

Decision Notice

Decision 056/2016: Mr Stuart Glendinning and City Property Glasgow

Evaluation of bids

Reference No: 201501835

Decision Date: 7 March 2016



Scottish Information
Commissioner

Summary

On 13 August 2015, Mr Glendinning asked City Property Glasgow (CPG) for information relating to the proposed sale and development of land adjacent to Park Quadrant Glasgow, including the scores awarded to each of the four finalists and the scoring methodology. CPG disclosed some information to Mr Glendinning and, following review, stated that other information was excepted from disclosure as commercially confidential under regulation 10(5)(e) of the EIRs.

CPG disclosed further information to Mr Glendinning during the Commissioner's investigation

The Commissioner found that CPG was entitled to rely upon regulation 10(5)(e) to withhold the remaining information.

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 13 August 2015, Mr Glendinning made a request for information to CPG. The information requested related to the proposed sale and development of land adjacent to land at Park Quadrant, Glasgow. The information requested included the score awarded to each of the four finalists for design and the methodology used to determine the score.
2. CPG responded on 3 September 2015. CPG provided Mr Glendinning with anonymised information on the scores awarded, with a brief explanation of the scoring methodology.
3. On 8 September 2015, Mr Glendinning wrote to CPG requesting a review of its decision regarding the above request. In particular, Mr Glendinning stated that the finalists should be named and that the scoring information provided for design did not answer his question in enough detail.
4. CPG notified Mr Glendinning of the outcome of its review on 2 October 2015. It provided the name of the finalist associated with each score and added to its explanation of the methodology. It acknowledged that it held further relevant information but stated that this was withheld under the exception in regulation 10(5)(e) of the EIRs.
5. On 6 October 2015, Mr Glendinning wrote to the Commissioner. He 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 Glendinning stated he was dissatisfied with the outcome of CPG's review because it had not revealed the methodology used to score the design element of the process.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Glendinning 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 21 October 2015, CPG was notified in writing that Mr Glendinning had made a valid application. CPG was asked to send the Commissioner the information withheld from Mr Glendinning. CPG provided the Commissioner with a blank design planning scoring sheet 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. CPG was invited to comment on this application and answer specific questions, focusing on its application of regulation 10(5)(e) of the EIRs.
9. CPG was asked again to provide the Commissioner with all the information it held and which fell within the scope of the request. It did so, along with its submissions on the exception.
10. During the investigation it was explained that Glasgow City Council (the Council) had entered into an agreement with CPG, to market the land in question and consider all bids received. CPG is wholly owned by the Council and it was accepted by the Council and CPG that both authorities held all information falling within the scope of Mr Glendinning's request jointly.
11. On 12 June 2015, the Council received a request, from another person, for information relating to the same process. The information held by each public authority and captured by Mr Glendinning's request and this other request was the same. The Council also withheld the information in terms of regulation 10(5)(e) of the EIRs. That request to the Council was also the subject of an investigation by the Commissioner.
12. During the investigation, CPG provided Mr Glendinning with a blank scoring sheet used to evaluate the bids received.
13. Mr Glendinning acknowledged receipt of the scoring sheet provided and submitted that there was no merit in CPG's arguments that disclosure would compromise any of the commercial interests the authority had identified.

Commissioner's analysis and findings

14. 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 Glendinning and CPG. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. It is clear from CPG's correspondence with both Mr Glendinning and the Commissioner, and from the information itself, that the information sought by Mr Glendinning is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the marketing and sale of a piece of land for the purposes of development and construction. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (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). CPG took this

approach from the outset and Mr Glendinning has not disputed this. The Commissioner will consider the information in what follows, solely in terms of the EIRs.

Regulation 5(1) of the EIRs

16. 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.
17. 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 relation to the exceptions contained in regulation 10(4) and (5), only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(5)(e) of the EIRs

18. CPG submitted that the information withheld and falling within the scope of Mr Glendinning's request 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 Guide¹ (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?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

¹http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Is the information commercial or industrial in nature?

