

Decision Notice



Decision 162/2010 Mr Chris Marshall of the Edinburgh Evening News and City of Edinburgh Council

Correspondence between three Councillors and the Chief Executive of tie limited

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Summary

Mr Chris Marshall, Transport and Environment Reporter for the Edinburgh Evening News, asked City of Edinburgh Council (the Council) to provide correspondence between three named Councillors and the Chief Executive of tie limited (tie), on the ongoing dispute with the consortium BSC / contractor Bilfinger Berger. The Council responded by withholding two pieces of email correspondence under certain exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Marshall remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council released some information contained in the emails. The Council indicated that it considered the remaining information to be environmental information excepted from disclosure under the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Following an investigation, the Commissioner accepted that the remaining information was excepted from disclosure under regulation 10(4)(e) of the EIRs (internal communications) and that, in all the circumstances, the public interest in making the information available was outweighed by that in maintaining the exception. However, in failing to respond to Mr Marshall's information request under the EIRs initially, the Commissioner found that the Council had failed to comply with the EIRs.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation: definition of environmental information (paragraphs (a), (b), (c) and (f)); 5(1) and (2)(b) (Duty to make environmental information available on request) and 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

1. On 4 September 2009, Mr Marshall wrote to the Council to ask for all written correspondence between three named Councillors and the Chief Executive of tie, “on the ongoing dispute with the consortium BSC / contractor Bilfinger Berger”.
2. The Council responded on 5 October 2009. It advised Mr Marshall that the Council held two items of correspondence covered by his request, but had decided that the information should be withheld under four separate exemptions in FOISA: section 33(1)(b) (Commercial interests and the economy); section 36(1) and (2) (Confidentiality) and section 38(1)(b) (Personal information). It provided a brief description of the correspondence and explained why it considered, where relevant, that the overriding public interest was against disclosure.
3. On 5 October 2009, Mr Marshall wrote to the Council requesting a review of its decision. In particular, Mr Marshall asked the Council to reconsider where the balance of public interest lay, in terms of withholding or disclosing the information. He also advised that he would be content for certain personal data to be withheld.
4. The Council notified Mr Marshall of the outcome of its review on 20 November 2009. It generally upheld its decision to withhold the information, but withdrew its reliance on section 36 in respect of the second email. It also cited the exemption in section 30(b)(ii) in relation to both emails, considering that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. In relation to the public interest test, the Council found that it was not in the public interest to release information that could weaken tie’s negotiating position, and that, on balance, the public interest was best served by withholding the information.
5. On 14 January 2010, Mr Marshall 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.)
6. The application was validated by establishing that Mr Marshall had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 19 January 2010, the Council was notified in writing that an application had been received from Mr Marshall and was asked to provide the Commissioner with the information withheld from him. After some delay, the Council provided the information on 3 March 2010 and the case was then allocated to an investigating officer.



8. After making enquiries about some previous correspondence from the Council in relation to the case, the investigating officer subsequently contacted the Council on 6 April 2010, 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. It was also invited to provide more information about its assertion that disclosure would have unprecedented financial and litigation implications.
9. Again, the Council's response was delayed, but was received on 19 May 2010. The Council provided some information regarding the financial and litigation implications of releasing the emails in question.
10. On 30 June 2010, the Council provided a further submission in relation to Mr Marshall's application for a decision, and advised that it intended to provide redacted versions of the two emails to Mr Marshall. Mr Marshall received this information on 5 July 2010, but he considered that the information provided was not sufficient for his purposes or to enable him to withdraw his application for a decision from the Commissioner.
11. The Council's submission of 30 June 2010 indicated that, after discussion with tie, it had taken cognisance of tie's view that the information withheld was environmental information, and that Mr Marshall's request for this information should have been dealt with under the EIRs. The Council later confirmed that it regarded the information in the second email as environmental information exempt from disclosure under 39(2) of FOISA, and excepted from disclosure under regulations 10(3), 10(4)(d), 10(4)(e), 10(5)(d) and 10(5)(e) of the EIRs.
12. On 3 August 2010, the Council provided some further arguments relating to the exception in regulation 10(4)(e) of the EIRs (internal communications). These are considered later in this decision notice.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Marshall and the Council and is satisfied that no matter of relevance has been overlooked.

