

# Decision Notice



Decision 175/2013 Mr Tom Gordon and Glasgow City Council

George Square design contest

Reference No: 201300902

Decision Date: 16 August 2013

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**Rosemary Agnew**

Scottish Information Commissioner

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



## Summary

On 22 January 2013, Mr Gordon asked Glasgow City Council (the Council) for the score cards used by the judges in the George Square design contest. The Council handled the request under the Environmental Information (Scotland) Regulations 2004 (the EIRs) and withheld the information under regulation 10(4)(e) (internal communications).

Following an investigation, the Commissioner found that the score cards were not excepted from disclosure and ordered the Council to provide the information to Mr Gordon.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1)(definitions (a) and (c) 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 22 January 2013, Mr Gordon wrote to the Council requesting all the information contained on the score cards used by the judges in the George Square design contest. Mr Gordon stated that the information should include the name of each judge, the criteria scored, and the scores awarded to each of the six submissions by each judge.
2. The Council responded on 14 February 2013. The Council stated that it was handling Mr Gordon’s request under the terms of the EIRs. The Council refused to disclose the information on the basis that regulation 10(4)(e) (internal communications) applied.
3. On 4 March 2013, Mr Gordon wrote to the Council requesting a review of its decision. Mr Gordon did not contest that the information fell under the scope of the EIRs or that regulation 10(4)(e) applied to the information. However, he did not accept that the public interest favoured the information being withheld.



4. On 20 March 2013, Mr Gordon highlighted to the Council a report by the Royal Incorporation of Architects in Scotland (RIAS), which he considered to include significant reference to the score cards in question. Mr Gordon requested that the Council take this report into account when conducting its review.
5. The Council notified Mr Gordon of the outcome of its review on 3 April 2013. The Council maintained its reliance on regulation 10(4)(e) to withhold the information, explaining further its consideration of the public interest.
6. On 4 April 2013, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
7. The application was validated by establishing that Mr Gordon made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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8. On 22 April 2013, the Council was notified in writing that an application had been received from Mr Gordon and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
10. The Council was asked specifically to identify the information that it was seeking to withhold, given that the scoring criteria and the identities of the judges were already in the public domain at the time of Mr Gordon's request. The Council was also asked to justify its reliance on regulation 10(4)(e) to withhold the score cards, and to comment on the implications of the published RIAS report.
11. The Council confirmed that it was only seeking to withhold the scores awarded to each of the six submissions by each judge under regulation 10(4)(e), and provided detailed submissions on its application of the exception.



## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Gordon and the Council. She is satisfied that no matter of relevance has been overlooked.
13. As noted above, Mr Gordon did not question the Council's decision to deal with his request under the EIRs, and also accepted that the information fell within the definition of "internal communications" for the purposes of regulation 10(4)(e). The Commissioner's investigation focussed, therefore, on considering whether the Council was correct to conclude that the public interest in maintaining that exception in this case outweighed the public interest in disclosure of the information.

### Regulation 10(4)(e)

14. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication.
15. The Commissioner and Mr Gordon are satisfied that the scores awarded to each of the six submissions falls within the definition of "internal communications" for the purposes of this exception.
16. As with all the exceptions in regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

### *Background to request*

17. A design competition was launched in Autumn 2012 for the redevelopment of George Square, Glasgow. Six firms were shortlisted; the judges' scores for these designs are the subject of this decision.
18. The winning design was announced on 21 January 2013. On the same date, the Council announced that it was no longer proceeding with the intended revamp of George Square, and consequently the Council would not be proceeding with the contract<sup>1</sup>.
19. Mr Gordon made his request for information following this announcement.

