request. Although grant funding was available, the Commissioner does not believe that this was an "inducement" as requested by the Applicant. The Commissioner must therefore find that the WHG was not entitled to rely on regulation 10(5)(e) in response to this part of the request and should have notified the Applicant that the information was not held in line with regulation 10(4)(a).

29. Having considered all the relevant submissions provided in this case, the Commissioner accepts that WHG have now conducted adequate searches and that those searches were reasonable in the circumstances. The Commissioner has also considered the explanations provided by WHG as to why no information is held with regard to parts two, three and six of this request. In conclusion, the Commissioner is satisfied, on the balance of probabilities, that WHG does not hold any information falling within the scope of the request.

The public interest

30. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
31. In this case, for the reasons set out above, the Commissioner is satisfied that WHG does not hold any further information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Decision

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

The Commissioner is satisfied that WHG does not hold any information in relation to parts two, three and six of the request (and therefore regulation 10(4)(a) of the EIRs applies).

However, he finds that WHG was not entitled to refuse to disclose information in relation to part six under regulation 10(5)(e).

As WHG notified the Applicant that no information was held in relation to part six of the request during the investigation, the Commissioner does not require WHG to take any action.

Appeal

Should either the Applicant or WHG 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

2 December 2021

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

"Scottish public authority" means –

...

- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and –
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or

...

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info