

# Decision Notice

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**Decision 036/2018: Mr Severin Carrell and Shetland Islands Council**

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**Contract for Anderson High School**

Reference No: 201701193

Decision Date: 13 March 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for a copy of the contract for Anderson High School and related information. An appeal to the Commissioner followed and the Council was required to respond under the EIRs. The Council withheld the information it held under the exceptions relating to commercial confidentiality and the interests of third parties. During the investigation, the Council amended its position and confirmed that it no longer considered some of the information to be excepted from disclosure. It disclosed this information to Mr Carrell.

The Commissioner accepted that the Council was entitled to withhold the remaining withheld information as commercially confidential.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available)

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 5 September 2016, Mr Carrell made a request for information to Shetland Islands Council (the Council). The information requested was

*... a copy of the entire original contract for the new Anderson High School project with the prime contractor (in this case Hub North Scotland (Anderson) Ltd), including the full financial model and any related correspondence, appendices, annexes or other financial information in full.*

*... details in full of any subsequent refining deals for the Anderson High School project, including any related correspondence, reports or other financial information in full.*
2. The Council did not respond to the request and, on 12 October 2016, Mr Carrell wrote to the Council and requested a review on the basis that it had failed to respond.
3. The Council responded to Mr Carrell's requirement for review on 14 October 2016. It provided some redacted information to Mr Carrell, explaining that the information redacted, and other information, was being withheld as it considered it to be exempt in terms of section 33 of the Freedom of Information (Scotland) Act 2002 (FOISA). This response, wrongly, advised Mr Carrell of the right to request a further review.
4. On 19 October 2016, Mr Carrell wrote to the Council, requesting a further review of its decision. In particular, Mr Carrell noted that no financial information had been provided and did not accept that a blanket refusal could be applied to this kind of information.
5. The Council notified Mr Carrell of the outcome of its further review on 15 November 2016. Essentially, the Council confirmed its original decision.

6. On 7 March 2017, following an application from Mr Carrell, the Commissioner issued *Decision 028/2017: Mr Severin Carrell and Shetland Islands Council*<sup>1</sup>. The decision found that the information under consideration was environmental information as defined in regulation 2(1) of the EIRs. The Commissioner found that the Council should, therefore, have responded under the EIRs and not under FOISA. The Commissioner required the Council to provide a response to Mr Carrell's requirement for review under the EIRs.
7. The Council notified Mr Carrell of the outcome of that review on 13 April 2017. It informed Mr Carrell that the remaining information (i.e. that not disclosed to him previously) was being withheld under the exceptions in regulation 10(5)(e) and 10(5)(f) of the EIRs.
8. On 6 July 2017, Mr Carrell 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 Carrell stated he was dissatisfied with the outcome of the Council's review on the basis that it had failed to disclose the information requested.

## Investigation

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9. The application was accepted as valid. The Commissioner confirmed that Mr Carrell made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 8 August 2017, the Council was notified in writing that Mr Carrell had made a valid application. The Council had provided the withheld information to the Commissioner's Office previously, during the investigation of Mr Carrell's earlier application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA which, by virtue of regulation 17 of the EIRs, applies to the enforcement of the EIRs, 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, focusing on the requirements of the exceptions cited in its review outcome of 13 April 2017.
12. The Council responded on 26 September 2017.
13. During the investigation, the Council disclosed some additional information to Mr Carrell. Having reconsidered its position, the Council informed Mr Carrell that this additional information should not have been withheld previously under the EIRs.
14. Also during the investigation, Mr Carrell provided submissions to the Commissioner, explaining why he did not consider the withheld information to be excepted from disclosure under the EIRs.

## Commissioner's analysis and findings

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15. 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 him by both Mr Carrell and the Council. He is satisfied that no matter of relevance has been overlooked.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602115.aspx>

## Information disclosed during the investigation

16. As noted above, the Council disclosed some of the previously withheld information to Mr Carrell during the investigation. The Council acknowledged that this information should not have been withheld earlier.
17. In failing to disclose this information earlier, the Commissioner therefore finds that the Council failed to comply with regulation 5(1) of the EIRs.

