

Decision Notice



Decision 045/2014 Mr John Steel and Glasgow City Council

Works carried out at a specified site in Glasgow

Reference No: 201301821

Decision Date: 26 February 2014

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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



Summary

On 22 April 2013, Mr Steel asked Glasgow City Council (the Council) for information relating to works carried out at a specified site in Glasgow. Following a review, the Council informed Mr Steel that it did not hold the requested information.

During the Commissioner's investigation, the Council identified and disclosed information from a number of documents to Mr Steel. It also withheld some information on the basis that it was excepted from disclosure under regulation 10(5)(e) of the EIRs (substantial prejudice to the confidentiality of commercial or industrial information).

The Commissioner found that the Council breached the EIRs by initially failing to identify and locate the information falling within the scope of Mr Steel's request. The Commissioner also found that the Council incorrectly gave notice in terms of regulation 10(4)(a) of the EIRs that it did not hold the information.

However, the Commissioner accepted that the Council was entitled to withhold information under the exception in regulation 10(5)(e) of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(a) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 22 April 2013, Mr Steel emailed the Council requesting information relating to the works recently carried out at a specified site in Glasgow. The works formed part of a wider regeneration project being carried out by the Council and a partner organisation, ISiS Waterside Regeneration (ISiS).



2. The Council responded on 3 May 2013. The Council provided a general explanation of the nature of the works being carried out at the site. The Council did not indicate whether or not it actually held any of the information sought by Mr Steel.
3. On 10 May 2013, Mr Steel emailed the Council requesting a review of its decision. Mr Steel noted that he had expected the Council to hold minutes of meetings and information on the tendering process and negotiations around the budget for the project.
4. The Council notified Mr Steel of the outcome of its review on 7 June 2013. The Council stated that it now considered the request should have been dealt with under the EIRs. The Council informed Mr Steel that it did not hold any information falling within the scope of his request and, consequently, the information was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs.
5. On 5 August 2013, Mr Steel 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 specified modifications.
6. The application was validated by establishing that Mr Steel 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. The case was then allocated to an investigating officer.

Investigation

7. 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. The Council was also asked to explain the searches it had undertaken in order to locate and retrieve any relevant information.
8. The Council subsequently contacted the investigating officer stating that it had carried out additional searches and had retrieved previously unidentified information which it considered fell within the scope of Mr Steel's request.



9. On 4 October 2013, the Council disclosed a considerable volume of information to Mr Steel. The Council withheld some of the information on the basis that it was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. In the Council's view, disclosure of the information 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. The Council also withheld some information in terms of regulation 11(2) of the EIRs. This was on the basis that the information comprised the personal data of third parties and its disclosure would breach the data protection principles in the Data Protection Act 1998.
10. Mr Steel subsequently informed the investigating officer that he remained dissatisfied with the information disclosed to him by the Council. Mr Steel remained dissatisfied with the Council's failure to disclose information concerning the tendering process and financial transactions for works carried out, especially by sub-contractors.
11. In subsequent discussions with the investigating officer, Mr Steel confirmed that he did not wish to receive the personal data that had been withheld in terms of regulation 11(2) of the EIRs. Therefore, this decision will not consider the Council's application of regulation 11(2).
12. The investigating officer wrote to the Council again, asking it to provide submissions justifying its application of the exception in regulation 10(5)(e) of the EIRs. The Council was also asked to explain the searches that it had undertaken in order to establish that all relevant information had been identified. Additionally, the Council was asked to provide the Commissioner with the information that it was withholding from Mr Steel.
13. The Council responded on 4 December 2013 with the information requested. The Council provided submissions on why it considered some of the information was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. The Council also explained the searches it had undertaken in order to locate and retrieve any relevant information falling within the scope of Mr Steel's request. The Council indicated that it intended disclosing some additional information to Mr Steel comprising draft pricing schedules for work provided to the Council.
14. At this stage, the Council also explained that it had consulted with its contractor in relation to the potential disclosure of the information. The Council provided a copy of a letter from the contractor which did not consent to disclosure of individual costs.
15. The Council disclosed the draft pricing schedules to Mr Steel on 19 December 2013. (Some parts of this information were withheld under the exception in regulation 10(5)(e) of the EIRs.)

Commissioner's analysis and findings

16. 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 Steel and the Council. She is satisfied that no matter of relevance has been overlooked.



Has all relevant information been identified and retrieved by the Council?

