

Decision Notice



Decision 048/2011 Shirley-Anne Somerville MSP and tie Limited

Transport Edinburgh Limited Business Plan

Reference No: 201000982

Decision Date: 9 March 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Ms Shirley-Anne Somerville MSP verbally requested from tie Limited (tie) a copy of the Transport Edinburgh Limited (TEL) Business Plan. In response, tie advised Ms Somerville that it would not provide her with a copy on the basis that it contained commercially confidential information. Following a review, Ms Somerville remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, tie initially applied the exception in regulation 10(4)(d) of the EIRs to the information in its entirety. It subsequently withdrew its reliance on this exception and instead applied the exceptions in regulation 10(4)(e) and 10(5)(e) of the EIRs to certain parts of the Business Plan.

The Commissioner found that tie was entitled to withhold certain information redacted from the Business Plan under regulation 10(5)(e) of the EIRs. He concluded that tie had acted in accordance with the EIRs by withholding that information. However the Commissioner found that tie acted in breach of regulation 5(1) of the EIRs in withholding certain information to which no exceptions under the EIRs applied and required tie to disclose this information

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b), (c) and (e) of “environmental information”); 5(1) and 2(b) (Duty to make environmental information available on request), 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 April 2010, Ms Somerville verbally requested a copy of the TEL Business Plan from Mr Richard Jeffrey, the Chief Executive of tie.
2. In its response, issued on 16 April 2010, tie declined to supply a copy of the plan indicating that it would be inappropriate to do so as the plan contained commercially confidential information relating to Lothian Buses.



3. On 29 April 2010, Ms Somerville wrote to tie requesting a review of its decision. In particular, Ms Somerville noted that Lothian Buses was a company with published annual accounts and reports and requested that tie reconsider its decision to withhold the Business Plan.
4. Ms Somerville was notified of the outcome of tie's review on 5 May 2010. It stated that tie remained of the view that it was not prepared to disclose the document in question.
5. On 10 May 2010, Ms Somerville wrote to the Commissioner, stating that she was dissatisfied with the outcome of tie's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Ms Somerville had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 10 June 2010, tie was notified in writing that an application had been received from Ms Somerville and was asked to provide the Commissioner with any information withheld from her. In response, tie provided the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted tie, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, tie was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. Its response of 12 August 2010 stated that tie wished to rely on regulation 10(4)(d) of the EIRs to justify withholding the requested information on the basis that it comprised environmental information that was still in the course of completion.
10. Following a series of correspondence and meetings with tie, the investigating officer advised tie that the Commissioner was not minded to accept that the information in question comprised material in the course of completion and would therefore be unlikely to accept that the exception in regulation 10(4)(d) could be engaged.
11. Subsequently, tie withdrew its reliance on regulation 10(4)(d), instead advising the investigating officer that it wished to rely on regulations 10(4)(e) and 10(5)(e) of the EIRs to justify withholding certain information within the Business Plan. It no longer maintained that the document was excepted from disclosure in its entirety.



12. Following these developments, the investigating officer invited tie to consider providing Ms Somerville with the information it no longer sought to withhold. However, tie declined to do so, indicating that it would prefer to await the outcome of the investigation, and the Commissioner's decision, before providing any information to Ms Somerville.

Commissioner's analysis and findings

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

Background

14. TEL is a company wholly owned by the City of Edinburgh Council (CEC) which was established to promote and develop the implementation of transport projects set out in CEC's local transport strategy and to promote the integration of all modes of public transport in Edinburgh.
15. CEC originally established tie as a wholly owned subsidiary, with responsibility for delivering the Edinburgh Tram Project (the tram project), in 2002.
16. Lothian Buses plc (Lothian Buses) is a company which runs bus services in Edinburgh and the surrounding area. CEC owns the majority of the company.
17. In December 2009, the Council agreed that ownership of tie should be transferred to TEL. Under this arrangement, day to day management, control and execution of the tram project remained with tie. CEC gave TEL responsibility for the majority of strategic and material decisions affecting the tram project. In time, it is intended that CEC's holding in Lothian Buses will also transfer to TEL.

Handling under the EIRs

18. Environmental information is defined in regulation 2(1) of the EIRs (the 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 various restrictions and exceptions contained in the EIRs.
19. In this case, the withheld information relates to ongoing and proposed measures or activities (the construction and future management of a new tram system in Edinburgh) affecting or likely to affect the state of elements of the environment (in particular land and natural sites) and factors (in particular noise and emissions) which would in turn affect or are likely to affect the elements of the environment. Furthermore, the information relates to cost benefit and other economic analyses and assumptions to be used within the framework of these measures and activities. The Commissioner therefore concurs with tie that the information falls within the definition of environmental information contained in regulation 2(1) (c) and (e) of the EIRs.



