

Decision Notice

Decision 076/2018: Mr A and City of Edinburgh Council

Fire stopping reports

Reference No: 201701743

Decision Date: 31 May 2018



Scottish Information
Commissioner

Summary

The Council was asked for fire-stopping reports and surveys relating to Edinburgh schools. The Council withheld information on the basis that disclosure would cause substantial prejudice to the confidentiality of commercial or industrial information, with the result that the information was excepted from disclosure under the EIRs.

Following an investigation, the Commissioner found that the Council was not entitled to withhold the information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b), (c) and (f) 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. In February 2017, City of Edinburgh Council (the Council) published a Report of the Independent Inquiry into the Construction of Edinburgh Schools¹ (the Cole report).
2. On 19 July 2017, Mr A made a request for information. Referring to sections 6.2.18 and 6.2.20 of the Cole report, Mr A asked the Council for:
 - a) *a copy of the independent review of the fire dampers across the school estate, and*
 - b) *a copy of any report produced by this independent expert which assess (sic) the original fire-stopping surveys by ESP [Edinburgh Schools Partnership Ltd], or assesses the remedial work carried out since.*
3. On 19 July 2017, referring to section 6.2.10 of the Cole Report, Mr A also requested:
 - c) *a copy of the original fire-stopping surveys from ESP, including copies of the photos produced for the report.*
4. On 16 August 2017, the Council responded to requests a) and b). It stated that it was responding under the EIRs. In relation to request a), it advised that an independent review was not instructed. In relation to part b), the Council advised that the reports held were subject to legal privilege and therefore excepted (and withheld) under regulation 10(5)(b) of the EIRs.
5. On 17 August 2017, the Council responded to request c). Again, it processed the request under the EIRs, refusing to make available the information it held. The Council stated that

¹ <http://www.edinburgh.gov.uk/schoolsinquiry>

the information was commercial information provided on a confidential basis, excepted in terms of regulation 10(5)(e) of the EIRs.

6. On 17 August 2017, Mr A wrote to the Council requesting a review of its decisions, on the basis that disclosure of the information being withheld was in the public interest. He disagreed with the application of the exceptions claimed. He also questioned the Council's assertion that it did not hold information relative to request a).
7. The Council notified Mr A of the outcome of its review on 14 September 2017. The Council now said that it did hold information falling within the scope of part a) of his request. The Council confirmed that it considered the information held in relation to all three requests was excepted from disclosure in terms of regulation 10(5)(b) of the EIRs. It explained that ESP and the Council were still seeking to resolve the liabilities and cost arising from the issues identified and that disclosure of the information would jeopardise a successful resolution to the ongoing negotiations. As such, the Council considered disclosure would, or would be likely to, substantially prejudice the course of justice.
8. On 3 October 2017, Mr A wrote to the Commissioner. Mr A applied to the Commissioner 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. Mr A stated he was dissatisfied with the outcome of the Council's review because he disagreed that the information held was confidential and believed disclosure was in the public interest.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr A made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
10. On 30 October 2017, the Council was notified in writing that Mr A had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr A. The Council provided the information and the case was allocated to an investigating officer.
11. 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, with specific reference to the requirements of regulation 10(5)(b) of the EIRs.
12. During the investigation, the Council disclosed some further information to Mr A, acknowledging that it could not justify withholding this information. It provided submissions to the effect that the remainder was being withheld under regulation 10(5)(e) of the EIRs.

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 Mr 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 Mr A and the Commissioner, and from the information itself, that the information sought by Mr A is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision). The information relates to fire precautions across a major construction project, which appear to engage paragraphs (b), (c) and (f) of the definition. Mr A made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request 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, but 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

17. The Council submitted that the information still withheld was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
18. 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.
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)). As noted above, 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)).
20. 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 that type of 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. 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:
 - Is the information commercial or industrial in nature?

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

- 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 commercial or industrial in nature?

22. The Council submitted that the information withheld from Mr A was commercial in nature. It advised that the information related to the buildings provided under a PPP contract with ESP, which remained active and ongoing. The contract was entered into on 14 November in 2001 and was due to conclude in 2033. It considered the information to be commercial as it related to the facilities provided under the contract, additional work required to be undertaken and related financial information.
23. Having considered the relevant submissions, the Commissioner accepts that the information withheld from Mr A is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs.

