

Decision Notice



Decision 119/2010 Mr Tom Minogue and Transport Scotland

Staff rates contained in New Forth Crossing Multi-Disciplinary Management
Consultancy Commission

Reference No: 200902027
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www.itspublicknowledge.info

Kevin Dunion
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Summary

Mr Tom Minogue requested from Transport Scotland information relating to the staff rates contained in the New Forth Crossing Multi-Disciplinary Management Consultancy Commission (the Consultancy Commission). Transport Scotland responded by relying on the exemption contained in Section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) to withhold the information requested. Following a review, Mr Minogue remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which Transport Scotland withdrew its reliance on FOISA and instead relied on the exceptions contained in regulation 10(5)(e), regulation 10(5)(f) and regulation 11(2) read in conjunction with regulation 11(3)(a)(i) of the Environmental Information (Scotland) Regulations 2004 (EIRs), the Commissioner found that Transport Scotland had dealt with Mr Minogue's request for information in accordance with the EIRs. He did not require Transport Scotland to take any action.

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); 39(2) (health, safety and the environment)

The 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 27 August 2009, Mr Minogue wrote to Transport Scotland, as part of an ongoing exchange of correspondence, regarding the costs associated with the Replacement Forth Crossing. In particular, he requested the rates for the various staff grades submitted by the successful tenderer for the Forth Replacement Crossing Multi-Disciplinary Management Consultancy Commission (the Consultancy Commission). He reiterated this request in a further letter to the Project Director on 28 August 2009.
2. Transport Scotland responded on 31 August 2009 indicating that it considered this information be exempt from disclosure under section 33(1)(b) of FOISA, on the grounds that it was commercially confidential and could cause harm to the supplier if disclosed.
3. On 30 September 2009, Mr Minogue wrote to Transport Scotland requesting a review of its decision.
4. Transport Scotland notified Mr Minogue of the outcome of its review on 27 October 2009. Transport Scotland upheld its decision to withhold the information by virtue of the exemption contained in Section 33(1)(b) of FOISA.
5. On 20 November 2009, Mr Minogue wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Transport Scotland 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 Minogue 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. Transport Scotland is an executive agency of the Scottish Ministers ("the Ministers") and, in line with agreed procedures, the Ministers were contacted on 27 November 2009, notified that an application had been received from Mr Minogue and asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify Transport Scotland's reliance any provisions of FOISA considered applicable to the information requested.



9. The Ministers responded on 9 February 2010 indicating that they were no longer relying on Section 33(1)(b) of FOISA to withhold the information. Instead, the Ministers indicated that they considered the information to be environmental information and therefore exempt information in terms of the exemption contained in Section 39(2) of FOISA. The Ministers further indicated that they were now relying on the exceptions contained in regulation 10(5)(e), regulation 10(5)(f) and regulation 11(2), read in conjunction with regulation 11(3)(a)(i) of the Environmental Information (Scotland) Regulations 2004 (EIRs) to withhold the information.
10. Mr Minogue was invited to comment on why he believed disclosure of the rates under consideration would be in the public interest. Mr Minogue's submissions are summarised and considered (along with the Ministers' submissions) where relevant in the Commissioner's analysis and findings section 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 Minogue and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. The information withheld from Mr Minogue in this case is the rates for the various staff grades submitted by the successful tenderer for the Consultancy Commission. This information is contained in a table which lists the man-hour and man-day rates for a range of different staff that is set out in an appendix to the relevant contract.
13. The Consultancy Commission was awarded on 22 January 2008 and is expected to remain operational until the award of the main contract and construction of the New Forth Crossing begins in 2011.

FOISA or EIRs?

