

Decision Notice

Decision 057/2018: Mr Reiner Luyken and Highlands and Islands Enterprise

Community wind turbine project

Reference No: 201701532

Decision Date: 25 April 2018



Scottish Information
Commissioner

Summary

HIE was asked for information concerning financial assistance for a community windfarm project. HIE disclosed some information, but withheld the remainder under the exception relating to commercial confidentiality.

The Commissioner found that HIE had correctly handled the request under the EIRs rather than FOISA. He also accepted that HIE was entitled to withhold some of the information as commercially confidential. However, he did not accept that the remainder was excepted from disclosure and required HIE to disclose it to Mr Luyken.

Relevant statutory provisions

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) (definition (a), (c) and (e) of “environmental information”) (Interpretation); 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

1. On 17 May 2017, Mr Luyken made a request for information to Highlands and Islands Enterprise (HIE). The request concerned financial assistance provided by HIE to Coigach Community CIC (CCCIC) (a community interest company) in relation to a community wind turbine project. Mr Luyken referenced a press release issued by HIE concerning the project and the financial assistance provided. The information requested was as follows:
 - 2) *Detailed breakdown of financing; and*
 - 4) *Detailed profit and loss forecast for the turbine’s projected lifespan, including interest and capital repayment, insurance, repair to the road to Achiltibuie that was badly damaged by construction traffic, and so on.*

Mr Luyken also requested other information which is not the subject of this decision notice.

2. HIE responded on 25 May 2017. HIE informed Mr Luyken that £66,000 had been awarded to CCCIC towards legal fees and strategic support. HIE also informed Mr Luyken that it held some information regarding the breakdown of the proposed £1.8 million cost of the project. It asked Mr Luyken if he wished HIE to consider the disclosure of this information, in which case it would undertake a third party consultation with CCCIC.
3. On 25 May 2017, Mr Luyken wrote to HIE, requesting a review of its decision. Mr Luyken stated that he wanted HIE to disclose the information it held at the date of its press release. At this stage, Mr Luyken made a further request for information (referred to hereafter as part

- 5) of the request) to HIE. Mr Luyken requested a detailed breakdown of the £66,000 awarded towards legal fees and strategic support.
4. HIE notified Mr Luyken of the outcome of its review into parts 2) and 4) of his request on 21 June 2017. HIE informed Mr Luyken that the information was exempt from disclosure in terms of section 33(1)(b) of FOISA, on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of HIE and third parties.
 5. Also on 21 June 2017, HIE responded to part 5) of Mr Luyken's request. HIE disclosed information to Mr Luyken which it believed fulfilled the terms of this request.
 6. On 29 June 2017, Mr Luyken wrote to HIE in relation to part 5) of his request. Mr Luyken stated that HIE had not provided the detailed information he had requested, for example, it had not disclosed contextual descriptions and figures in relation to the costs incurred. Additionally, it had not disclosed the names of companies, consultants and firms providing services.
 7. Also on 29 June 2017, Mr Luyken expressed dissatisfaction with HIE's application of the exemption in section 33(1)(b) of FOISA (in relation to parts 2) and 4) of his request). In his view, the exemption did not apply.
 8. On 14 July 2017, HIE wrote Mr Luyken. In relation to part 5) of his request, HIE informed Mr Luyken that it had treated his communication of 29 June 2017 as a supplementary request. HIE informed Mr Luyken that it considered the information to be exempt from disclosure in terms of section 33(1)(b) of FOISA. In relation to parts 2) and 4) of the request, HIE reiterated its view that the information requested was exempt from disclosure in terms of section 33(1)(b) of FOISA.
 9. On 27 July 2017, Mr Luyken wrote to HIE. He again asked HIE to review its decision in relation to parts 2) and 4) of his request. Additionally, he asked HIE to review its decision in relation to part 5) of his request. Mr Luyken was dissatisfied that the information requested had been withheld.
 10. HIE notified Mr Luyken of the outcome of its review on 24 August 2017. HIE informed Mr Luyken that it now considered the information requested to be environmental information. HIE informed Mr Luyken that the information was exempt from disclosure in terms of section 39(2) of FOISA (Health, safety and the environment). As such, it considered his request should be handled under the EIRs. HIE informed Mr Luyken that it considered the information to be excepted from disclosure under regulation 10(5)(e) of the EIRs. This was on the basis 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.
 11. On 28 August 2017, Mr Luyken 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 Luyken queried whether the request should have been handled under the EIRs. He also submitted that the public interest favoured disclosing the information.

