

Decision Notice

Decision 033/2016: Dr Nic Honhold and City of Edinburgh Council

Information relating to two specified planning applications

Reference No: 201500826

Decision Date: 10 February 2016



Scottish Information
Commissioner

Summary

On 12 February 2015, Dr Honhold asked the City of Edinburgh Council (the Council) for information about two planning applications. The Council disclosed some information, redacting other information which it considered to be commercially confidential. Following a review, Dr Honhold remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had been wrong to withhold all of the redacted information on the basis that it was commercially confidential. She ordered the Council to disclose the information which it had incorrectly withheld.

The Commissioner also found that the Council had failed to identify all of the information falling within the scope of Dr Honhold's request. She required the Council to carry out a further review in relation to the additional information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available); 16(1), (3) and (4) (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 Appendix forms part of this decision.

Background

1. On 12 February 2015, Dr Honhold made a request for information to the Council. He asked for:
"The full details of all internal and external audits undertaken for the planning applications from Mountgrange and/or Sundial of the enabling case for development of the Craighouse campus e.g. for planning applications 12/04007/FUL and 12/04007/SCH3."
2. Both of these planning applications concern "enabling development," i.e. development which is contrary to national, regional or local planning policy but where the gain that would accrue would subsidise a public benefit that could not otherwise be achieved. For this reason, financial issues are central to its consideration.
3. The Council responded on 12 March 2015. It supplied Dr Honhold with a redacted copy of one audit report. It told him that the redacted parts were commercially confidential and, as a result, excepted from disclosure under regulation 10(5)(e) (Confidentiality of commercial or industrial information) of the EIRs.
4. On 20 March 2015, Dr Honhold wrote to the Council requesting a review of its decision. Dr Honhold believed that the Council held more than one audit report. He was also concerned that the audit report that was disclosed contained no details of any auditing of either cost prices or sales prices for the buildings to be converted. Dr Honhold stated that there had clearly been internal and external audits of the financial case provided to the Council. He

stated that while he could accept that the cost audit information *may* be commercially confidential, the audits of sales prices were not.

5. The Council notified Dr Honhold of the outcome of its review on 20 April 2015. The Council told Dr Honhold that the external audits looked at build costs and the internal audits looked at the sales prices to be derived from completed units. The Council stated that it had not provided Dr Honhold with a breakdown of the individual sales prices because it considered the information to be commercially sensitive. The Council informed Dr Honhold that, in addition to the information it had already disclosed, it held three cost plan audit reports. The Council gave Dr Honhold redacted copies of these reports, withholding some information was under regulations 10(5)(b) (Course of justice, etc.), 10(5)(e) and 11(2) (Personal data) of the EIRs. The Council also gave Dr Honhold a copy of an internal audit document which was an appendix to one of the planning applications.
6. On 4 May 2015, Dr Honhold wrote to the Commissioner. Dr Honhold 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. Dr Honhold stated he was dissatisfied with the outcome of the Council's review because the subject of his request was the costs and sales values submitted by the developer. The financial appraisal had been audited both internally by Council officials (the sales) and externally by an independent consultant (the costs), but no information on sales figures had been disclosed. Dr Honhold also stated that he did not agree that the exceptions in regulations 10(5)(e) and 10(5)(b) of the EIRs applied to the information. Dr Honhold did not question that the Council had relied on regulation 11(2) to withhold personal data.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Dr Honhold 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.
8. On 21 May 2015, the Council was notified in writing that Dr Honhold had made a valid application. The Council was asked to send the Commissioner the information withheld from Dr Honhold. The Council provided the information and the case was allocated to an investigating officer.
9. 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 to justify its reliance on the exceptions in regulations 10(5)(b) and (e).
10. The Council subsequently provided submissions. It told the Commissioner that it no longer wished to rely on the exception in regulation 10(5)(b).
11. During the investigation, the Council also disclosed additional information to Dr Honhold.

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 Dr Honhold and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. It is evident from the subject matter (planning applications for development on a protected site) that any information falling within the scope of Dr Honhold's request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition are set out in Appendix 1). The Commissioner will therefore 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(s) outweighs the public interest in making the information available.

Regulations 10(5)(e) of the EIRs

16. 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.