20. Therefore, the Commissioner considers that tie correctly identified Ms Somerville's request as one covered by the EIRs.
21. Where a request for environmental information is made in writing, that request will also fall to be considered in terms of the Freedom of Information (Scotland) Act (FOISA) also. However, while the EIRs allow information requests to be made verbally, FOISA does not.
22. Since Ms Somerville's request was made verbally, the Commissioner is required (and is entitled) only to consider Ms Somerville's application for decision solely in terms of the EIRs.

The withheld information

23. The Business Plan for TEL has undergone a number of revisions since it was first developed. A previous version of the Business Plan was published in 2006. The information under consideration in this case is the most recent version of the Business Plan for TEL that was held by tie at time of Ms Somerville's request. This was developed in 2009.
24. As noted above, tie initially withheld the Business Plan in full. Its comments in communications with Ms Somerville did not indicate which exception was considered to apply. During the investigation, tie submitted to the Commissioner that it was excepted from disclosure under regulation 10(4)(d) of the EIRs. However, it withdrew its application of this exception following discussion with the investigating officer, who advised that the Commissioner's initial view was that this exception was not applicable in this case.
25. tie made further submissions which identified particular parts of the Business Plan, which it considered to be excepted from disclosure under regulations 10(4)(e) and 10(5)(e) of the EIRs. It did not seek to apply any exception to justify its decision to withhold the remaining parts of the Business Plan.
26. As no justification has been provided during the investigation for withholding this information, the Commissioner finds that tie acted in breach of regulation 5(1) of the EIRs by withholding the parts of the Business Plan that were not marked by tie as being excepted under regulations 10(4)(e) or 10(5)(e).
27. The Commissioner has gone onto consider whether the remaining parts of the Business Plan were correctly withheld by tie.

Regulation 10(5)(e) of the EIRs

28. The exception in regulation 10(5)(e) has been applied by tie to all of the information which it considers to be excepted from disclosure.
29. 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.



30. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention) 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.
31. 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 case by case. 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;
 - 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.
32. The Commissioner has taken this guidance into consideration when considering this exception. His 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?
33. Before setting out his consideration of these tests in detail, the Commissioner would point out that (as he must in any case) he has considered these matters (and the associated public interest test) in the circumstances that held at the time when tie notified Ms Somerville of the outcome of its review. In this case, the relevant date is 5 May 2010. The Commissioner has not taken into consideration any developments in the period since that date.

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



Is the information commercial or industrial in nature?

34. In its submissions, tie contended that, as the withheld information comprises key predictions of traffic volumes, patronage, operating costs, revenue protection measures and financial assumptions upon which the Business Plan is based, the information is clearly commercial in nature
35. Having considered all of tie's representations and the nature of the information under consideration, the Commissioner is satisfied that all of the withheld information is commercial or industrial in nature as it comprises information on TEL's Strategic Business Plan including a detailed assessment of TEL's anticipated revenues and profitability once the first phase of the tram project is in place.

Does a legally binding duty of confidence exist?

36. In its submissions, tie argued that the information it was seeking to withhold had either been provided in confidence by Lothian Buses, comprised part of the existing tram maintenance contract or comprised internal projections on the operating costs of the integrated transport service.
37. In particular, it was argued by tie that much of the information it seeks to withhold was provided by Lothian Buses in order to facilitate creation and subsequent updating of the Business Plan and, given the sensitivity of the information, it was provided to tie with a clear expectation of confidence and received by tie in that manner.
38. The Commissioner does not accept that a general implication of a duty of confidence will, in itself, mean that all information 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.
39. 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
 - iii. 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

40. To have the necessary quality of confidence, the information should not be generally accessible. The Commissioner is satisfied that this is the case here. Although the 2006 version of the Business Plan is in the public domain, the updated or revised information that tie is seeking to withhold is not. The information in question will only have been viewed by a limited number of individuals in CEC, Lothian Buses, tie and TEL.
41. The Commissioner is therefore of the view that the information held at the time of it being created, and has subsequently retained, the necessary quality of confidence.

Obligation to maintain confidentiality

42. The next test is that information must have been communicated in circumstances which imposed an obligation on it to maintain confidentiality.
43. The information provided by Lothian Buses was originally supplied as part of the process of amalgamating the operations of Lothian Buses and the tram project into a single integrated public transport system in Edinburgh under the control of TEL on behalf of CEC. At the time the information was supplied, Lothian Buses was, and continues to be, a separate commercial organisation. It was stated by tie that the Lothian Buses information was supplied with an expectation that confidentiality would be maintained as the information could be used by its competitors to assess its business model and profitability.
44. The Commissioner accepts that the inherent nature of information sharing between commercial organisations that are considering or undergoing a process of amalgamation carries an implied obligation of confidentiality. Having considered the Lothian Buses information to which tie has applied regulation 10(5)(e), 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 an exercise of this kind.
45. The Commissioner also notes that some of the redacted information comprises information contained within the Infraco contract between tie and Bilfinger Berger UK Limited and Siemens plc. This contract concerns the delivery of the infrastructure for the tram network.
46. In this case, having considered the withheld information, the Commissioner is satisfied that the nature of the relationship between tie and the contractor and the fact that the contracted work remains ongoing means that this information was communicated in circumstances imposing an obligation on tie to maintain confidentiality.
47. The remainder of the redacted information contains internal projections on operating costs, forecasts and assumptions. Again, the Commissioner is satisfied that the nature of the information is such that it was communicated to tie in circumstances imposing an implied obligation on tie to maintain confidentiality.