14. While the Ministers initially indicated in correspondence with Mr Minogue that the information was being withheld under Section 33(1)(b) of FOISA, they indicated during the investigation that they considered the information under consideration to be environmental information and that they now wished to apply the exemption in section 39(2) of FOISA to this information. They provided details of their reasoning for withholding the information in terms of the EIRs.
15. As set out at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner's views on the interaction between FOISA and the EIRs are as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in 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 a 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 then **also** 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.
16. The implication of Decision 218/2007 for the Commissioner's consideration of Mr Minogue's request is therefore that he must first determine whether the information withheld is environmental information.
17. Environmental information is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
18. In this case, the Ministers indicated that the request should properly be considered under the EIRs as the Consultancy Commission was part of a process that will have wider built environment impacts and that will be subject to environmental impact assessments.
19. The Commissioner's view is that the withheld information relates to proposed measures or activities - the design and eventual construction of a new crossing across the River Forth - affecting or likely to affect the state of elements of the environment (in particular land, water, and natural sites) and factors (in particular noise, emissions) which would in turn affect or are likely to affect the elements of the environment. Furthermore, the information relates to and cost benefit and other economic analyses and assumptions to be used within the framework of these measures and activities. The Commissioner therefore considers the information falls within the definition of environmental information contained in regulation 2(1)(c) and (e) of the EIRs.
20. As previously indicated, the definition of what constitutes environmental information should not be viewed narrowly. The Commissioner accepts that the tender and associated Consultancy Commission contain financial information which, considered in isolation, may not be environmental information. However, he considers that when this information is taken in the context of the project as a whole, it must be considered to be environmental information.



21. As the Commissioner considers that the information requested by Mr Minogue is environmental information, he also therefore considers that the Ministers were correct in their application of section 39(2) of FOISA.
22. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA.

Consideration of Regulation 10(5)(e)

23. 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. It should be noted that under regulation 10(2)(b), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
24. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
25. The UNECE Implementation Guide to the Aarhus Convention¹ (which offers guidance on the interpretation of the Aarhus Convention, the treaty from which the EIRs are ultimately derived) notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information. In practical terms, this means that national law must explicitly protect the type of information in question as commercial or industrial secrets.
26. The same guidance goes on to note that the Aarhus Convention does not define "legitimate economic interest" but that there are several steps that countries have taken to help define legitimate economic interest on a case by case basis. These are
 - Establish a process. Parties (to the Convention, i.e. relevant states) may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential;
 - Determine confidentiality. Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case;

¹ <http://www.unece.org/env/pp/acig.pdf>



- Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.
24. The Commissioner has taken this guidance into consideration when considering this exception.
25. The Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

26. The Ministers have submitted that, as the withheld information comprises the hourly and day rates chargeable under the Consultancy Commission that had been awarded after a competitive tendering process, the information is clearly commercial in nature.
27. The Commissioner has considered the Ministers' representations on this point and accepts that the withheld information comprises commercial information

Does a legally binding duty of confidence exist?

28. The Ministers have stated that the information had the necessary quality of confidence and it would clearly have been included in the tender in the expectation of confidentiality.
29. The Commissioner does not accept that a general implication of a duty of confidence will, in itself, mean that all information contained in a tender, or generally supplied by a third party, be automatically considered confidential. The Commissioner will therefore look behind any implied duty of confidence to the nature of the information concerned and consider whether the duty should stand.
30. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
- i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already;
 - ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
 - a. there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.



Necessary quality of confidence

31. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here. Although the total value of the Consultancy Commission is in the public domain, the detailed costings for the supply of labour under it are not. The information in question will only have been viewed by a limited number of individuals.
32. The Commissioner is therefore of the view that the information held at the time of it being supplied to Transport Scotland, and has subsequently retained, the necessary quality of confidence.

Obligation to maintain confidentiality

33. The Ministers must also have received the information in circumstances which imposed an obligation on them to maintain confidentiality. The information was originally supplied as part of a competitive tendering exercise, one aspect of which was to state the hourly or daily rate that the tendering company intended to charge for staff undertaking a range of functions. The tender document issued contained an estimate of the number of hours required to conduct each particular function. The hourly and daily rates included in the completed tender documents were unique to each tenderer.
34. The Commissioner accepts that the inherent nature of the tendering process implied an obligation of confidentiality with respect to certain types, but not all, of the information contained within the tender document. This decision only concerns the information withheld from Mr Minogue, namely the hourly and daily staff rates. Having considered the information to which the Ministers have applied regulation 10(5)(e), which was obtained by Transport Scotland in the process of receiving tenders (and for purposes related to the evaluation of those tenders and subsequent award of the Consultancy Commission), the Commissioner is satisfied that the information in question was subject to an implied obligation of confidentiality. Such an expectation would have been the normal practice in a tendering exercise of this kind.

