

Decision Notice

Decision 220/2016: Mr William Chisholm and Scottish Borders Council

New Earth Solutions Group Ltd: Lessons learned

Reference No: 201600649

Decision Date: 14 October 2016



Scottish Information
Commissioner

Summary

Mr Chisholm asked Scottish Borders Council (the Council) for information about the termination of its waste management contract with New Earth Solutions Ltd. (NES), including a breakdown of costs and details of any “lessons learned”.

The Council provided Mr Chisholm with a breakdown of costs, but withheld information regarding the “lessons learned” under regulation 10(4)(e) of the EIRs (Internal communications). Following a review, Mr Chisholm remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mr Chisholm’s request for information in accordance with the EIRs. She accepted that some information was correctly withheld under regulation 10(4)(e), but found that this exception was wrongly applied to some information. She required the Council to provide Mr Chisholm with the information which had been wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(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 16 February 2016, Mr Chisholm made a request for information to the Council. The information requested was:
 - (i) Detailed breakdown of the costs which the Council incurred as a result of terminating the contract since 19 February 2015...to include payments to consultants, legal firms and any other specialists involved in the closure process, and in the formulation (so far) of an alternative waste management solution for the Scottish Borders, as well as any monies paid to or received from New Earth Solutions.
 - (ii) Information “contained in Council documents, reports, emails and other written correspondence detailing the ‘lessons learned’ from the Council’s unfortunate experience with a contractor who could not deliver either the technology or the funding for the region’s vital modern waste facility at Easter Langlee”.
2. The Council responded on 15 March 2016. It provided Mr Chisholm with the information he had asked for in request (i), but it withheld information falling under the scope of request (ii), arguing that it was excepted from disclosure under regulation 10(4)(e) of the EIRs.

3. On 16 March 2016, Mr Chisholm wrote to the Council requesting a review of its decision on the basis that a very significant sum of public money was spent for no return, and it was important for the public to be aware of the lessons learned from this particular episode so that they might be assured the same mistakes would not be repeated in future.
4. The Council notified Mr Chisholm of the outcome of its review on 12 April 2016. It noted that Mr Chisholm appeared to want sight of a report setting out the lessons learned, following the workshop that had taken place. It explained that a separate report detailing the lessons learned had not been created, as this was not the Council's normal practice. It explained that the lessons learned through the NES project have already informed subsequent decisions it has made, and provided Mr Chisholm with two reports which, it said, had been informed by these lessons. The Council maintained its previous decision to withhold information under regulation 10(4)(e) of the EIRs.
5. On 12 April 2016, Mr Chisholm applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Chisholm stated he was dissatisfied with the outcome of the Council's review because it was continuing to withhold information from him.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Chisholm made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 10 May 2016, the Council was notified in writing that Mr Chisholm had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Chisholm. The Council provided the information and the case was allocated to an investigating officer.
8. 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 including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

Commissioner's analysis and findings

9. 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 Chisholm and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in full in Appendix 1 to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various qualifications and exceptions contained in the EIRs.
11. In its initial response to Mr Chisholm's request, the Council informed him that it had applied the exemption in section 39(2) of FOISA and was withholding the requested information under regulation 10(4)(e) of the EIRs.

12. The Commissioner notes that the withheld information relates to the “lessons learned” from the Council’s termination of a contract for a waste treatment facility and she is satisfied that the information would fall within paragraphs (a), (b) or (c) of the definition of environmental information in regulation 2(1) of the EIRs.
13. The exemption in section 39(2) of FOISA provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing such information to be considered solely in terms of the EIRs. As the Commissioner accepts that the requested information is environmental and must be considered under the EIRs, she is satisfied that the Council was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
14. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr Chisholm in this case, the Commissioner also finds that the public interest in maintaining this exemption and in responding to the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner will therefore consider this case in what follows solely in terms of the EIRs.