Does a legally binding duty of confidence exist in relation to the information – and is it publicly available?

24. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
25. The Council submitted to the Commissioner, that the information was provided to it by ESP on a confidential basis under a contractual obligation. The Council provided evidence to show that, following receipt of the requests, ESP had informed it that the information should not be disclosed as it had been provided for information only, was subject to legal privilege and might be subject to future litigation. It referred to ongoing commercial disputes it was still in the process of trying to resolve.
26. On the basis of these communications and the confidentiality provisions in the contract, the Council submitted that the information was subject to a legally binding duty of confidence.
27. The Council drew the Commissioner's attention to Clause 20.1 of the PPP contract, which states:

Each of the Council and the Service Company shall keep confidential this Agreement, the Project Documents and the Financing Documents and all documents and other information supplied by or on behalf of the other in connection with this Agreement, the Project Documents and/or the Financing Documents and shall not, and shall use its reasonable endeavours to procure that persons for whom it is responsible under this Agreement shall not, make any disclosure of the same to any person.

28. It noted exceptions to clause 20.1 in clause 20.2. Clause 20.2.6 of the contract states that:

The confidentiality obligation in Clause 20.1 shall not apply to any disclosure of information required by any Applicable Law (including any order of the court, association or agency of competent jurisdiction), any relevant stock exchange, government agency or government or other competent regulatory authority or in order to comply with the Council's standing orders (but only to the extent so required);

29. The Council further explained that the term “*Applicable Law*” is defined in the contract agreement as meaning “... *any and every law... whether now or hereafter in effect which in any way affects or impinges upon any of the matters referred to in or requiring to be done...*” The Council accepted that “*Applicable Law*” would include Freedom of Information legislation.
30. The Council went on to submit, however, that it was not required by law to disclose the remaining withheld information. It took the view that disclosure would still amount to a breach of confidence actionable by ESP. It explained the information was provided by ESP in connection with the PPP contract (and therefore fell within the scope of the confidentiality clause) and ESP would not have supplied the information but for the confidentiality clause.
31. The Commissioner has considered the submissions made by the Council on this point and would confirm that he considers “*Applicable Law*” as defined by the contract to include both FOISA and the EIRs. He also considers himself to be a “*competent regulatory authority*” as referred to at clause 20.2.6 of the contract.
32. Under both FOISA and the EIRs, a Scottish public authority is obliged by law to disclose information that it holds following a request for that information, except where the applicable regime permits it not to do so. A prime example is where the information can be withheld under (as appropriate) an exemption in FOISA or an exception in the EIRs.
33. Clause 20.2.6 of the contract appears to recognise that, regardless of the agreement entered into by the Council and ESP, there will be times when information must be disclosed by the Council in order to allow it to comply with its statutory duties (for example, under the EIRs). Of course, an exception based on confidentiality might still apply to the information.
34. As in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*³, the Commissioner does not accept that the existence of a confidentiality agreement will, in itself, mean that all information captured by the terms of such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold all such information under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look behind the confidentiality clause and focus on the nature of any withheld information to determine whether the duty of confidence should stand.
35. The nature of the withheld information is crucial in considering questions of confidentiality. Even if notionally covered by the terms of a confidentiality obligation, the information must still have the essential quality of confidence for that obligation to be sustainable. It must not be information which is accessible to the public already, or in respect of which there is no reason for confidentiality.
36. The remaining withheld information is largely factual in nature – photographic and descriptive – identifying fire-stopping defects which require to be remedied in the schools concerned. The actual recorded information may not be in the public domain, but the defects themselves are – or are in spaces which must be routinely accessible to those with responsibilities relating to maintenance, inspection and repair. The import of the defects will be apparent to many of these persons – and in many cases is likely to be apparent to the casual observer: the fire safety implications of a hole in a wall, for example, do not require detailed technical knowledge to understand. There is no suggestion that each and every person who might

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

come across these defects has been alerted to the confidentiality of information relating to them – and, given their clear health and safety implications, it is difficult to imagine conscientious individuals regarding information about the defects as inherently confidential.