Scope of Commissioner's Decision

14. The Council initially withheld one email and one email exchange which fell within the scope of Mr Marshall's request. During the investigation, the Council released most of the contents of the single email (referred to as the first email), and withheld only some personal data relating to a third party.



15. As Mr Marshall has previously indicated that he would be content for such personal data to be withheld, the Commissioner will not consider whether the Council was correct to withhold this information. Similarly, as Mr Marshall has now received all of the remaining information in the email, the Commissioner will not go on to consider whether this information should have been provided to him at the time of his request or request for review.

EIRs or FOISA?

16. The Council initially dealt with Mr Marshall's request under FOISA, but took cognisance of his view that the information in the email exchange (referred to as the second email) was environmental information as defined in paragraphs (c) and (f) of the definition of environmental information contained in regulation 2(1) of the EIRs, in that it related to contingency plans and contracts for the construction of transport infrastructure, partly within the World Heritage Site of Edinburgh Old Town.
17. On the basis that the information requested by Mr Marshall was environmental information, the Council then applied the exemption in section 39(2) of FOISA. For this exemption to apply, the information requested must be environmental information as defined in regulation 2(1) of the EIRs (reproduced in the Appendix below). The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it here.
18. Given the subject matter of the information covered by Mr Marshall's request, the Commissioner agrees with the Council that any information held in relation to the request would meet the definition of environmental information within paragraphs (c) and (f) of regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of regulation 2(1), through which cultural sites and built structures may be affected.
19. The Commissioner therefore accepts that Mr Marshall's request should have been dealt with under the EIRs, not FOISA, and that the exemption in section 39(2) of FOISA applies.
20. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. Consequently, the Commissioner accepts that the Council was correct to withhold the information under section 39(2) of FOISA and deal with the request under the EIRs.
21. The Commissioner has gone on to consider whether the Council correctly withheld the remaining information in the second email under the exceptions cited in the EIRs.

Internal Communications (regulation 10(4)(e))

22. The Council has advised that it considers the information withheld from the second email to be excepted from disclosure under regulation 10(4)(e) of the EIRs.



23. Under regulation 10(4)(e) of the EIRs, 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.
24. As with all of the exceptions contained in 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)). The public interest test set out in regulation 10(1)(b) must also be met.

Is the information an internal communication?

25. The Council has submitted that communications between the Chief Executive of tie and elected members of the Council are “internal communications”, given that tie is a wholly owned subsidiary of the Council, funded by and accountable to the Council, and legally, politically and in practical terms part of the Council structure.
26. The Commissioner notes that two of the Councillors named in Mr Marshall’s request are members of the Board of Directors of tie, while the third Councillor is the current Leader of the Council.
27. Although tie and the Council are separate entities for the purposes of FOISA and the EIRs, the Commissioner accepts that the second email should be regarded as an internal communication, in that it communicated information on matters which had been delegated to tie by the Council, to individuals who were Board Members or, in the case of the Leader of the Council, who have a key role in delivery and management of the trams project. The Commissioner accepts that through the powers formally delegated to tie, the Council can attend board meetings and receive certain information to ensure clear accountability and transparency of operations for which the Council is ultimately responsible.
28. The Commissioner therefore accepts that the exception in regulation 10(4)(e) of the EIRs applies to the withheld information, subject to the public interest test in regulation 10(1)(b).

The public interest test

29. Regulation 10(1)(b) states that a request for environmental information can only be refused if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
30. The Council has submitted that the public interest is best served by enabling tie’s negotiating stance and views on live contractual disputes to be discussed in private, limiting involvement to those individuals who have a genuine role to play in minimising financial impact whilst ensuring the tram project is delivered as efficiently and effectively as possible.