Withheld information

15. The Council initially provided the Commissioner with five documents it was withholding from Mr Chisholm:
 - (i) Document 1
 - (ii) Document 2 (report)
 - (iii) Annex 1 of Document 2
 - (iv) Annex 2 of Document 2, and
 - (v) Document 3
16. Of these, the Commissioner noted that Document 1 was a duplicate of Annex 2, while Document 2 (report) and Document 3 both contained information which fell outside the scope of Mr Chisholm’s request. The Commissioner concluded that parts of Annex 1 and Annex 2 were also outwith the scope of Mr Chisholm’s request as they comprised general discussions or comments by officers and did not relate directly to lessons learned by the Council.
17. The Council contended that the information in Annex 1 was entirely outwith the scope of Mr Chisholm’s request. It argued that while Annex 1 relates to a “lessons learned” workshop, the workshop related to the earlier part of the project with NES, so Annex 1 is not relevant to Mr Chisholm’s request. The Commissioner disagrees that Annex 1 is not relevant to Mr Chisholm’s request. Parts of Annex 1 identify lessons from the period before the contract with NES was agreed, but these issues affected the relationship that later developed with NES and, consequently, the outcomes from which lessons have been learned.
18. The information being considered by the Commissioner in this decision is, therefore:
 - (i) Annex 1 (except for the entirety of sections 1.1 and 1.2 and parts of sections 1.4 and 1.5, which are outwith the scope of the request.)
 - (ii) Annex 2 (except for parts of sections 1.3, 1.4, 1.5, 1.6 and 1.8 and the whole of section 1.9, which are outwith the scope of the request).

19. During the investigation, Mr Chisholm made it clear that he was not seeking the names of any staff, so all names will be withheld and the Commissioner will not consider them further in this Decision Notice.

Has all relevant information been identified?

20. The Council was asked whether it held any further information falling within the scope of Mr Chisholm's request, besides the documents already listed. In particular, the Commissioner questioned the absence of a report or summary bringing together the "lessons learned" from two workshops which the Council had held. The Council maintained that the only documentation it held had already been provided to the Commissioner. The Council explained that the outcome of the "lessons learned" workshops will be taken forward and embodied in future projects and reports. It submitted that Mr Chisholm was provided with two such reports in its review outcome.
21. The Commissioner believes it was reasonable to expect that the Council might have held a "final" document or report summarising the "lessons learned" from the Council's experience with NES, rather than simply relying on its staff to take forward the lessons and incorporate them in future projects or reports. However, there is nothing within the documents she has viewed or the submissions from the Council which indicates the existence of a "summary" document, and therefore she must accept that the only relevant information held by the Council is that detailed above in paragraph 15.

Regulation 10(4)(e) of the EIRs (internal communications)

22. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. As with all exceptions under the EIRs, however, regulation 10(4)(e) is subject to the public interest test.
23. With regard to Annex 1 and Annex 2, the Council submitted that these documents were not prepared on a formal basis and were not for submission to any other party, be that Officers of the Council, Senior Management Team, Councillors or any Committee. The Council explained that both of these documents are simply a written record of conversations which occurred in the context of a meeting. It argued that these conversations are clearly communications and the parties who were involved were acting purely as Officers or Agents of the Council; therefore, the conversations/communications were clearly internal communications.
24. The Commissioner is satisfied that Annex 1 and Annex 2 can both be described as internal communications and, therefore, that the exception in regulation 10(4)(e) of the EIRs was correctly applied by the Council.

Public interest test – Mr Chisholm's submissions

25. Mr Chisholm explained that, in response to other requests he had made to the Council about its contract with NES, he had been told that "lessons will be learned" from the experience. Mr Chisholm argued that, given the sizeable loss of public money associated with what he considered to be the Council's mismanagement of its waste management strategy:

"...members of the public, who are footing the bill for the Council's mistakes, have a right to know the "lessons learned" so that millions of pounds more are not wasted on a repeat fiasco."

Public interest test – the Council's submissions

26. The Council acknowledged that there is a public interest in disclosure of the information, given the sum of public money that was expended during the contract with NES. The Council accepted that it was important that the public can be reassured that, if mistakes were made, lessons will be learned and that those mistakes will not recur. The Council also acknowledged that there is a presumption in favour of the disclosure of information unless the public interest in withholding it is substantial and outweighs the public interest in disclosing information.
27. The Council maintained that, having considered the matter repeatedly, the public interest in withholding the information was so significant that it outweighed the disclosure of the information in this case. The purpose of a “lessons learned” workshop is to ensure that a project can be properly and thoroughly scrutinised with honesty and objectivity. It argued that the most full and frank disclosure and discussion will always take place in circumstances where those participating in that conversation are free to speak honestly, safe in the knowledge that the information will be used for its proper purpose and will not find itself placed in a public environment.
28. The Council submitted that there is a significant public interest in ensuring that where projects have been completed (whether successfully or otherwise), this conversation is able to take place and the fullest rewards of such a conversation are able to be achieved. This way, a public authority can ensure that it is best placed to critically review its own actions, and the public can be assured that such conversations take place. The Council submitted that the public interest in a local body being able to critically review its own actions is substantial, and this interest will be significantly weakened if the content of these conversations find their way directly into the public domain.
29. The Council explained that the lessons which its officers noted as a result of the conversations held in the “lessons learned” workshop will inform future decisions as they are made. It submitted that it had provided Mr Chisholm with two reports where such an approach had since been taken. It stated that it continues to prepare its future waste plans and there will be reports to Council and its Committees as those plans progress. Those reports will undoubtedly make reference to previous projects and to the lessons which were learned from them. The Council maintained that the public interest in ensuring lessons are learned will be further enhanced from that information being made available in those reports.