Unauthorised disclosure would cause detriment

48. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
49. The Commissioner is satisfied that when the decision was taken to amalgamate the operations of Lothian Buses and the tram project into a single integrated operation under the management of TEL, there was an expectation that the detailed financial and performance information shared between the key parties would not be disclosed into the public domain. During the course of the investigation, tie provided the Commissioner with information that clearly identified the detriment which it considered would, or would be likely to, be caused by the release of the financial and performance information. The Commissioner is therefore satisfied that release of the information would be unauthorised and that disclosure of the redacted information would cause detriment to Lothian Buses, TEL, tie and CEC.

Is the information publicly available?

50. The Commissioner is satisfied that the redacted information will only have been viewed by a limited number of individuals and is not in the public domain.

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

51. The term legitimate economic interest is not defined within the EIRs. The interest in question will 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.
52. In its submissions, tie argued that there was a significant business case underlying the integration of the tram project and Lothian Buses and that this integration as an economic interest of CEC would be severely jeopardised by the release of the redacted information. It was also submitted by tie that the release of information concerning business models would allow competitor transport companies to restructure their business models to the disadvantage of TEL and Lothian Buses.
53. The Commissioner has considered these arguments carefully and is persuaded that, because of its nature, the release of the redacted information would, or would be likely to, cause substantial harm to the legitimate economic interests of CEC, TEL and Lothian Buses. As such, the Commissioner is satisfied that the exception in regulation 10(5)(e) was correctly applied to the redacted information.



Consideration of the public interest test

54. Having upheld the use of the exception contained within regulation 10(5)(e), the Commissioner is required to consider the public interest test required by 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.
55. In its submissions, tie argued that the public interest lay in maintaining the exception for a number of reasons. It considered that the release of the information would impact on proper competition across the sector as it would unfairly disadvantage Lothian Buses to the benefit of competitors. It also considered that if the redacted information concerning the Infraco contract were to be released, there would be a threat to the relationship between the parties to the contract which would be to the detriment of the public interest. Additionally, tie considered that the release of market sensitive information such as internal and commercial formulae for costs and projections would not be in the public interest.
56. The Commissioner has considered fully the submissions made on the public interest by tie taking into consideration the specific content and wider context of the withheld information. In considering the public interest test, the Commissioner is aware of the high level of public interest that exists regarding the tram project and the future of the transport infrastructure in Edinburgh.
57. Ms Somerville was invited to comment on the public interest in disclosure in this case, but no response was received to this request. Nonetheless, 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, disclosure would contribute to the debate on the future of the public transport infrastructure in Edinburgh and would allow an insight into the future planning that is taking place.
58. 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:
- The general public interest in confidences being maintained,
 - The likelihood of commercial damage being caused through disclosure of the information under consideration,
 - The possibility that disclosure would have a detrimental effect on proper and fair competition across the sector,
 - The likelihood that disclosure would have a detrimental effect on the ability of the parties to the Infraco contract around their contractual obligations and liabilities to work effectively together on an ongoing basis.



59. Having carefully weighed up the arguments, the Commissioner has concluded that in all the circumstances of the case, the public interest in making this information available in this instance is outweighed by the public interest in maintaining the exception.
60. The Commissioner therefore concludes that tie was entitled to apply the exemption in regulation 10(5)(e) of the EIRs to the redacted information contained in the Business Plan. Therefore, the Commissioner has concluded that tie acted in accordance with the EIRs in withholding this information.
61. Some of the redacted information was also withheld by tie under the exception in regulation 10(4)(e) 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 exception cited by tie.

DECISION

The Commissioner finds that tie Limited (tie) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Somerville.

The Commissioner finds that tie acted in accordance with the EIRs by withholding certain information redacted from the TEL Business Plan (the Business Plan) in terms of regulation 10(5)(e).

In the absence of any submissions from tie to justify the non-disclosure of the remaining parts of the Business Plan in terms of the EIRs, the Commissioner finds that tie acted in breach of regulation 5(1) of the EIRs by withholding this information from Ms Somerville.

The Commissioner therefore requires tie to disclose the redacted version of the Business Plan to Ms Somerville by 25 April 2011.

Appeal

Should either Ms Somerville or tie 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
9 March 2011



Appendix

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;

...

- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

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;