31. The Council believes it is essential for Board Members to be able to communicate between themselves in order to discharge their responsibilities, in circumstances where delicate negotiations are underway. It has argued that release of the information in the second email would impact in a negative way on tie's negotiating strategy, and could result in millions of pounds in additional cost to the public purse.
32. The Council provided the Commissioner with details of the adverse impact which disclosure of the information could have in relation to the ongoing unsettled disputes and negotiations, to support its view that disclosure would not be in the public interest.
33. In his application to the Commissioner, Mr Marshall contended that disclosing details of the ongoing dispute and its impact on the overall cost of the trams project would be very much in the public interest. He commented that both the Council and tie had been very reticent in discussing the dispute with the BSC consortium and, as a result, in his view, very little had been done to hold the £500 million project to account.
34. In his request for review, Mr Marshall agreed with the Council's statement that the overriding public interest was for the project to be completed at the least cost to the public purse. However, he took the view that this made it even more important for those in charge of the tram project to be upfront about potential cost overruns, which would affect the city's council tax payers.
35. Mr Marshall also stated that, if the content of the email contradicted the stated position of the Council and tie, then it would be very much in the public interest for this to be disclosed.
36. The Commissioner has examined some of these public interest issues in discussions with tie, and accepts that disclosure of the information in the second email would, currently and at the time of the request, have consequences which are not in the public interest by adversely affecting negotiations in which tie is involved. The Commissioner accepts that in order to produce the best outcome in terms of limiting future costs of the trams project, it is essential for tie to preserve a strong negotiating position in the formal dispute resolution procedure now invoked to resolve outstanding issues between tie and the contractors.
37. The question for the Commissioner to consider is therefore whether, in all the circumstances, the public interest in disclosure is strong enough to outweigh the damage to public interests which would be caused by disclosure.
38. The Commissioner accepts that there is a strong public interest in ensuring accountability for the way in which public money is used, and in enabling scrutiny of publicly-funded projects such as the Edinburgh trams to ensure that the public obtains value for money.
39. Given the history of rising costs and mounting controversy associated with the trams project, the Commissioner also accepts that there is a strong public interest in the release of information about the project, including information relating to the management of contractual disputes, and that disclosure of such information would help inform the public debate on whether the project represents value for money for the taxpayer.



40. However, the Commissioner notes that the Council has now disclosed some information from the second email in relation to the management of the contractual dispute. He has concluded that if the remaining information in the second email were disclosed, the consequences would be likely to prevent rather than secure value for money, by weakening tie's negotiating position. The Commissioner therefore finds that the public interest in withholding the information outweighs the public interest in disclosure, and that the Council was correct in withholding the email contents under regulation 10(4)(e).
41. Because the Commissioner has found that the information was correctly withheld under this exception, he is not required to consider whether the other exceptions cited by the Council should also be upheld.
42. The Commissioner has reached his decision on the basis of information about the current state of play with the trams project, and the likely effects of disclosure in circumstances as they exist or existed at the time of the request. The Commissioner notes that the Council has given an assurance that "all important information produced or received by tie is stored in a digital vault and will be available for future audit".

DECISION

The Commissioner finds that by initially failing to deal with Mr Marshall's request under the Environmental Information (Scotland) Regulations 2004 (the EIRs), the Council failed to comply with regulation 5(1) of the EIRs. However, the Commissioner also finds that the Council was entitled to withhold the information which has not been disclosed to Mr Marshall under regulation 10(4)(e) of the EIRs.

Appeal

Should either Mr Marshall or the City of Edinburgh 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 notice.

Kevin Dunion
Scottish Information Commissioner
13 September 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-

...

- (b) would be so obliged but for any exemption contained in the regulations.



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- ...
- (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 an 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.