

Decision Notice



Decision 107/2010 Mr D H Telford and Glasgow City Council

Tenders for Scottish National Arena and Velodrome

Reference No: 200901251
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Summary

Mr Telford requested from Glasgow City Council (the Council) information relating to the tenders received for the Scottish National Indoor Arena and Velodrome or the original tender documentation for the same. The Council responded by withholding the information requested under section 33(1)(b) of FOISA, which relates to commercial interests, and also arguing that the cost of complying with the request would exceed £600 and therefore (under section 12(1) of FOISA) it was not required to comply. Following a review, Mr Telford remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, it was put to the Council that the information withheld was environmental information. The Council provided submissions on the potential application of the EIRs.

Following an investigation, the Commissioner found that the withheld information was all environmental and therefore subject to the EIRs. He also found that the information could be withheld under regulation 10(5)(e) of the EIRs, which relates to commercial confidentiality.

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); 12(1) (Excessive cost of compliance) and 39(2) (Health, safety and the environment)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2) 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 1 May 2009, Mr Telford wrote to the Council requesting “the various tenders that have been submitted, or alternatively the original tender documentation, for the Scottish National Arena and Velodrome.”
2. The Council responded on 2 June 2009 by withholding the information requested, applying the exemption in section 33(1)(b) of FOISA, which relates to commercial interests, and also arguing that the cost of complying with the request would exceed £600 and therefore (under section 12(1) of FOISA) it was not required to comply.
3. On 4 June 2009, Mr Telford wrote to the Council requesting a review of its decision. In particular, he queried the lack of explanation of why the information was being withheld. He did not accept that any commercial interest would be prejudiced by disclosure, or that the cost of compliance with the request would exceed £600.
4. The Council notified Mr Telford of the outcome of its review on 3 July 2009, partially upholding its original decision. It released a copy of the invitation to tender and supporting information, together with clarifications and other communications issued to tenderers in the course of the “invitation to tender” stage of the procurement. However, it withheld the tenders received, adhering to its original reliance on sections 12(1) and 33(1)(b) of FOISA while also citing a new exemption under section 26 (Prohibitions on disclosure).
5. On 9 July 2009, Mr Telford 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.
6. The application was validated by establishing that Mr Telford 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. The case was allocated to an investigating officer.

Investigation

7. The investigating officer contacted the Council on 28 August 2009, 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.
8. During the investigation, the Council was also invited to comment on whether it considered any of the information withheld to constitute environmental information for the purposes of the EIRs. In relation to any information it considered environmental, it was asked to confirm which exception or exceptions in the EIRs it wished to apply to that information, with reasons.



9. The Council provided submissions, indicating it was not persuaded that the withheld information was all environmental information for the purposes of the EIRs. However, it did provide arguments in support of certain exceptions in the EIRs which it stated it would consider applicable to the withheld information should the Commissioner consider it to be environmental, confirming in addition that it would wish to apply the exemption in section 39(2) of FOISA should this be the case.
10. The submissions received from both Mr Telford and the Council, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. 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 Telford and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. 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*. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in regulation 2(1) of the EIRs
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore **must** be dealt with under the EIRs
 - In responding to any request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
13. The Council initially took the view that the information requested by Mr Telford was not environmental and should in fact be dealt with entirely under FOISA.



14. During the investigation, the Council accepted that some of the withheld information was indeed environmental information, but disagreed with the Commissioner's view that all of it was likely to be environmental information.
15. The Council explained that it considered those sections of the tenders dealing with sustainability and reduction of the carbon footprint of the project to be environmental information, as were the technical submissions dealing with matters such as proposals for dealing with any contamination found on the site. Acknowledging that the proposed construction of the arena and velodrome would have a direct impact on the land use and landscape of the area where they were to be built, it accepted that those parts of the tenders dealing with what the tenderers proposed to build and how they proposed to do so, would also fall to be considered environmental. The Council did not agree, however, that the information in its entirety was environmental in nature, arguing that it would stretching the language of the EIRs too far to include as environmental information the tenderers' submissions on such matters as costs and community benefits. It reasoned that such information was too distantly connected to any of the elements of the environment to be covered by the statutory definition.
16. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulations 10 and 11, and certain other restrictions set out elsewhere in the EIRs.
17. The tenders under consideration here are for the construction of a substantial built structure which will, in the Commissioner's view (and as the Council acknowledges), have a significant impact on the landscape of the area in which it is to be built. The construction project itself can also be expected to have a significant impact on the elements of the environment, through such matters as the sourcing and use of materials and energy, transport of materials, equipment and personnel, and the various emissions which result from the construction process. In addition, the completed facility can be expected to have a substantial ongoing impact through factors affecting or likely to affect the environment, including energy, noise, waste and emissions. The Commissioner would therefore consider the project for which tenders were submitted to be, in its entirety, a measure affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition of environmental information, and therefore itself to fall within paragraph (c) of that definition. Consequently, he considers the tenders themselves to comprise, in their entirety, environmental information.

Section 39(2) of FOISA

18. The Council confirmed that should the Commissioner consider the withheld information to be environmental information it would wish to claim the exemption in section 39(2) of FOISA. As the Commissioner does consider the information to be environmental information, he also therefore considers that the Council was entitled to claim this exemption.



19. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As, in this case, there is a separate statutory right of access to environmental information available to Mr Telford, the Commissioner is satisfied that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Consideration of the withheld information under the EIRs

20. The Council indicated that should the Commissioner consider the withheld information to be environmental, it would apply exceptions under regulation 10 of the EIRs to some or all of the information withheld. The Commissioner will first look at the Council's arguments relative to regulation 10(5)(e).

Regulation 10(5)(e)

21. 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.
22. As with all of the exceptions 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 made available 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)).
23. In its submissions, the Council referred to the European Union's public procurement rules, as given force in Scots law through the Public Contracts (Scotland) Regulations 2006. Regulation 43(1) of these regulations states that a contracting authority such as the Council "shall not disclose information forwarded to it by an economic operator [such as the four tenderers here] which the economic operator has reasonably designated as confidential". The Council stated it was satisfied, having reviewed those designations, that the tenderers' designations of confidential information were reasonable.
24. In addition, the Council argued that the tenders, although submitted at the time of Mr Telford's information request, were not as a result in the public domain. It considered it critical to the tender evaluation process (which remained ongoing at the time it dealt with the request and when it dealt Mr Telford's request for review) that it remained confidential from start to finish. The evaluation process inevitably included an element of clarification and it was essential to the fair treatment of tenderers that none of them had knowledge of what their competitors had said in the course of the process.
25. Mr Telford, on the other hand, argued that it could not be reasonable for a tenderer to designate information as confidential where tendering instructions specifically set out that all of the tender documentation submitted will be subject to freedom of information legislation.



26. As outlined in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*, the Commissioner (having taken into consideration the guidance in the Aarhus Convention Implementation Guide) would expect authorities to have considered the following matters before the exception in regulation 10(5)(e) could be engaged:

- 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 commercial or industrial in nature?

27. Having considered the Council's submissions as to the tendering process for the purposes of which the withheld information was submitted, along with the nature of that information, the Commissioner is satisfied that it is commercial in nature.

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

28. The Commissioner has considered carefully the arguments presented on this point by both Mr Telford and by the Council. In the absence of a specific statutory duty of confidence (which the Commissioner does not believe to have been the effect of regulation 43(1) of the Public Contracts (Scotland) Regulations 2006), the question is whether such a duty existed in respect of the withheld information at common law.

29. Having considered the Council's submissions on the tendering process, the Commissioner accepts in the circumstances that all of the withheld information in this case was received under an implicit obligation to maintain confidentiality and that such an obligation would have remained in force at the time of receipt of tenders and during their evaluation by the Council (i.e. throughout the period in which it dealt with Mr Telford's request for information and his request for review). To the extent that the information had been so designated by the tenderers, it may also have been the subject of an express duty of confidence at that time.

Is the information publicly available?

30. The Commissioner also accepts the Council's submissions that the withheld information was not publicly available when it dealt with Mr Telford's request for information, or when it dealt with his request for review. In other words, it retained the essential quality of confidence.



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

31. For this exception to apply, the authority must demonstrate harm to an interest (of itself or of a third party), which must be financial, commercial or otherwise “economic” in nature. The harm must be substantial, and therefore of real and demonstrable significance. This test is therefore somewhat more demanding than the straightforward requirement of detriment if an actionable breach of confidence is to be established at common law.
32. The Commissioner has considered the Council's arguments in relation to fairness to all of those participating in the tendering process. In the circumstances, he is satisfied that the interests of the affected tenderers in the process could be described as economic in nature. He is also satisfied in the circumstances that, due to the timing of Mr Telford's request, disclosure of the withheld information in response to his information request or his request for review would have caused, or would have been likely to cause, substantial harm to those economic interests.

Consideration of the public interest

33. Having upheld the use of the exception contained within regulation 10(5)(e), the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs. The test specifies that a 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.
34. Mr Telford submitted that it was not credible for the Council to deny the principles of public interest pertaining to openness and transparency. He also commented on the public interest in ensuring contracts are framed in such a way as to prevent avoidable delays and overspends.
35. While acknowledging the significant public interest in openness and transparency (and a specific public interest in a major publicly-funded capital project), the Council considered this to be outweighed in this case by the specific public interest in safeguarding the legitimate commercial interests of the tenderers. It considered that the wider public interest would be met by its publication of information on the contract award. In the circumstances, it could identify no public interest sufficiently strong to outweigh the obligation of confidentiality which was present in this case.
36. The withheld information clearly relates to a significant item of public expenditure, and the Commissioner recognises the public interest in transparency in relation to the award of the contract in question. Equally, however, he is satisfied that there was a strong public interest in the information not being generally available at the time the Council dealt with Mr Telford's information request and his request for review, in the interests of fair competition. In all the circumstances, therefore, he concludes that the public interest in making the information available was in this case outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.



37. For the reasons set out above, the Commissioner has concluded that the Council was entitled to withhold the information in the tenders requested by Mr Telford under regulation 10(5)(e) of the EIRs. Having reached this conclusion, he is not required to consider the application of the other exceptions in regulation 10 of the EIRs referred to by the Council in its submissions.

DECISION

The Commissioner finds that Glasgow City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Telford.

Appeal

Should either Mr Telford or Glasgow City Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
22 June 2010



Appendix

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

39 Health, safety and the environment

...

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

- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

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

...



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.



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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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.
- (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;

...