

Decision Notice

Decision 069/2015: Patersons of Greenoakhill Ltd and South Lanarkshire Council

Waste management/disposal tenders

Reference No: 201401227

Decision Date: 28 May 2015



Scottish Information
Commissioner

Summary

On 6 January 2014 Patersons of Greenoakhill Limited (Patersons) asked South Lanarkshire Council (the Council) to respond to a request about tenders for a waste management/disposal contract.

The Council disclosed some information for parts of the request, withheld other information and stated that it did not hold the remaining information.

The Commissioner investigated and found that the Council had dealt with the request generally in accordance with the EIRs .

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b), (c) and (f) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and 5(e) (Exceptions from duty to make environmental information available); 16(1) and (3) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of the decision.

Background

1. On 6 January 2014 Patersons made a seven-part request to the Council (through their solicitors) for information regarding the tenders for a waste management/disposal contract. To the extent that it forms the subject matter of this decision, the full text of the request is reproduced in Appendix 2 to this decision.
2. In this decision, all references to Patersons should be read as including solicitors acting on Patersons' behalf.
3. The Council responded on 3 February 2014, applying section 39(2) of FOISA and handling the request under the EIRs. It stated that it did not hold elements of the requested information (applying regulation 10(4)(a)) and withheld the remainder under regulation 10(5)(e).
4. On 21 February 2014, Patersons wrote to the Council and requested a review of its decision with regard to parts 1 to 4 (inclusive) and 7 of the request. Patersons argued that the circumstances had changed since the Council's refusal to disclose the information. They did not believe regulation 10(5)(e) applied to the information and, in any event, considered the public interest favoured disclosure.
5. The Council sought clarification of Patersons' requirement for review on 5 March 2014. On 14 March 2014, Patersons confirmed (*inter alia*) that they did not accept the Council complied with the EIRs in its response of 3 February 2014.

6. The Council notified Patersons of the outcome of its review on 26 March 2014. It provided some further information but generally upheld its earlier application of regulation 10(5)(e) of the EIRs. In relation to request 1.1, it stated that it did not hold the information and applied regulation 10(4)(a).
7. On 4 June 2014, Patersons wrote to the Commissioner. Patersons 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. For a number of reasons considered below, Patersons were dissatisfied with the outcome of the Council's review in relation to parts 2 to 4 (inclusive) and 7 of the request.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Patersons 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.
9. On 12 June 2014, the Council was notified in writing that Patersons had made a valid application. The Council was asked to send the Commissioner the information withheld from Patersons. The Council provided the information and the case was allocated to an investigating officer.
10. 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 particular reference to its application of regulation 10(4)(e) of the EIRs (but also raising queries about information which appeared to be publicly available).
11. Before the Council provided its full submission, the Council raised an issue in relation to the review, considered below.

Commissioner's analysis and findings

12. 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 Patersons and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. It is clear from the Council's correspondence with Patersons that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. In any event, Patersons have made no suggestion to the contrary. The information in question relates to a contract for the management and disposal of waste and is all covered by the paragraphs of the definition of environmental information (in regulation 2(1) of the EIRs) set out in Appendix 1. In what follows, therefore, the Commissioner will consider the Council's handling of the request solely in terms of the EIRs.

Regulation 5(1) of the EIRs

14. 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.
15. 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 all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
16. The Commissioner notes that Patersons' dissatisfaction relates only to parts 2 to 4 (inclusive) and 7 of the request. She will now go on to consider the withheld information for these parts only.

Regulations 10(5)(e) of the EIRs

17. 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.
18. Patersons submitted that the Council had applied this exception indiscriminately, without considering the actual information sought. It questioned whether the information in question could all be considered confidential or commercial sensitive, and suggested that the Council had failed to provide detailed justification for withholding the information.
19. Patersons also suggested that circumstances had changed by the time of the Council's review, with the result that the exception was no longer relevant. During the investigation, the Council asked the Commissioner to consider whether changes in circumstances following the authority's initial decision on the request should be taken into account by a Scottish public authority when carrying out a review.
20. The Commissioner has considered this last point fully. Under regulation 16(1) and (3) of the EIRs, read together, a Scottish public authority is obliged to consider whether it has complied with the EIRs in relation to a particular request. Therefore, in the Commissioner's view, the review must consider the handling of the request at the time the original decision on the request was made. It would not appear to be barred from considering any subsequent change in circumstances, but it is not obliged to do so.

Information released during the investigation

21. During the investigation, the investigating officer noted that some of the withheld information was available to the public, either online or in public registers. Both the Council and Patersons were invited to comment on this publicly available information.
22. Patersons indicated to the Commissioner that it did not require some of this information. The remainder was provided by the Council during the investigation.

23. By definition, this information cannot be considered confidential. Consequently, the Commissioner finds that the Council was incorrect to withhold this information under regulation 10(5)(e) of the EIRs.

Remaining withheld information

24. 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)).
25. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (at page 88) 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.
26. 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. The Commissioner has concluded 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?