23. CPG submitted that the withheld information was commercial in nature. Having explained the background to the sale, it submitted that the information related to the scoring of bids for the sale of the site to a developer for a monetary consideration. As such, it formed part of a commercial transaction. CPG further explained that the transaction was still live, since missives of sale had not yet been concluded. Therefore, CPG argued there was still the potential that the sale might fall through, in which case CPG would need to restart the bidding process for the sale of the site.
24. Having considered these submissions, 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. In its submissions to the Commissioner, CPG stated that there was an implied duty of confidence in relation to the information held. Bidders for a transaction of this nature would not expect this information to be made public, and submitted their bids on the basis that it would remain confidential.
26. CPG stated that the duty to maintain confidentiality could be implied both from the circumstances of the bids and the nature of the relationship between CPG and the bidders. CPG submitted that such an expectation is normal practice in a transaction of this kind. CPG stated that, having received the bids, each bid was scored against the criteria set out the scoring sheet and the feedback forms completed for each bidder. This information could not have been created without the confidential information supplied by the bidders.
27. CPG made reference to *Decision 185/2015 Mr Bill Chisholm and Scottish Borders Council*², where the Commissioner found that the confidentiality covered by this exception would include confidentiality imposed by common law. In this case, CPG submitted (for the reasons set out above) such confidentiality was present.
28. Having considered the content and context of the information, the Commissioner accepts that the withheld information in this case is subject to an implied obligation of confidence. Such an obligation may lapse with the passage of time but, in the circumstances of this particular case, the Commissioner accepts that the obligation of confidence remained in force at the time CPG responded to Mr Glendinning's requirement for review.
29. While the Commissioner accepts CPG's submissions on this point, those providing such information to a Scottish public authority must be aware that the information may still be disclosed under FOISA or the EIRs, where substantial prejudice is not evident or where it is deemed to be in the public interest.

Is the information publicly available?

30. CPG submitted that the information was not currently in the public domain.
31. Whilst noting that other information relating to this process has been made publicly available, the Commissioner accepts that the withheld information was not publicly available when CPG dealt with Mr Glendinning's requirement for review.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201501199.aspx>

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

32. The term “legitimate economic interest” is not defined in the EIRs. In the Commissioner’s view, the interest in question must 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.
33. In its submissions to the Commissioner, CPG explained that the information related to a live land transaction to the value of several million pounds. It reiterated that the transaction was not yet concluded. It submitted that the transaction was at a particularly sensitive stage, where missives had not yet been concluded. Both parties had committed considerable resource in reaching this point and were working hard towards a concluded bargain. Disclosure would undermine the developer’s confidence in the Council and CPG, and could lead to the developer pulling out of this transaction. If that happened, a substantial capital receipt would be lost and considerable additional resources would be required for fresh negotiations or a new bidding process.
34. For future disposals, CPG argued that disclosure of the information would substantially prejudice the Council’s ability to sell sites for the highest price possible and achieve its duty to obtain Best Value. It believed the likelihood of disclosure of information of this kind would in turn be likely to deter developers from bidding for public sector sites in favour of privately owned land opportunities. This would reduce competition for public sector sites, leading to lower prices being offered. The quality of future bids would also be reduced, as agents would not wish to include their detailed designs, schemes, layouts and proposed product in their bids with the risk of this information being made publicly available.
35. Mr Glendinning informed the Commissioner that he did not believe disclosure of further scoring information would in any way compromise CPG’s commercial interests. He submitted that CPG had provided no examples to demonstrate that such a risk existed and that disclosure of the methodology would be beneficial to all concerned. He noted that scores could not be cross-referenced against designs.
36. Mr Glendinning also explained how outcome of the design scoring process appeared to contradict the conclusions of the design panel. He highlighted significant changes in the preferred bidder’s design since the scoring process, suggesting that as a result the assessment process was largely irrelevant to the current design. The “winning” design was, he submitted, in the public domain in any event: none of the other designs were available, so knowing what they scored could not compromise anything.
37. The Commissioner has to be satisfied that the harm to the economic interest in question (and thus to the confidentiality to be protected) would be real, actual and of significant substance. She accepts CPG’s submissions as to the commercial sensitivity of the information at the time it responded to the request and carried out its review. In coming to this conclusion, the Commissioner has considered the timing of the information request and CPG’s responses. She has taken account of the fact that missives of sale have not been completed, with the resultant possibility that this particular land transaction may not progress and may have to be re-advertised.
38. Having taken CPG’s submissions into account (while not accepting all of the claims made by CPG), together with the information actually withheld, the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause,

substantial prejudice to the confidentiality of the information and the ongoing legitimate economic interests of CPG. Consequently, the Commissioner is satisfied that CPG was entitled to apply regulation 10(5)(e) of the EIRs to the withheld information.