Information disclosed during the investigation

17. The Council disclosed some of the redacted information from the audit reports to Dr Honhold during the investigation.
18. The Council did not make any submissions to the Commissioner as to why information which it had previously considered to be commercially confidential was no longer considered as such. Consequently, the Commissioner must find that the Council was not entitled to withhold this information under regulation 10(5)(e) of the EIRs.

Remaining withheld information

19. The information remaining withheld by the Council can be categorised as follows:
 - (i) Category 1: build cost figures and
 - (ii) Category 2: information in an email exchange with two commercial firms and three bullet points from a commentary by one of the firms on cost plans, which do not contain any actual build cost figures.
20. As with all of the exceptions in regulation 10, a Scottish public authority 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)).
21. 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)

¹ http://www.unece.org/env/pp/implementation_guide.html

that national law must expressly protect the confidentiality of the withheld information before the exception can apply: it must, the guidance states, explicitly protect the type of information in question as commercial or industrial secrets. The confidentiality must also protect a "legitimate economic interest." This term is not defined in the Convention, but is considered further below.

22. 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 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 prejudice to a legitimate economic interest?

Is the information commercial or industrial in nature?

23. The information which has been withheld is contained in reports on the audit of building costs for a development.
24. The Council stated that the developer had clear commercial interests in relation to the building costs for the development. The developer had created and developed the planning applications and there was likely to be a future procurement process for the award of contracts relating to the construction of planned units.
25. The Commissioner is satisfied that the information relates to the developer's proposals for the development of the site and that the information is commercial in nature.

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

26. 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.
27. The Council submitted that the developer supplied detailed building costs for the development on the understanding that the information was confidential and was not to be released into the public domain. It provided the Commissioner with a letter from the developer's solicitors, which stated that the information had been provided to the Council on the understanding that it would remain confidential. This had been explained both verbally and in writing to the Council.
28. The Commissioner accepts, in the circumstances, that the information was provided to the Council subject to an obligation of confidentiality.

Is the information publicly available?

29. Whilst noting that some of the information contained within the audit reports has been disclosed, the Commissioner accepts that the remaining withheld information was not publicly available when the Council received and subsequently responded to Dr Honhold's request for information and his requirement for a review.

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

30. The Commissioner therefore accepts that the remaining withheld information is not in the public domain.

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

31. The phrase "legitimate economic interest" is not defined in the EIRs or in the Aarhus Convention Implementation Guide. However, in the Commissioner's view, the interest in question will be financial, commercial or otherwise "economic" in nature. In order to apply this exception, an authority must be able to demonstrate that disclosure would, or would be likely to, cause substantial prejudice to the economic interest. In other words, the harm must be real, actual and of significant substance.
32. The Council submitted that disclosing the remaining information would, or would be likely to, cause such prejudice to the legitimate economic interests of the developer.
33. The Council argued that the developer had a legitimate economic interest in being able to conduct a sound and secure procurement process in order to progress the project from the planning application stage to a completed planning development. Disclosure of the build costs would make the developer's position in going to market to procure contractors "impossible". It would reveal the detailed elements of the build costs, resulting in the developer being unable to negotiate fair and realistic prices for the planning development. This would cause substantial prejudice to the developer's economic interests.

The Commissioner's conclusions on the "category 1" information

34. In making a decision as to whether disclosure of the remaining withheld information would have caused (or would have been likely to cause) substantial harm to the developer's legitimate economic interests, the Commissioner must base her conclusions on the circumstances at the time the Council responded to Dr Honhold's requirement for review.
35. The Commissioner agrees that disclosing the build cost figures would allow potential tenderers to estimate the developer's costs for these works. The Commissioner accepts that this would be likely to substantially prejudice the developer's ability to secure competitive tenders, as contractors would know how much the developers would be willing to pay.
36. For these reasons, the Commissioner accepts that disclosure of the "category 1" withheld information would have been likely to cause substantial prejudice to the developer's legitimate economic interests.
37. The Commissioner will consider the public interest as it relates to this information below.

The Commissioner's conclusions on the "category 2" information

38. The Council's arguments about harm to the developer's economic interests focus on the build costs. The Commissioner accepts that disclosure of the build cost figures would be likely to cause substantial harm to the developer's economic interests; however, the "category 2" information does not contain information about build costs and the Council has not explained why it considers that disclosing the information would cause such harm.
39. The Commissioner has examined the information and, in the absence of submissions from the Council or of any obvious reason as to why disclosure should cause harm, the Commissioner cannot accept that disclosure would, or would be likely to, prejudice substantially the developer's legitimate interests.