## Regulation 10(5)(e): confidentiality of commercial or industrial information

18. 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.
19. As with all exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). 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)).
20. The Aarhus Convention: an Implementation Guide<sup>2</sup>, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (at 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 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.
21. 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?*

22. The Council stated that the information formed part of a commercial or industrial contract between it and Hub North Scotland (Anderson) Limited (HNSAL) dated 29 July 2015, for the construction of a major new building at a cost of around £40 million. The Council explained that the information being withheld comprised key components of the contract considered to be commercially sensitive, for which the parties involved had identified a need for protection.
23. Having considered the withheld information, with the Council's submissions, the Commissioner is satisfied that the information is commercial or industrial in nature for the

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[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)

purposes of regulation 10(5)(e) of the EIRs. The Commissioner is satisfied that the information forms part of a contract for the construction of a major infrastructure project on a commercial basis.

*Does a legally binding duty of confidence exist in relation to the information, and is the information publicly available?*

24. The Council explained that the contract extended to around 290 pages and described it as a legally binding contract. It was withholding those parts identified in a schedule to the contract, which the parties to the contract had agreed was commercially sensitive and to be kept confidential for set periods. It referred to the clause in the contract which provided for that confidentiality.
25. As in *Decision 033/2009: Mr Paul Drury and East Renfrewshire Council*<sup>3</sup>, the Commissioner does not accept that the existence of a confidentiality clause in a contract will, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look behind the confidentiality clause and focus on the nature of any withheld information to determine whether the duty of confidence should stand.
26. In this case, having viewed the withheld information, the Commissioner is satisfied that it falls within the scope of the information described within the contract as confidential and that there is no reasonable basis for treating it as other than confidential. In the circumstances, he is satisfied that a legally binding duty of confidence exists in respect of the withheld information.

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

27. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.

#### The Council's submissions

28. The Council submitted that the withheld information in this case was part of a complex contractual arrangement for its most significant capital project in living memory. The Council stated that this capital project was unlike the majority of those it entered into. Usually, it explained, it had a direct contractual arrangement with the builder; in this case, however, the contractual arrangements involved a commission through the "Hubco process", a Scottish Government initiative. The Council stated that this process allowed it access to funding and expertise which were a benefit to securing this major building.
29. The Council submitted that the economic interest under consideration in this case was not primarily that of the Council, but of the other parties who provided the information and sought to have it protected by the non-disclosure clause in the contract. The Council explained that it had sought (and obtained) the views of the direct party to the contract – HNSAL. The Council also sought the views of HNSAL's parent company (Equitix Hubco3 Ltd), funders

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<sup>3</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

(the Scottish Futures Trust (the SFT) and Aviva) and the provider of the facilities management services (Robertson FM). Comments from these consultees were provided.

30. Supported by the comments received, the Council submitted that disclosure of the information would result in sensitive commercial data being provided to commercial competitors of the various parties involved in the contract. These included financial requirements, the risk profile assumed and the process of negotiating transactions. The Council submitted that this would also damage future negotiations, undermine the confidence of funders and contractors in the whole hub process, and undermine the competitiveness of future public procurement exercises.
31. The Council submitted that it also had to protect its own legitimate economic interests. It stated that HNSAL had informed the Council that it would regard the disclosure of the withheld information as a breach of contract. The Council could therefore expect to be sued for this breach of contract if it chose to disclose the information.
32. The Council stated that it was considering approaching the SFT and using the Hubco process for other new build projects. In its view, this route for funding might be curtailed or subject to additional conditions if the parties considered the Council would not uphold its confidentiality undertakings.
33. The Council concluded that, for the reasons outlined above, the substantial prejudice envisaged by the exception in regulation 10(5)(e) would ensue from disclosure. In the Council's view, disclosure of the information would be substantially prejudicial to the other parties involved in the contract as it would disclose their position to commercial competitors and put them at a disadvantage in future contracts for which they might be involved.
34. The Council also argued that disclosure of the withheld information would undermine the Hubco process if there could be no reliance on contractual confidentiality clauses. Additionally, the Council considered itself to be at risk of substantial prejudice as there was a strong likelihood that it would be faced with litigation if it chose to disclose the remaining withheld information.

#### Mr Carrell's submissions

35. Mr Carrell submitted that the Council's position that it could not disclose any financial information, regardless of the level of detail within that information, meant it was putting its own interests, and the commercial interests, ahead of the public interest as defined in the EIRs.
36. Mr Carrell submitted that financiers, banks and contractors had themselves disclosed information on the rates of return they received in identical SFT projects. In his view, this served to disapply or weaken the exceptions open to the Council under the EIRs.
37. Mr Carrell argued also that the Council had applied exceptions in a blanket fashion without considering whether some of the information could be disclosed.

#### The Commissioner's view

38. The Commissioner has considered carefully the arguments presented by both the Council and Mr Carrell.
39. In the Commissioner's view, disclosing the withheld information in response to Mr Carrell's request would, or would be likely to, cause substantial harm to a legitimate economic interest. In particular, the Commissioner accepts that the economic interests which would be

affected are those of the principal contractor, the funders and the facilities management provider.