17. The Council explained that, on receipt of Mr Steel's initial request, its Customer Care team circulated the request to the designated information officers within each Council department in accordance with its processes for dealing with information requests.
18. The Council established that its Development and Regeneration Services Department (DRS) had managed the allocation of funds to allow the work that was the subject of the information request to be carried out. Accordingly, DRS took responsibility for coordinating the response to the information request. As part of this process, officers within DRS who had involvement in, or may have had knowledge of, the works in question were identified and asked to undertake searches to identify any relevant information.
19. The Council stated that searches had been undertaken for hard copy documentation including paper files and diaries. It explained that it had carried out searches of electronic mailboxes and explained the search terms that had been utilised. The Council stated that the searches undertaken at the initial response and review stages had not included a search for information held electronically by officers who had left the Council's employment. The Council explained that this oversight may have occurred because the email account of officers who leave the Council are archived by its IT service provider and the information is not readily accessible by Council officers. These email accounts were searched after Mr Steel had appealed to the Commissioner.
20. In relation to the minutes of meetings, the Council explained that responsibility for the allocation of funding for specific projects (such as the one which is the subject of this decision) was delegated to DRS by the Council's Executive Committee. The Council stated that the funds for this particular project were allocated under this delegated authority; the level of expenditure involved in this particular project was not at a level that required formal committee approval.
21. The Council also highlighted that the works at the site were of a temporary nature, the requirement for which had arisen as a result of the original developer having pulled out of development of the site for financial reasons. The Council submitted that the works referred to in this instance were instructed to improve the appearance of the undeveloped site whilst new options for development of the site were explored. The Council stated that a distinction must be made between the formality of the arrangements for a full scale site development and the informal arrangements in relation to short term, low value works such as those under consideration in the present case.
22. In the Council's view, the searches undertaken had located and retrieved all of the information that it held which fell within the scope of Mr Steel's request. It stated that all of the information that it held had been disclosed to Mr Steel during the investigation subject to the redaction of personal data and some financial information which was withheld under the exception in regulation 10(5)(e) of the EIRs. Additionally, the Council had reviewed the relevant information held by ISiS which fell within the scope of Mr Steel's request. The Council noted that this information duplicated that which had already been disclosed to Mr Steel by the Council.



23. The Commissioner has considered the Council's submissions, its explanation of the searches that it has undertaken and its explanation of why no further information is held beyond that which has been identified. Having done so, she is satisfied that the Council has now conducted proportionate searches and all relevant information falling within the scope of Mr Steel's request has now been located and retrieved.
24. However, given what was identified and located during the investigation, the Commissioner cannot accept that the Council carried out adequate searches when dealing with Mr Steel's information request and requirement for review. In failing to identify, locate and provide information covered by Mr Steel's request, and by incorrectly giving notice (in terms of regulation 10(4)(a) of the EIRs) that it did not hold the requested information, the Council failed to comply with regulation 5(1) of the EIRs.
25. The Commissioner also notes that her remit in carrying out this investigation extends to the consideration of whether the Council actually holds the relevant information requested by Mr Steel. She cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process. Consequently, in this instance, she cannot comment on whether the Council ought to hold further recorded information, or whether it was entitled to carry out the works that are the subject of this decision in the way it did.

Regulation 10(5)(e)

26. Regulation 10(5)(e) of the EIRs 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.
27. 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 released 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)).
28. The Aarhus Convention: an Implementation Guide (second edition)¹ (which offers guidance on the interpretation of the Aarhus Convention) notes (at page 82) that the first test for considering this exception is that national law must expressly protect the confidentiality of the withheld information: it must, the guidance states, 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 Convention, but its meaning is considered further below.

¹ http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_text_only.pdf



29. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*² and the Commissioner does not intend to repeat that consideration in detail here. There, the Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - 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 industrial or commercial in nature?

30. The Council submitted that the information withheld in this case comprised the prices charged by a contractor for various materials and landscaping installations to undertake the works and aesthetic improvements to the area.
31. Having considered the nature of the information, the Commissioner is satisfied that it is commercial in nature, comprising the sale of services within a competitive commercial environment.

Does a legally binding duty of confidence exist in relation to the information?

32. The Council submitted that the relationship between it and ISiS (under the Glasgow Canal Regeneration Partnership) and the contractor brought with it an implied obligation of confidentiality between the parties in relation to the content of the cost schedules provided by the contractor.
33. Given the nature of the withheld information and the circumstances in which it was received by the Council, the Commissioner is satisfied that the information was received under an implied obligation to maintain confidentiality. The Commissioner considers such an expectation to be normal practice in circumstances of this kind. The Commissioner considers there would have been no expectation on the part of the contractor that the information would not be treated as confidential.

Is the information publicly available?

34. The Council stated that, whilst the total cost of the works at the site had been disclosed to Mr Steel, the breakdown of costs provided in the quotations supplied by the contractor was not publicly available.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.asp>



35. The Commissioner accepts that the specific withheld information comprising individual pricing details was not publicly available when the Council dealt with Mr Steel's request for information, or when it dealt with his request for review (or, indeed, is available now). In other words, that information retained the essential quality of confidence.