40. Therefore, the Commissioner finds that the “category 2” information is not excepted from disclosure under regulation 10(5)(e) of the EIRs and the Commissioner requires the Council to disclose it to Dr Honhold.
41. As Dr Honhold did not challenge the Council’s reliance on regulation 11(2) of the EIRs to withhold the personal data in the category 2 information, the Council is not required to disclose the names, direct email addresses and telephone numbers of the individuals who took part in the email exchange.

Consideration of the public interest test: category 1 information

42. Having accepted that the exception in regulation 10(5)(e) applies to the “category 1” information (the build cost figures), the Commissioner must 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. Dr Honhold commented that, without the information he asked for, it was impossible to evaluate how the Council had come to a decision. This meant the decision making process was not transparent.
44. The Council recognised the importance of disclosing information to demonstrate that it was acting in the best interests of the citizens of Edinburgh when processing planning applications. The Council also recognised the general public interest in accountability, and for the need for public authorities to be subject to scrutiny when applying planning legislation and considering planning applications.
45. The Council submitted that at the time of Dr Honhold’s request the planning applications in question had been approved, but it would not have been in the public interest for the Council to undermine their successful implementation by disclosing information on build costs. The disclosure of the withheld information would compromise the efficient and effective implementation of the planning development. The developer had not agreed the contracts to carry out the work at the development, and the disclosure of the information would substantially harm the developer’s ability to achieve best value.
46. It was the Council’s view that the information should not be disclosed when it would cause such harm and that there was a public interest in the maintaining confidentiality within a competitive environment.
47. The Council submitted that, on balance, the public interest in maintaining the exception outweighed the public interest in making the information available.

The Commissioner’s conclusions about the public interest test

48. The Commissioner notes that Dr Honhold’s arguments regarding the transparency of the process appear to hinge on the provision of sales value information, rather than on build cost information. The information which has been withheld consists solely of build cost figures.
49. The Commissioner recognises the public interest in openness and in public accountability. She also recognises the public interest in preventing economic harm to developers in situations such as this. If the build cost figures for this development were disclosed, other developers in a similar situation might hesitate to take on projects, and that would not be in the public interest.

50. The Commissioner, having carefully considered the public interest arguments advanced by both parties, has concluded that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. She is therefore satisfied that the Council was entitled to withhold the category 1 information under regulation 10(5)(e) of the EIRs.

Sales value information located during the investigation

51. During the investigation, the Council was asked to carry out additional searches to ensure that it had located all of the information which fell within the scope of the request. This resulted in the Council locating information relating to sales values.
52. The Commissioner has considered the wording of Dr Honhold's request to determine whether sales value information falls within the scope of the request.
53. Dr Honhold asked the Council for "the full details of all internal and external audits undertaken" for the planning applications in question. His request for review to the Council specifically made reference to sales prices. In his application to the Commissioner, Dr Honhold commented that sales valuation figures were crucial to the financial case for enabling development. It is therefore clear that he intended his request to cover sales valuation figures.
54. Although Dr Honhold's request did not specifically refer to sales valuation figures, the Commissioner is satisfied that the figures fall within the scope of his request. The request was for "full details" of the audits undertaken and the Commissioner is satisfied that the figures would be an integral part of the audits.
55. As the sales value information was not previously considered by the Council to fall within the scope of the request, the Commissioner now requires the Council, in terms of regulation 16(3) of the EIRs, to carry out a further review which considers what information it holds in relation to sales value information and whether it can be disclosed to Dr Honhold.

Decision

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Dr Honhold.

She finds that the Council breached regulation 5(1) of the EIRs by withholding the "category 2" information under regulation 10(5)(e) and by excluding sales value information from the scope of Dr Honhold's request.

The Commissioner requires the Council to disclose to Dr Honhold the "category 2" information, as described in the covering letter to this decision.

The Commissioner also requires the Council to carry out a further review (in terms of regulation 16(3) of the EIRs) to consider what sales value information it holds and to determine whether the information can be disclosed to Dr Honhold. The outcome of the review must be notified to Dr Honhold.

All of these steps must be taken by 28 March 2016.

Appeal

Should either Dr Honhold or the City of Edinburgh Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

10 February 2016

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 -

(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.

...

- (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.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

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