Investigation

12. The application was accepted as valid. The Commissioner confirmed that Mr Luyken made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
13. On 22 September 2017, HIE was notified in writing that Mr Luyken had made a valid application. HIE was asked to send the Commissioner the information withheld from Mr Luyken. HIE provided the information and the case was allocated to an investigating officer.
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. HIE was invited to comment on this application, and answer specific questions, focusing on the requirements of regulation 10(5)(e) of the EIRs.
15. HIE responded with submissions.

Commissioner's analysis and findings

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 him by both Mr Luyken and HIE. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

17. "Environmental information" is defined in regulation 2(1) of the EIRs. The relevant parts of the definition are reproduced in Appendix 1 to this decision.
18. In his application to the Commissioner, Mr Luyken queried whether the request had been correctly handled under the EIRs, rather than FOISA. Mr Luyken did not specifically argue that the information was other than environmental in nature, but suggested that by shifting its response from one under FOISA to one under the EIRs, HIE had violated the intention of FOISA and the will of the Parliament that enacted it.
19. HIE argued that the information requested related principally to a turbine and information associated with it. In HIE's view, the information fell within the definitions in paragraphs (c) and (e) of regulation 2(1) of the EIRs.
20. In the Commissioner's view, the information requested by Mr Luyken is environmental and falls within the definition of environmental information in regulation 2(1) of the EIRs. The information concerns the construction of a wind turbine. The Commissioner is satisfied that it would fall within the definition as it comprises:
 - information on the state of the elements of the environment (definition (a));
 - information on measures affecting or likely to affect those elements (definition (c)); and
 - costs benefits and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c) (definition (e)).
21. In its final review outcome, HIE applied the exemption in section 39(2) of FOISA to the information requested by Mr Luyken. The exemption in section 39(2) provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. As there is a separate statutory right of access to environmental information available under the EIRs in this case,

the Commissioner has concluded that the public interest in maintaining this exemption, and responding to the request in line with the EIRs, outweighs the public interest in disclosure under FOISA.

22. Given his conclusion that the withheld information is properly classified as environmental, the Commissioner concludes that HIE is correct to apply section 39(2) of FOISA. The Commissioner will therefore consider HIE's handling of the request in what follows solely in terms of the EIRs.

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

23. 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.

24. 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)).

25. The Aarhus Convention: an Implementation Guide¹, 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.

26. 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?

27. HIE submitted that the information related to the financing and commercial operations of CCCIC and included CCCIC's borrowing, funding, operating expenditure, profit/loss and income. In HIE's view, all of this related to CCCIC's trading position and was therefore commercial in nature.
28. HIE submitted also that the pricing and scoping work provided by contractors to CCCIC indicated charges for their commercial trading activity, which was also commercial information.

¹http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

29. Having considered the withheld information, with HIE's submissions, the Commissioner is satisfied that the information is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs. The Commissioner is satisfied that the information forms (or relates to) part of the overall funding package for the construction of an 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?

30. HIE stated that it had consulted with CCCIC and had been informed that CCCIC was subject to confidentiality obligations with its private contractors, either contractually or under common law. In HIE's view, contractors would not expect their pricing information or methodology to be disclosed. In HIE's view, disclosure of this kind could put CCCIC in breach of contractual and common law obligations owed by it to third party contractors.