The Commissioner's consideration of the public interest test

30. The Commissioner acknowledges that it is important that authorities are not deterred from reviewing their actions and decisions (especially in situations which have not had a positive outcome), in order that the knowledge and experience gained from past projects can be utilised in future projects. The Commissioner considers that it is in the public interest for authorities to be able to continually improve their performance in order to increase their efficiency.
31. The Commissioner further considers that “lessons learned” events are most useful when staff can honestly reflect on decisions that were made and are able to be open and frank about identifying past actions which could be improved on in any future scenario. Group sessions which encourage staff to analyse past practices can then be fed into wider organisational learning points, which can enable the authority to improve its performance.
32. The Commissioner notes the Council's concern that if the information is disclosed, its staff will be reluctant to be free and frank in any future “lessons learned” processes, and that this

would be to the detriment of the public. However, Mr Chisholm has indicated he does not require the names of Council officers, where they appear in the withheld information. The Commissioner considers that if staff names are not disclosed, then it is far less likely that staff will be inhibited from fully engaging in a similar process in the future.

33. Having considered the two documents containing information that falls within the scope of Mr Chisholm's request, the Commissioner notes that there is information in section 1.3 of Annex 1 which does not embody formal "lessons" gained from the workshops, but describes the personal reflections and experiences of the staff involved. These comments cannot be seen as organisational learning, but more accurately reflect frank discussions between officers about their own experiences at various times during the project. The Commissioner considers that although this information falls within the scope of Mr Chisholm's request, its disclosure would not be in the public interest: it would not add to public understanding of the Council's assessment of its overall performance, as the discussions focus on individual experiences. In addition, the Commissioner considers that disclosure of this kind of information may well lead to the harm anticipated by the Council, as officers may not wish to contribute their thoughts so freely in future if they consider that personal reflections and discussions which do not relate to an organisational learning point may be disclosed, even with their names redacted.
34. Section 1.4 of Annex 2 contains information about a sum of money requested by NES. The Commissioner accepts that this figure would have been confidential at the time when the money was requested, and the Council has maintained that this sum should not be disclosed even at this juncture. The Commissioner is satisfied that this information is not required in order to understand any of the lessons learned by the Council, and she finds that its disclosure, in the context of Mr Chisholm's request, is not required in the public interest.
35. With regard to the remaining content of Annex 1 and Annex 2, the Commissioner notes that both contain organisational "lessons" from the Council's handling of the NES project. The Commissioner considers that disclosure of these "lessons" are in the public interest, as they indicate that the Council has evaluated its handling of the NES project and they demonstrate how this evaluation will be used to improve the management of future waste treatment contracts. The Commissioner notes that the cancellation of the NES contract led to the Council "writing off" several million pounds of tax payers' money, and, in the circumstances, she considers that disclosure of the lessons learned during this process is in the public interest.
36. The Commissioner finds that the public interest in disclosure outweighs the public interest in maintaining the exception and withholding the information. Accordingly, she finds that the Council was not entitled to withhold the information under consideration under regulation 10(4)(e) of the EIRs. She now requires the Council to disclose parts of Annex 1 and 2 to Mr Chisholm. The Commissioner will provide the Council with marked up copies of Annex 1 and 2 to indicate what information is to be disclosed.

Decision

The Commissioner finds that Scottish Borders Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Chisholm by correctly withholding some information under regulation 10(4)(e) of the EIRs.

However, by wrongly withholding other information under regulation 10(4)(e) of the EIRs, the Council failed to comply with section 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide Mr Chisholm with the information which was wrongly withheld from Annex 1 and Annex 2 by **28 November 2016**.

Appeal

Should either Mr Chisholm or Scottish Borders Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Rosemary Agnew
Scottish Information Commissioner

14 October 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

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;

...

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

...

(e) the request involves making available internal communications.

Scottish Information Commissioner

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