37. The recorded information may not – strictly speaking – be publicly available but, in the circumstances narrated above, the Commissioner does not consider it reasonable to describe it as information in respect of which there is any reason for confidentiality. It cannot, therefore, be regarded as confidential for the purposes of regulation 10(5)(e) of the EIRs.
38. Even if he accepted that a duty of confidence existed in relation to the remaining withheld information, as claimed by the Council, consideration would have to be given to the other tests in regulation 10(5)(e) before determining whether the exception applied.
39. For completeness, therefore, the Commissioner will now consider the question of substantial prejudice.

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

40. The term “legitimate economic interest” is not defined within the EIRs. The interest in question must, however, be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. At page 88, the Aarhus Convention Implementation Guide (as mentioned above) identifies the need for disclosure to significantly damage the interest in question and assist competitors.
41. 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.
42. The Council stated that the reports were informing the ongoing process of remedial works and resolution of liabilities and costs arising. It was seeking to protect the legitimate economic interests of the parties involved.
43. The Council submitted that the agreement between the parties regarding remedial work had not yet been concluded and that disclosing the information at this stage would harm the process of resolution between the parties.
44. The Council went on to submit that substantial economic harm would be caused to the parties if the settlement was not agreed and resulted in potential litigation. It argued that its ability to manage future projects would be prejudiced if information it had agreed to keep confidential was disclosed while a contract was ongoing.
45. The Council also believed disclosure would harm its ability to achieve its duty to obtain Best Value, as the disclosure of information of this kind would be likely to deter contractors from tendering for public sector projects in favour of privately owned opportunities. The Council submitted that it would be less able to achieve value for money or manage contracts appropriately for the citizens of Edinburgh if it were to release this information during the contract.
46. The Council concluded that disclosure of the information would cause, or would be likely to cause, substantial harm to the legitimate economic interests of the parties involved, including the Council itself.
47. In any case investigated by the Commissioner, it is made clear to the public authority that it is responsible for providing submissions to support its position and, where information has

been withheld, these submissions must explain why the exception or exemption applies to the specific withheld information.

48. For this exception to apply, disclosure must be at least likely to cause substantial prejudice to a legitimate economic interest. In this regard, the Commissioner must be satisfied that any harm to the economic interest caused by disclosure would be substantial, in other words of real and demonstrable significance. It must be at least likely, so there must be at least a significant probability of it occurring. It is not enough that it might, possibly, occur at some unspecified time in the future.
49. In this case, the Council submitted that disclosure would mean that private contractors would stop (or be deterred from) bidding for public sector contracts in the future, that its future contract management would be undermined and that disclosure would somehow harm the process of resolution between the parties involved (to the point that litigation might ensue). While claiming that such harm would follow disclosure, it has provided no evidence or substantive argument to explain how precisely the substantial prejudice required would be manifested in the event of disclosure, or indeed why these should be likely consequences of disclosure.
50. Having taken all of the Council's submissions into consideration, set against the actual information that remains withheld (the nature of which has been considered at some length above), the Commissioner is not persuaded that disclosure of this information would, or would be likely to, result in the harm the Council has claimed. The consequences presented may be dire, but the Commissioner is not satisfied that the Council has managed to substantiate – or even explain – why any of them should be remotely likely should this particular information be disclosed in response to Mr A's request.
51. The submissions by the Council as to the harm disclosure would cause are basically assertions, speculative in nature. They are essentially hypothetical and are predicated on conjecture as to events that might happen at some indeterminate point in the future. The language used by the Council in its submissions is entirely speculative, with no reference to why the events in question could be considered likely to occur should the information be disclosed. In the circumstances, the Commissioner cannot accept that disclosure of any of this information should cause significant detriment to the Council, or any other party.
52. Consequently, the Commissioner must conclude that the exception in regulation 10(5)(e) of the EIRs is not engaged and that the Council was not entitled to withhold information under this exception. As the Commissioner is not satisfied that the exception is engaged, he is not required to go on to consider the public interest test in regulation 10(1)(b).
53. The Commissioner requires the Council to provide Mr A with the information it continued to withhold at the end of the investigation.

The Commissioner finds that the City of Edinburgh Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr A. The Commissioner finds that the Council was not entitled to withhold the information in terms of regulation 10(5)(e) of the EIRs.

The Commissioner therefore requires the Council to provide Mr A with the information that remained withheld by **16 July 2018**.

Appeal

Should either Mr 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.

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.

Daren Fitzhenry
Scottish Information Commissioner

31 May 2018

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

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...

(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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

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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