Is the information commercial or industrial in nature?

27. The Council explained that there was a tender process for the receipt, separation, recycling and disposal of unsorted municipal waste. The contract was to be divided into two lots, covering different geographical areas. Each tenderer was asked to provide information regarding their performance and suitability. This information is the focus of Patersons' request. The information sought details a commercial process, involving a competition to win a contract for services. As such, the Commissioner is satisfied that the withheld information is commercial in nature.

¹

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

²

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

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

28. The Commissioner considers that, 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.
29. The Council explained that the Public Contracts (Scotland) Regulations 2012 (the 2012 Regulations) allowed parties to a tendering process to raise a court action against a public authority, seeking to set aside any decision the authority was minded to make to award a contract and/or to seek damages in relation to losses sustained. It also explained that the authority awarding a contract must allow for a “standstill period”. This is a period between the decision to award and the actual award.
30. The Council followed this process and, on 31 December 2013 (i.e. just before Patersons’ information request), a court action was raised in the Court of Session by Patersons. The Council went on to explain that this process remained unresolved at the time it dealt with Patersons’ request.
31. Given the subsequent conclusion of the Court of Session process and award of the two contracts before they sought a review, Patersons argued that circumstances had changed by the time of the review and the information could no longer be considered confidential. For the reasons stated in paragraph 20 above, the Commissioner cannot accept this argument. The Council was only obliged to consider the position as at the time it dealt with the request. At that time, no contracts had been (or could have been) awarded and it was reasonable to conclude that any information submitted with tenders or relating to their evaluation remained subject to an obligation of confidentiality. That position might have changed over time, but that was not relevant for the purposes of the Council’s review. Neither, as the Commissioner’s function is to consider the Council’s handling of the request, is it relevant here.

Is the information publicly available?

32. The Council submitted that it had now disclosed all publicly available information and that the remaining withheld information was correctly withheld. The Commissioner accepts this.

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

33. As noted above, the terms “legitimate economic interest” is not defined in the EIRs or in the Aarhus Convention Implementation Guide. In the Commissioner’s view, the interest(s) 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 be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
34. The Council submitted that the tenderers were involved in a highly competitive market and that disclosure would place them at a disadvantage in relation to future tenders. This, it explained, was one of a series of similar contracts to be awarded by itself and other Scottish public authorities. Disclosure of the withheld information would reveal matters confidential to the tenderers and thus cause the required harm. Information on the evaluation of the tenders would identify those elements of the tenders considered advantageous, and also any perceived weaknesses, to the benefit of competitors.

35. The Commissioner accepts these arguments. At the time the Council responded to the request, all of the information was the subject of a live tendering exercise. At that time, it was reasonable to conclude that its disclosure would be likely to cause substantial prejudice to the legitimate economic interests of the tenderers. The Commissioner acknowledges that it is information of varying degrees of sensitivity, which would therefore be expected to lose that quality at varying rates over time, but she is satisfied that it was all capable of causing the requisite harm at the relevant time for the purposes of this case.

Consideration of the public interest test

36. Having accepted that the exception in regulation 10(5)(e) applies to the majority of the withheld information, 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.
37. Patersons submitted that the public interest in making the information available outweighed any public interest in refusing to do so. It highlighted the public interest in transparency and in ensuring that the Council was properly and effectively conducting its procurement processes.
38. The Council referred to the public interest arguments it had presented to Patersons in its response of 3 February 2014. It acknowledged the significant general public interest in openness and transparency. It then explained that it considered this to be outweighed here by the specific public interest in safeguarding the legitimate commercial interests of the tenderers. On balance, it believed the wider public interest would be met by publication of information on the contract award “as and when that occurs”.
39. As the Commissioner has confirmed above, given the timing of the request, the requirements of regulation 10(5)(e) were met in this particular case. The information was commercial in nature and, at the relevant time, confidential. At that time, its disclosure would have been likely to cause substantial prejudice to the legitimate economic interests of the tenderers. There is a clear public interest in protecting such information, even if its disclosure may be appropriate at a later date.
40. The Commissioner also acknowledges the public interest in ensuring that the Council is conducting its procurement processes properly and effectively, as highlighted by Patersons. As the Council has stated, however, it is obliged (by the 2012 Regulations and the underlying Directive) to publish information on the contract and the award process once the contract has been awarded. Thus, as the Council has argued, the public interest is met to some extent. The law recognises that more detailed information may be too sensitive for publication at the time of award (and certainly earlier) but may lose that sensitivity over time.
41. The Commissioner has carefully considered all the public interest arguments advanced by both parties. On balance, she accepts that (at the material time, as described above) the public interest in making the information available was outweighed by that in respecting its confidentiality and maintaining the exception in regulation 10(5)(e) of the EIRs.

42. In conclusion, the Commissioner is satisfied that the Council was entitled to withhold the majority of the withheld information (i.e. with the exception of that information she has found to have been publicly available, which has been disclosed during the investigation) under regulation 10(5)(e) of the EIRs.

