

# Decision Notice

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**Decision 034/2016: Mr Graham Sutherland and Glasgow City Council**

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## **Evaluation of bids**

Reference No: 201501750

Decision Date: 10 February 2016



Scottish Information  
Commissioner

## Summary

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On 12 June 2015, Mr Sutherland asked Glasgow City Council (the Council) for information relating to the marketing and sale of land at Park Quadrant, Glasgow, including the scoring, selection criteria and method used in the process. The Council disclosed some information to Mr Sutherland and, following a review, confirmed that some information was exempted from disclosure as commercially confidential under regulation 10(5)(e) of the EIRs.

The Council disclosed further information to Mr Sutherland during the Commissioner's investigation. The Commissioner found that the Council was entitled to rely upon regulation 10(5)(e) to withhold the remaining information. She also found that the Council had failed to comply with the statutory timescales for responding to Mr Sutherland's requirement for review.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 7(1) (Extension of time); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available); 16(1) 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

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1. On 12 June 2015, Mr Sutherland made a request to the Council for information about the marketing and sale of land at Park Quadrant, Glasgow. Part 3 of the request sought the scoring, selection criteria and method used to select shortlisted bidders, preferred bidder and the successful bidder.
2. The Council responded on 8 July 2015. It treated the request as one for environmental information, applying the exemption in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) and otherwise handling the request under the EIRs.
3. In relation to part 3 of the request, the Council provided Mr Sutherland with some explanation as to the overall assessment of bids received and explained that further information was available on the Council's website. It provided a link to where the information could be found. As it considered this information to be publicly available, the Council applied regulation 6(1)(b) of the EIRs.
4. On 28 July 2015, Mr Sutherland wrote to the Council, requesting a review of its decision regarding a number of parts of his request, including part 3.
5. On 21 August 2015, the Council informed Mr Sutherland that it was extending the time allowed to respond to his requirement for review by 20 working days, which it considered to be in accordance with regulation 7 of the EIRs.

6. On 22 August 2015, Mr Sutherland wrote to the Council setting out his dissatisfaction with the extension of the response time.
7. The Council notified Mr Sutherland of the outcome of its review on 22 September 2015. The Council gave additional explanations about the methodology used and confirmed that it held further information. It considered this further information to be excepted from disclosure in terms of regulation 10(5)(e) of the EIRs, on the basis that disclosure would substantially prejudice the Council's commercial interests by undermining future bidding exercises.
8. On 28 September 2015, Mr Sutherland wrote to the Commissioner. He 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. Mr Sutherland stated he was dissatisfied with the outcome of the Council's review because he did not accept that the exception applied to the information requested.

## **Investigation**

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9. The application was accepted as valid. The Commissioner confirmed that Mr Sutherland 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.
10. On 13 October 2015, the Council was notified in writing that Mr Sutherland had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Sutherland. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. In relation to part 3 of the request, the questions related to the Council's application of regulation 10(5)(e) of the EIRs.
12. During the investigation it was explained that the Council entered into an agreement with City Property Glasgow (CPG), which is also a Scottish public authority for the purposes of FOISA, to market the land in question and consider all bids received. CPG is wholly owned by the Council and it was accepted by the Council and CPG that both authorities held all information falling within the scope of Mr Sutherland's request jointly.
13. On 13 August 2015, CPG received a request (from another person) for basically the same information as is being withheld by the Council in this case. CPG also withheld the information in terms of regulation 10(5)(e) of the EIRs. That request to CPG is also the subject of an investigation by the Commissioner.
14. During the investigation, the Council provided Mr Sutherland with a blank scoring sheet used to evaluate the bids received.
15. Mr Sutherland acknowledged receipt of the scoring sheet provided, but submitted that it was in the public interest for the remaining withheld information to be disclosed.

## **Commissioner's analysis and findings**

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16. 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 Mr

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

### **Application of the EIRs**

17. It is clear from the Council's correspondence with both Mr Sutherland and the Commissioner, and from the information itself, that the information sought by Mr Sutherland is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the marketing and sale of a piece of land for the purposes of development and construction. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (state of the elements of the environment, including land and landscape) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements). The Council took this approach from the outset and Mr Sutherland has not disputed this. The Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Regulation 5(1) of the EIRs**

18. 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.
19. 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 relation to the exceptions contained in regulation 10(4) and (5), only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

### **Regulation 10(5)(e) of the EIRs**

20. The Council submitted that the information withheld falling within the scope of Mr Sutherland's request was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
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 contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
23. The Aarhus Convention: an Implementation Guide<sup>1</sup> (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>[http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Aarhus Convention, but its meaning is considered further below.

24. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) Is the information commercial or industrial in nature?
  - (ii) Does a legally binding duty of confidence exist in relation to the information?
  - (iii) Is the information publicly available?
  - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

*Is the information commercial or industrial in nature?*

25. The Council submitted that the withheld information was commercial in nature. Having explained the background to the sale, it submitted that the information related to the scoring of bids for the sale of the site to a developer for a monetary consideration. As such, it formed part of a commercial transaction. The Council further explained that the transaction was still live, since missives of sale had not yet been concluded. Therefore, the Council argued there was still the potential that the sale might fall through, in which case the Council would need to restart the bidding process for the sale of the site.
26. Having considered these submissions, the Commissioner is satisfied that the information is commercial in nature.

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

27. In its submissions to the Commissioner, the Council stated that there was an implied duty of confidence in relation to the information held. Bidders for a transaction of this nature would not expect this information to be made public, and submitted their bids on the basis that it would remain confidential.
28. The Council stated that the duty to maintain confidentiality could be implied both from the circumstances of the bids and the nature of the relationship between the Council and the bidders. The Council submitted that such an expectation is normal practice in a transaction of this kind. The Council stated that, having received the bids, each bid was scored against the criteria set out the scoring sheet and the feedback forms completed for each bidder. This information could not have been created without the confidential information supplied by the bidders.
29. The Council made reference to *Decision 185/2015 Mr Bill Chisholm and Scottish Borders Council*<sup>2</sup>, where the Commissioner found that the confidentiality covered by this exception would include confidentiality imposed by common law. In this case, the Council submitted (for the reasons set out above) such confidentiality was present.
30. Having considered the content and context of the information, the Commissioner accepts that the withheld information in this case is subject to an implied obligation of confidence. Such an obligation may lapse with the passage of time but, in the circumstances of this

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.asp>  
<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201501199.aspx>

particular case, the Commissioner accepts that the obligation of confidence remained in force at the time the Council responded to Mr Sutherland's requirement for review.

31. While the Commissioner accepts the Council's submissions on this point, those providing such information to a Scottish public authority must be aware that the information may still be disclosed under FOISA or the EIRs, where substantial prejudice is not evident or where it is deemed to be in the public interest.

*Is the information publicly available?*

32. The Council submitted that the information was not currently in the public domain.
33. Whilst noting that other elements of the requested information have been made publicly available, the Commissioner accepts that the withheld information was not publicly available when the Council dealt with Mr Sutherland's requirement for review.

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

34. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view, the interest in question must 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, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
35. In its submissions to the Commissioner, the Council explained that the information related to a live land transaction to the value of several million pounds. It reiterated that the transaction was not yet concluded and submitted that the transaction was at a particularly sensitive stage, where missives had not yet been concluded. Both parties had committed considerable resource in reaching this point and were working hard towards a concluded bargain. Disclosure would undermine the developer's confidence in the Council and could lead to the developer pulling out of this transaction. If that happened, a substantial capital receipt would be lost and considerable additional resources would be required for fresh negotiations or a new bidding process.
36. For future disposals, the Council argued that disclosure of the information would substantially prejudice its ability to sell sites for the highest price possible and achieve its duty to obtain Best Value. It believed the likelihood of disclosure of information of this kind would in turn be likely to deter developers from bidding for public sector sites in favour of privately owned land opportunities. This would reduce competition for public sector sites, leading to lower prices being offered. The quality of future bids would also be reduced, as agents will not wish to include their detailed designs, schemes, layouts and proposed product in their bids with the risk of this information being made publicly available.
37. Mr Sutherland argued that any commercial interest would only be relevant if the retendering exercise actually occurred. He suggested that any further bids to purchase would be on different criteria and did not see the link between disclosure and the harm claimed.
38. The Commissioner has to be satisfied that the harm to the economic interest in question (and thus to the confidentiality to be protected) would be real, actual and of significant substance. She accepts the Council's submissions as to the commercial sensitivity of the information at the time it responded to the request and carried out its review. In coming to this conclusion, the Commissioner has considered the timing of the information request and that Council's responses. She has taken account of the fact that missives of sale have not been

completed, with the resultant possibility that this particular land transaction may not progress and may have to be re-advertised.

39. Having taken the Council's submissions into account (while not accepting all of the claims made by the Council), together with the information actually withheld, the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the information and the ongoing legitimate economic interests of the Council. Consequently, the Commissioner is satisfied that the Council was entitled to apply regulation 10(5)(e) of the EIRs to the withheld information.

#### *Consideration of the public interest*

40. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to the withheld information, the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs.