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<sup>1</sup> <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-21058651>



*The Council's submissions on the public interest*

20. The Council stated that it was mindful of the presumption in favour of disclosure. It acknowledged that there had been significant media coverage in the redevelopment of George Square and that the judges' scores might be *of interest* to the public, but considered this to be a separate matter from the release of the scores being *in the interests of* the public.
21. In the Council's view, it was in the public interest that evaluation panels retained the right to freely and frankly express their views in evaluating tenders, without the threat that individual judges' scores might be made publicly available. The Council argued that judging panels should be allowed adequate private space to properly deliberate and score each tender against the set criteria, without external forces such as public perception and media backlash playing any sort of influential role.
22. The Council argued that, if the individual judges' scores were released, the fairness of the evaluation process in future procurements for large public projects across Scotland might be compromised, as evaluation panels might start to take account of public opinion as an undisclosed criterion, leading to procurement challenges (at a considerable cost to the public purse) and delays in major projects as a result.
23. The Council did not consider the information published by the RIAS to be sufficiently detailed to affect its decision to withhold the information.

*Submissions from Mr Gordon*

24. Mr Gordon did not accept the Council's argument that the judges were entitled to private thinking space, away from direct public scrutiny. He found this argument to be weak, given what he considered to be a considerable sum of public funds spent on the contest and the fact that all the judges were professionals. He argued that the Council has not taken into consideration the particulars of this case and instead relied upon (irrelevant) speculation about potential jeopardy for future (hypothetical) procurement exercises.

*Conclusions*

25. The Commissioner accepts that there is a public interest in protecting the evaluation process, at the time of the evaluation, and prior to the identification of the winning bidder. The Commissioner also accepts that in some circumstances this might also apply for a period of time after such identification but considers that those circumstances would be more likely to be specific to the case under consideration.
26. Had Mr Gordon made his request at the time of evaluation or prior to the identification of the winning bidder, the public interest in maintaining the exception would have been more clearly defined. In the circumstances of this case, Mr Gordon made his request following the identification of the winning design *and* after it had been announced that the plan to redevelop George Square along the lines envisaged by the competition had been abandoned.



27. The Commissioner has, therefore, considered whether the weight of evidence and argument submitted by the Council favours withholding the information in the public interest at the time the request was made.
28. Taking account the circumstances of this particular case, including the timing of Mr Gordon's request, the Commissioner does not accept the arguments presented by the Council. These arguments are generic in nature and (as Mr Gordon indicates) speculative and unsubstantiated in relation to the effect of disclosure on future procurement exercises. The arguments also make no reference to why in the circumstances of this case, the timing is particularly sensitive. The Commissioner does not accept that disclosure in this instance, in the circumstances outlined, would (or would be likely to) result in the harm suggested by the Council.
29. Even when projecting the effects of disclosure on future practice, a Scottish public authority, must approach each case individually. There may be cases where the arguments relating to public opinion identified by the Council are of particular relevance, but the Commissioner has received no evidence to persuade her that this is such a case.
30. Furthermore, the Commissioner has taken account of the content of the RIAS report referred to by Mr Gordon in his requirement for review (see paragraph 4 above). This report, although not detailed, provides a clear indication of the general thrust of the voting and describes a clear divide in the panel. This goes a considerable way towards undermining the arguments presented by the Council in terms of offering a "private thinking space" for the judges.
31. The Commissioner also recognises a significant public interest in allowing transparency in the decision making process, particularly in relation to major proposals for the redevelopment (at public expense) of a significant piece of public space, abandoned so soon after the outcome of the competition was announced.
32. Taking account of regulation 10(2)(b) (applying a presumption in favour of disclosure) and having carefully considered the submissions made by both parties and the timing of Mr Gordon's request, the Commission is satisfied (in all the circumstances) that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e). She therefore requires the Council to disclose the information to Mr Gordon.



## **DECISION**

The Commissioner finds that Glasgow City Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Gordon.

The Commissioner finds that the Council was not entitled to withhold the information on the basis that it was excepted from disclosure under regulation 10(4)(e) of the EIRs. By failing to make the information available, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to disclose the withheld information by 30 September 2013.

## **Appeal**

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Should either Mr Gordon or Glasgow City Council wish to appeal against this decision, there is an 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**  
**16 August 2013**





## Appendix

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### Relevant statutory provisions

#### The Environmental Information (Scotland) Regulations 2004

##### 2 Interpretation

(1) ...

"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.

...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that  

...

  - (e) the request involves making available internal communications.

...