Unauthorised disclosure would cause detriment

35. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
36. The Commissioner is satisfied that when the consortium in this case submitted the tender document to Transport Scotland, it did so in the expectation that the detailed costing information contained therein would not be disclosed into the public domain. During the course of the investigation, the Ministers provided the Commissioner with correspondence from the consortium that clearly identified the detriment which they considered would, or would be likely to, be caused by the release of the detailed costing information. The Commissioner is therefore satisfied that release of the information would be unauthorised.
37. In their submissions, the Ministers have provided the Commissioner with a number of examples of substantial harm which they consider would result from disclosure of the information. These will be considered in more detail below. As noted at paragraph 30 above, the detriment under consideration in this instance need only be potential and the Commissioner is satisfied that the disclosure of the information in this case is capable of causing detriment to the consortium.



38. The Commissioner is therefore satisfied that a legally binding duty of confidence exists.

Is the information publicly available?

39. The Ministers have submitted that while the aggregated costs of the Consultancy Commission are publicly available and have been widely discussed, the detailed costing information requested by Mr Minogue has not entered the public domain.

40. The Commissioner is aware that the global value of the Consultancy Commission has been the subject of media reporting but accepts that the detailed costings are contained in a confidential tender document and have not, according to his research, entered the public domain. Accordingly, the Commissioner concludes that the information is not publicly available.

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

41. The term legitimate economic interest is not defined within the EIRs. The interest in question must however 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.

42. In their submissions, the Ministers argued that disclosure of the information would cause the consortium substantial prejudice as the Consultancy Commission had been won on the basis of a tender competition in which the consortium had competed against a number of other firms to win the work. The Ministers further argued that the structure of tendering processes and the competition between private firms in this field is very similar and the release of the specific information, in effect the unit cost of labour, would place the consortium at a commercial disadvantage in future contract negotiations or tender competitions.

43. The Ministers also argue that in addition to the economic interests of the consortium, the economic interests of Transport Scotland are also likely to suffer substantial harm. In support of this argument the Ministers indicated that there was a reputational risk to Transport Scotland and the Scottish Government as other companies may choose not to tender rather than risk their commercial information being made available to the public and therefore competitors. If this occurred the Ministers argued that this would reduce the choice available for the Scottish Government when attempting to secure best value for public expenditure and would therefore impact on the ability to select the most advantageous contract to ensure that public money is being spent advantageously for the economy of Scotland.

44. Mr Minogue indicated in his correspondence with the Commissioner that he is concerned that the reputation of Scotland as enterprising, hard-working and honest has been damaged in recent years by what he described as the scandals surrounding major public sector construction projects. He suggests that had some difficult questions been asked at an early stage of these projects then these "scandals" might have been averted. He goes on to indicate that Transport Scotland had provided him with a great deal of information but had refused to provide the information that would allow him to assess whether or not the public's money is being spent wisely.



45. The Commissioner first considered the arguments relating to the interests of the consortium, and is persuaded that the release of the information would, or would be likely to, prejudice substantially the legitimate economic interests of the consortium.
46. Accordingly, the Commissioner is satisfied that the Ministers acted correctly in applying the exception in regulation 10(5)(e) to the withheld information in this case. Having reached this conclusion, he has not gone on to consider whether disclosure would or would be likely to prejudice substantially the commercial interests of the Scottish Government.
47. Having decided that the exception is engaged the Commissioner is required to go on and assess the public interest in maintaining the exception.