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

36. The term "legitimate economic interest" is not defined within the EIRs. However, the interest in question will 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.
37. As noted above, the Council sought the views of the contractor in relation to the potential disclosure of the pricing information. The contractor explained to the Council that it considered the information to be commercially sensitive and that disclosure of its commercial rates could be used by its competitors to their advantage.
38. The Council submitted that disclosure of the contractor's price breakdown would allow competitors to view its rates for the individual aspects of such works. This would allow competitors to ascertain the contractor's supply margins and staff rates, thereby providing sufficient information for a competitor to undercut it when quoting for work on landscaping projects. The Council submitted that this would be to the substantial prejudice to the contractor's ability to compete for such work in a competitive marketplace and would, therefore, be to the substantial harm of its legitimate economic interests.
39. The Commissioner has considered carefully the Council's submissions. Having done so, she is satisfied, given the detail within the withheld information, that its disclosure would be likely to have a significant detrimental effect on the contractor, thereby inhibiting its ongoing commercial activities.
40. The Commissioner notes that the quotes were submitted relatively recently and that the information in question comprised the basis upon which the contractor priced quotes for work of this nature. The Commissioner considers that this information – which would allow insight into the contractor's overall pricing strategy – would be of significant interest to the contractor's competitors.
41. For these reasons, the Commissioner accepts that disclosure of the withheld information would have been likely to cause substantial prejudice to the contractor's legitimate economic interests and that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the withheld information.



The public interest test

42. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Mr Steel, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
43. In Mr Steel's view, there was no valid reason for the Council not to disclose the financial information on the costs spent on improving the site in question. He considered it was in the public interest to establish if the sum quoted by the Council had actually been spent on the area. Mr Steel stated that he and other residents had seen no real improvement in the area apart from tree planting. In his view, if the money had actually been spent, then there was a serious flaw in the works undertaken which would warrant further investigations.
44. Mr Steel further argued that, in a period of financial austerity and constraints, it was extremely important to ensure that any monies spent had been used properly and accounted for by the Council.
45. The Council acknowledged that there was a public interest in scrutinising the expenditure of local authorities. However, it also considered there was a public interest in local authorities obtaining best value when incurring expenditure. The Council submitted that authorities' ability to scrutinise and negotiate rates would be prejudiced should contractors be deterred from submitting detailed cost breakdowns on the basis that their legitimate economic interests would be harmed by public disclosure of their commercial rates.
46. The Council was unaware of any wider public interest in the disclosure of the price breakdown in this instance, and stated that it had sought to balance the competing interests by disclosing the total costs provided in the quotations together with details of the various aspects of the works quoted for.
47. The Commissioner has noted all of the comments made by Mr Steel and the Council regarding the public interest test.
48. In considering the public interest in favour of disclosure, the Commissioner recognises the general public interest in disclosing information held by Scottish public authorities. She also recognises the public interest in ensuring that value for money is seen to be obtained, particularly where this involves the public purse. She acknowledges that disclosure in this case would contribute to transparency and accountability and public scrutiny of the Council's practices.
49. The Commissioner considers that organisations which engage in commercial activities with public authorities should be aware that at times information relating to these activities will require to be released as a result of information requests made to those authorities.



50. The Commissioner has already acknowledged the risk of substantial commercial prejudice to the contractor in this case, should the information be disclosed. The withheld information constitutes a core part of the contractor's trading activities. In the Commissioner's opinion, if this information were to be made available to the contractor's competitors, this would be likely to put the contractor at a disadvantage in any competitive tendering exercise it subsequently entered. The Commissioner considers there is a public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for work from public authorities and other organisations.
51. The Commissioner also agrees with the Council that the summary information already disclosed to Mr Steel goes some way towards satisfying the public interest identified in relation to the disclosure of the withheld information.
52. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice may result, the Commissioner does not believe that this is justified in this case. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(5)(e). The Commissioner therefore finds that the Council was entitled to withhold the information to which this exception had been applied.

DECISION

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

The Commissioner finds that the Council was entitled to withhold information under the exception in regulation 10(5)(e) of the EIRs.

The Commissioner finds that, by failing initially to identify and locate the information falling within the scope of Mr Steel's request, the Council failed to comply with regulation 5(1) of the EIRs. The Commissioner also finds that the Council incorrectly gave notice in terms of regulation 10(4)(a) of the EIRs that it did not hold the information requested by Mr Steel.

Given the Commissioner's conclusions that the requested information was either disclosed to Mr Steel during the investigation or is excepted from disclosure under regulation 10(5)(e) of the EIRs, she does not require the Council to take any action in response to these failures in response to this decision.

Decision 045/2014
Mr John Steel
and Glasgow City Council



Appeal

Should either Mr Steel or Glasgow City 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.

Margaret Keyse
Head of Enforcement
26 February 2014



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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;



...

- (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;

...