#### The Council's submissions

41. In its submissions to the Commissioner, the Council acknowledged the significant public interest in authorities being open and transparent. It also recognised that transactions governing the sale of land will be of interest to the public, particularly in cases where land has been purchased as the result of a compulsory purchase order. The Council further recognised that there is always a general public interest in making information held by public authorities accessible, with the aim of enhancing the scrutiny of decision making.
42. On the other hand, the Council submitted that there is a general public interest in confidences being maintained. This, it claimed, was particularly relevant in this case, given the sensitive stage of the transaction with missives not yet concluded. It highlighted the prejudice claimed above, in relation to the current and future transactions, which it submitted was not in the public interest.
43. The Council submitted that the public interest in disclosure was satisfied by the information already in the public domain, such as the Executive Committee Paper dated 28th May 2015 and other information the Council had provided concerning the approach taken in scoring the bids and the two stage evaluation process.
44. The Council intimated that it had noted the concerns raised by the applicant (see below), but was of the view that such matters would properly be addressed in the consideration of the planning application. It believed the public interest in viewing documents held by public authorities and scrutinising the decision making process would be satisfied through the planning process, which would involve a full public consultation on the basis of detailed plans.
45. On balance, the Council submitted that the public interest lay in the maintaining the exception.

#### Mr Sutherland's submissions

46. Mr Sutherland submitted that disclosure was necessary to ensure transparency in the process, which would allow the local residents, and others interested in maintaining the architectural heritage of the area, to help ensure the Council delivered a sympathetic development of appropriate scale, or identify other land uses in keeping with the needs of the area.



47. He stated that to date the Council had only disclosed generalised information and further disclosure would provide reassurance that the process was carried out effectively and fairly, and provide clarity. He referred to perceived shortcomings in the process.
48. Mr Sutherland also submitted that none of the information withheld is a trade secret and disclosure would only serve to reveal to any remaining bidders what specific criteria the Council might be expected to compromise.
49. Mr Sutherland further commented that he did not know whether the shortlisted tenderer had the financial capacity to complete the development to the level of quality demanded in the site brief.

#### Commissioner's conclusions

50. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves the sale and marketing of publicly owned assets such as land. She also acknowledges the significant environmental and architectural importance of the area in question. The Commissioner also accepts that disclosure of the information might shed some light on the process followed and on the selection of the preferred bidder. She has borne in mind that those entering into contracts with, or submitting bids to, Scottish public authorities should be aware that, at times, such information will require to be made available as a result of a request under the EIRs.
51. The withheld information relates to how the Council considered a number of bids for the land in question and the design aspects of those bids. Disclosure of the information would provide competitors who were involved in this bid (and those who may be involved in future bids) with an insight into how those competitors fared against specific criteria. Such disclosure (in the context described above) is not conducive to open and fair trading, and as such not in the public interest.
52. The Commissioner has also taken account of the submissions made by the Council in favour of maintaining the exemption. She has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that this would not be in the public interest.
53. The Commissioner considers that it is in the public interest for those organisations operating within a competitive market, to be able to do so, along with potential competitors, on a fair and equal footing. This is particularly relevant where the proposed sale has not been concluded and may be subject to further negotiation or remarketing.
54. On balance, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in disclosing the requested information is outweighed by that in the maintenance of confidences and in fair competition. On balance, therefore, in all the circumstances of this case, she concludes 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.
55. The Commissioner finds the Council was entitled to withhold the information under the exception in regulation 10(5)(e) of the EIRs.

#### **Regulation 16 of the EIRs**

56. Regulation 16 of the EIRs states that, on receipt of a requirement for review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16 (3) and (4)).



57. Mr Sutherland wrote to the Council on 28 July 2015, specifically asking the Council to review its initial decision of 8 July 2015. To comply with regulation 16(4), as above, the Council would have to provide Mr Sutherland with a response to that requirement for review by 25 August 2015.
58. The Commissioner notes that, on 21 August 2015, the Council wrote to Mr Sutherland stating that it was extending the 20 working days set by regulation 16(4) by a further 20 working days, which the Council stated was in accordance with regulation 7 of the EIRs.
59. The Commissioner notes that the application of regulation 7 is strictly restricted to the time allowed to respond to an initial request, and even then can only then be extended if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.
60. Regulation 7 of the EIRs does not, therefore, allow an authority to extend the time allowed (for review) under regulation 16 of the EIRs, so the Council was not entitled to use this regulation with a view to delaying responding to Mr Sutherland's requirement for review.
61. As the Council did not respond to Mr Sutherland's requirement for review until 22 September 2015, the Commissioner must find that the Council failed to comply with regulation 16(4) of the EIRs.

## Decision

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The Commissioner finds that Glasgow City Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Sutherland. Whilst finding that the Council was entitled to withhold information under regulation 10(5)(e) of the EIRs, she must also find that it failed to comply with the timescales set down in regulation 16(4).

## Appeal

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Should either Mr Sutherland or Glasgow City 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**10 February 2016**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(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.

...

#### 7 Extension of time

(1) The period of 20 working days referred to in-

(a) regulation 5(2)(a);

(b) regulation 6(2)(a); and

(c) regulation 13(a),

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable

for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

...

## **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.

...

- (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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