Consideration of the Public Interest Test

48. All the exceptions to disclosure contained in regulation 10 are subject to a public interest test contained in regulation 10(1)(b) that requires the Commissioner to consider whether in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
49. Mr Minogue, as outlined in paragraph 45 above, indicated that his reason for requesting the information was his concerns surrounding the high costs and poor value for money of previous major public sector contracts. He stated that in his view the public interest favoured openness and accountability and that disclosing the information would serve the public interest by allowing examination of the various rates charged under the Consultancy Commission. He also argued that this would further serve the public interest by allowing the public to assess whether a fair price was being paid. Mr Minogue did not identify any public interest in withholding the information.
50. The Ministers indicate that they considered the following factors when assessing the public interest:

Supporting disclosure:

- a. There is a clear public interest in ensuring that the expenditure of public funds is conducted in a fair and transparent manner
- b. There is a public interest in ensuring that Transport Scotland is getting value for money on behalf of the public when purchasing the services of the consortium

Supporting maintenance of the exception

- a. Public accountability and scrutiny of expenditure and the assessment of value for money have already been released into the public domain by virtue of Parliamentary scrutiny;
- b. The Forth Replacement Crossing project as a whole is being scrutinised by processes such as the Office of Government Commerce gateway review;
- c. There has been no suggestion of wrongdoing or concern over the award of the Consultancy Commission to the consortium whom the Scottish Government selected on the basis of providing best value and quality;



- d. Release of the information would be to the serious detriment of the consortium's commercial viability and would significantly impact on the available tenderers for public sector contracts;
 - e. The choice available to the Scottish Government when attempting to secure best value for public expenditure would be reduced thus impacting negatively on the ability of select the most advantageous contract to ensure public money is spent in the best interests of the economy of Scotland;
 - f. There is no public interest in creating a situation where companies cannot tender competitively nor confidently for government work, thus impeding the Scottish Government's ability to deliver its programme of projects.
51. The Ministers, having considered these factors concluded that the public interest favoured maintaining the exception.
52. The Commissioner has considered fully all of the submissions on the public interest made by both Mr Minogue and the Ministers taking into consideration the specific content and wider context of the withheld information.
53. The Commissioner recognises that the information in question relates to a unique public sector construction project of major public interest and he is aware that the project continues to be the subject of both political and public debate.
54. The Commissioner acknowledges that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In this case, this would contribute to the debate on a matter of public interest and may allow the public to make a judgement as to whether the Scottish Government has entered an appropriate contract that provides value for money.
55. The Commissioner also accepts that there are relevant and valid arguments in this case which suggest that the public interest in making the information available is outweighed by the public interest in maintaining the exception. These include:
- a. The general public interest in confidences being maintained;
 - b. The likelihood of commercial interests of the consortium being compromised through disclosure of sensitive information;
 - c. The possibility that the consortium's competitors could analyse and identify the cost structure operated by the consortium to its future detriment;
57. Having carefully weighed up the arguments, the Commissioner has concluded that in all the circumstances of the case, the public interest in making the information available in this instance is outweighed by the public interest in maintaining the exception.
58. The Commissioner is mindful of the fact that the Consultancy Commission remains a live and ongoing commercial agreement between the Scottish Government and the consortium. In addition, the Commissioner considers that the nature of the information would provide little additional understanding of the project as a whole to the public while providing extremely sensitive and advantageous commercial information to the consortium's competitors.



59. The Commissioner therefore concludes that the Ministers have correctly withheld the detailed costing information from Mr Minogue under regulation 10(5)(e) of the EIRs.
60. The Ministers also withheld the information on the basis of the exceptions in regulations 10(5)(f) and 11(2), read in conjunction with 11(3)(a)(i), of the EIRs. However, given that the Commissioner has found the information to be excepted under regulation 10(5)(e) of the EIRs, he does not consider it necessary to go on to consider the other exceptions cited by the Ministers.

DECISION

The Commissioner finds that Transport Scotland was entitled to withhold the detailed costing information from Mr Minogue in terms of section 39(2) of the Freedom of Information (Scotland) Act 2002 and under regulation 10(5)(e) the Environmental Information (Scotland) Regulations 2004. He therefore concludes that Transport Scotland acted in accordance with the EIRs in responding to Mr Minogue's information request.

Appeal

Should either Mr Minogue or Transport Scotland 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
12 July 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-
- (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.

...



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;

...