Regulation 9(1) of the EIRs – Duty to provide advice and assistance

43. Regulation 9(1) of the EIRs provides that a Scottish public authority shall “provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.” The Council was asked to comment on the application of regulation 9(1) to any material change in circumstances, prior to the issue of its review outcome, which would make it likely that a new request for the information would receive a different response from the original one.
44. The Council did not accept that this was the purpose of regulation 9(1), suggesting that the obligation to provide advice and assistance was limited by the terms of the Scottish Ministers’ Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs. The Commissioner does not accept this view: an authority is taken to have complied with regulation 9(1) when it conforms to this Code of Practice in relation to the provision of advice and assistance in a particular case (see regulation 9(3)), but she does not believe it follows that the Code is exhaustive on what may constitute such advice and assistance. What it is reasonable to expect in a particular case is, ultimately, a decision for her.
45. The Commissioner considers it might be reasonable to expect an authority to inform the applicant if circumstances had changed between its original decision on that applicant’s request and the issue of its review outcome, with the result that a fresh request would be likely to result in the disclosure of information previously withheld. Whether it is reasonable to do so in any particular case, and the nature and extent of the advice required, will depend on the circumstances of that case.
46. In the circumstances of this particular case, the Council noted that Patersons were represented by solicitors, who were quite capable of advising their clients on the options of either making a new request or seeking a review. The Commissioner acknowledges that applicants who are legally represented will be less likely to require advice and assistance under regulation 9(1) than those who are not.
47. The Commissioner also acknowledges that the Council considered the change in circumstances, as highlighted by Patersons, in carrying out its review in this case. While it was not required to do this, it nonetheless did so and reached the conclusion that the exception still applied. This may or may not have been the correct conclusion (it is not for the Commissioner to say in the circumstances of this case), but it appears to have been a considered one, reached in good faith. Presumably, the Council would have reached the same conclusion in considering whether advice and assistance was required. It would hardly be logical, therefore, to expect it to alert the applicant to a possibility of disclosure which it did not believe existed.
48. In all the circumstances, therefore, the Commissioner is satisfied that the Council was not required to provide Patersons with advice and assistance in this case, to meet its obligations under regulation 9(1) of the EIRs.

Decision

The Commissioner finds that generally South Lanarkshire (the Council) complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Patersons of Greenoakhill Limited (Patersons).

However, in withholding information under regulation 10(5)(e) of the EIRs which was publicly available, the Council failed to comply with regulation 5(1) of the EIRs. As this information was disclosed to Patersons during the investigation, the Commissioner does not require any action to be taken in respect of this breach, in response to Patersons' application.

Appeal

Should either Patersons of Greenoakhill Limited or South Lanarkshire 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 South Lanarkshire 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.

Margaret Keyse
Head of Enforcement

28 May 2015

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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- (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 any applicant.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

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;

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

- (3) The Scottish public authority shall on receipt of such representations –
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.

...

APPENDIX 2: Information request dated 6 January 2014

2 EVALUATION OF PATERSON'S TENDER SUBMISSIONS

- 2.1 All information contained within documents or records regarding the written comments made by the members of the Evaluation Panel regarding Paterson's tender submissions.
- 2.2 All information contained within documents or records regarding the content of any evaluation matrix used in the assessment of Paterson's tender not covered by the requests above.

3 EVALUATION OF VIRIDOR'S TENDER SUBMISSIONS

- 3.1 All information contained within documents or records regarding the written comments made by the members of the Evaluation Panel regarding Viridor's tender submissions.
- 3.2 All information contained within documents or records regarding the content of any evaluation matrix used in the assessment of Viridor's tender not covered by the requests above.
- 3.3 All information contained within documents or records regarding supporting evidence submitted by Viridor as part of its response to questions 1.2, 2.1, 2.2, 2.3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 4.1, 4.2 and 5 of section 8 of the invitation to tender.

4 EVALUATION OF LEVENSEAT'S TENDER SUBMISSION

- 4.1 All information contained within documents or records regarding the written comments made by the members of the Evaluation Panel regarding Levenseat's tender submissions.
- 4.2 All information contained within documents or records regarding the content of any evaluation matrix used in the assessment of Levenseat's tender not covered by the requests above.
- 4.3 All information contained within documents or records regarding supporting evidence submitted by Levenseat as part of its response to questions 1.2, 2.1, 2.2, 2.3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 4.1, 4.2 and 5 of section 8 of the invitation to tender.

7 EVALUATION OF THE GUARANTEED RECYCLING PACKAGE

- 7.1 All information contained within documents or records detailing the evaluation methodology undertaken by or on behalf of the Council in relation to the Guaranteed Recycling Percentages proposed by all tenderers in response to question 1.1 of section 8 of the invitation to tender including the scores awarded to each tenderer, the dates that those scores were awarded, any adjustments made to the scores including the date of such adjustments and any information detailing the reasons for such adjustments.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info