40. The Commissioner accepts that disclosure of the information would allow significant insight into the rates applied by successful lenders and the unit costs charged for specific work and items. In the Commissioner's view, this would allow competitors to have a commercial advantage and to undercut the parties in this case for similarly sized (future) projects, transactions and tenders. In the Commissioner's view, this would place the existing lenders and contractors at a disadvantage in future competitions, thereby causing substantial prejudice to the commercial interests of those parties.
41. The Commissioner is therefore satisfied that the disclosure of this information, in response to Mr Carrell's request, would, or would be likely to, cause substantial harm to a legitimate economic interest. Consequently, he is satisfied that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld by it.

#### *Public interest*

42. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### The Council's submissions

43. The Council submitted that the general public interest in openness and accountability with regard to public spending had already been achieved by disclosure of the overall cost of the project. It did not consider the detailed methodology and calculation of the costs to be a matter of general public interest, although these were matters of high importance to the contracting parties and those providing the information.
44. The Council also considered there to be a public interest in ensuring that commercial contractors were willing to engage in the Hubco process and, when doing so, that there would be a fair market place. In the Council's view, this interest would be undermined by disclosing detailed financial information. Given the significant risk of litigation and consequent call on public funds, it also identified a public interest in not breaching its contractual obligations.

#### Mr Carrell's submissions

45. Mr Carrell argued that there were very significant implications for public spending, public sector debt and the future of Scottish Government capital spending attached to the Hub programme, and for individual authorities involved in them. He noted that the project in this case involved significant levels of debt incurred to build the school and tied the Council into a 25-year management contract, as well as incurring cancellation clauses which, in turn, greatly increased the overall cost of the school.
46. Mr Carrell argued that without disclosure it was impossible for Shetland voters and taxpayers generally to examine and understand the full costs and implications of the contract. He also commented that projects such as this, initiated under the SFT's Hub programmes, were already binding public services into contracts with an approximate lifetime value of £6 billion, which did not include those going through the evaluation and procurement process.

### The Commissioner's view on the public interest

47. As in any case, the Commissioner must consider the circumstances as they existed at the time the Council issued its response to Mr Carrell's requirement for review (on 13 April 2017).
48. The Commissioner acknowledges that there is always a general public interest in transparency and accountability, particularly in relation to the expenditure of public funds. In this case, he accepts that disclosure of the information would allow insight into the detail of the contract entered into by the Council and a judgment to be made on whether the project was delivering value for money.
49. On the other hand, the Commissioner accepts there is a public interest in ensuring that there is fair competition in the commercial environment in which the contracting bodies in this project are operating.
50. The Commissioner has already concluded that disclosure of the withheld information would, or would be likely to, cause substantial harm to a legitimate economic interest. The Commissioner considers such harm would be contrary to the public interest: it would be contrary to the public interest to place the contracting parties in a disadvantageous position with regard to their competitors.
51. In the Commissioner's view, it is in the public interest for organisations operating in a commercial environment to be able to trade fairly and provide a viable service in a competitive market. The Commissioner also considers it is in the public interest that the relevant contractors in this case are not treated unfairly as a result of having entered contractual arrangements with public bodies, with a consequential adverse impact on their ability to participate effectively in future competitive exercises.
52. The Commissioner has therefore concluded that, in all the circumstances of this case, the public interest in making the withheld information available is outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.
53. The Commissioner acknowledges, however, that the public interest can change over time and the confidentiality of information, and potential harm resulting from disclosure may diminish in future. Indeed, in this case, he notes that some of the information deemed commercially sensitive within the contract is no longer considered to be confidential after two years from the completion date of the project.
54. As the Commissioner has found the withheld information was properly withheld under regulation 10(5)(e) of the EIRs, he is not required to go on to consider the Council's application of the exception in regulation 10(5)(f).



## Decision

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The Commissioner finds that Shetland Islands Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Carrell.

The Commissioner finds that the Council was entitled to withhold information under the exception in regulation 10(5)(e) of the EIRs.

However, the Commissioner finds that the Council breached regulation 5(1) of the EIRs by incorrectly withholding some information under regulation 10(5)(e) and 10(5)(f) of the EIRs. Given that this information was disclosed to Mr Carrell during the investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr Carrell's application.

## Appeal

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Should either Mr Carrell or Shetland Islands 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**13 March 2018**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 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;

...

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