Consideration of the public interest

39. 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.

CPG's submissions

40. In its submissions to the Commissioner, CPG acknowledged the significant public interest in authorities being open and transparent. It also recognised that transactions governing the sale of land will be of interest to the public, particularly in cases where land has been purchased as the result of a compulsory purchase order. CPG further recognised that there is always a general public interest in making information held by public authorities accessible, with the aim of enhancing the scrutiny of decision making.
41. On the other hand, CPG submitted that there is a general public interest in confidences being maintained. This, it claimed, was particularly relevant in this case, given the sensitive stage of the transaction with missives not yet concluded. It highlighted the prejudice claimed above, in relation to the current and future transactions, which it submitted was not in the public interest.
42. CPG submitted that the public interest in disclosure was satisfied by the information already in the public domain, such as the Executive Committee Paper dated 28th May 2015 and other information CPG had provided concerning the approach taken in scoring the bids and the two stage evaluation process.
43. CPG intimated that it had noted the concerns raised by the applicant (see below), but was of the view that such matters would properly be addressed in the consideration of the planning application. It believed the public interest in viewing documents held by public authorities and scrutinising the decision making process would be satisfied through the planning process, which would involve a full public consultation on the basis of detailed plans.
44. On balance, CPG submitted that the public interest lay in the maintaining the exception.

Mr Glendinning's submissions

45. Mr Glendinning submitted that the methodology used to determinate scores being in the public domain would be of benefit to the public. He stated that the public was unaware of the four final proposals and was unable to cross-reference the score against each of the designs.
46. Mr Glendinning also believed the information provided by CPG previously was contradictory. He noted different placings awarded to the same bidder at different stages in the evaluation process. He considered it clear that CPG had not followed any sort of rigorous scoring process.
47. He further commented upon the numerous design elements which had changed, stating that the whole assessment process was largely irrelevant to the current design and that it was in the public interest that the information be disclosed.
48. Mr Glendinning also highlighted the significance of the site and its surroundings in historic environment and landscape terms. In this context, he believed it was in the public interest

that the decision making process was not flawed in anyway and that all relevant information regarding that process should be disclosed.

Commissioner's conclusions

49. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves the sale and marketing of publicly owned assets such as land. She also acknowledges the significant environmental and architectural importance of the area in question. The Commissioner also accepts that disclosure of the information might shed some light on the process followed and on the selection of the preferred bidder. She has borne in mind that those entering into contracts with, or submitting bids to, Scottish public authorities should be aware that, at times, such information will require to be made available as a result of a request under the EIRs.
50. The withheld information relates to how CPG considered a number of bids for the land in question and the design aspects of those bids. Disclosure of the information would provide competitors who were involved in this bid (and those who may be involved in future bids) with an insight into how those competitors fared against specific criteria. Such disclosure (in the context described above) is not conducive to open and fair trading, and as such not in the public interest.
51. The Commissioner has also taken account of the submissions made by CPG in favour of maintaining the exemption. She has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that this would not be in the public interest.
52. The Commissioner considers that it is in the public interest for those organisations operating within a competitive market, to be able to do so, along with potential competitors, on a fair and equal footing. This is particularly relevant where the proposed sale has not been concluded and may be subject to further negotiation or remarketing.
53. On balance, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in disclosing the requested information is outweighed by that in the maintenance of confidences and in fair competition. On balance, therefore, in all the circumstances of this case, she 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.
54. The Commissioner finds CPG was entitled to withhold the information under the exception in regulation 10(5)(e) of the EIRs.

Decision

The Commissioner finds that, in respect of the matters considered in this decision, City Property Glasgow complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Glendinning.

Appeal

Should either Mr Glendinning or City Property Glasgow 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.

Rosemary Agnew
Scottish Information Commissioner

7 March 2016

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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