31. HIE stated that the information was not trivial, was inherently sensitive and was not in the public domain. HIE stated that it does not bind itself to written confidentiality undertakings under its grant documentation, but the information under consideration had been provided by CCCIC to HIE under an implied duty of confidentiality, in the expectation that the commercially sensitive information relating to its funding, operating expenditure, income, profit/loss and arrangements with contractors would be kept confidential. HIE stated that there was an expectation that it would only be used by HIE for the purposes of agreeing the level of grant and then monitoring the project and, in particular, the grant element.

32. As in *Decision 033/2009: Mr Paul Drury and East Renfrewshire Council*², the Commissioner does not accept that the existence of a confidentiality clause in any agreement 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 any such confidentiality clause and focus on the nature of any withheld information to determine whether the duty of confidence should stand.

33. In this case, having viewed the withheld information, the Commissioner is satisfied that, on the balance of probabilities, there is an expectation that it should be treated as confidential. He is satisfied also that the information is not already in the public domain. 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?

34. 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.

35. HIE submitted that CCCIC had a legitimate economic interest in operating the wind turbine for the generation of power for commercial sale and for the benefit of the community. In HIE's view, disclosure of the information would substantially harm CCCIC's ability to compete in the marketplace, if it were to become available to competitors who could analyse and use the information for their own benefit.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

36. HIE submitted that CCCIC's legitimate economic interests included retaining and improving its market position, retaining its finance arrangements and protecting its commercial bargaining position in the context of negotiating finance arrangements. In HIE's view, disclosure of withheld information that put CCCIC in breach of contractual and common law obligations owed to it by a third party would cause it substantial prejudice by exposing it to claims and to potential termination of contract for breach.
37. HIE also submitted that CCCIC is run by a number of volunteers who give up their time for the benefit of CCCIC and the community. Disclosure of CCCIC's and its funders' and contractors' commercial information could impact on those individuals' business and personal relationships with funders and contractors, and deter them from volunteering their time; this would adversely impact upon CCCIC's ability to function.
38. HIE stated also that CCCIC and contractors had legitimate economic interests in ensuring that their competitors did not gain access to commercially valuable information. In HIE's view, it would cause substantial prejudice to CCCIC and those contractors if competitors could match or better their commercial offerings as a result of disclosure as a result of disclosure of commercial information.
39. HIE submitted that it had a legitimate economic interest in developing the Scottish economy and supporting fragile communities by awarding grants. Disclosure would substantially harm those legitimate economic interests, by adversely impacting upon the sector's and grant funding partners' trust in engaging in confidential discussions with HIE, for the purpose of developing the Scottish economy, supporting fragile communities and awarding/receiving grants. In HIE's view, this would reduce its ability to develop the Scottish economy effectively and substantially prejudice its legitimate economic interests.
40. The Commissioner has considered carefully the arguments presented by HIE in relation to the substantial prejudice it believes would ensue from disclosure of the information.
41. For the exception to apply, disclosure must be at least likely to cause substantial prejudice to a legitimate economic interest. The Commissioner must also be satisfied that any harm to the economic interest caused by disclosure would be substantial, in other words of real and demonstrable significance. It must be at least likely, so there must be at least a significant probability of it occurring. It is not enough that it might, possibly, occur at some unspecified time in the future.
42. In the Commissioner's view, disclosing some of the withheld information in response to Mr Luyken's request would, or would be likely to, cause substantial harm to a legitimate economic interest.
43. In particular, the Commissioner accepts that the disclosure of the more detailed pricing information and financial projections would allow insight into the rates applied by lenders and the prices charged by contractors for detailed pieces of work. 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 could place the existing lenders and contractors at a disadvantage in future, thereby causing substantial prejudice to their commercial interests.
44. The Commissioner is therefore satisfied that the disclosure of this information, in response to Mr Luyken's request, would have caused, or would have been likely to, cause substantial harm to a legitimate economic interest. Consequently, he is satisfied that HIE was entitled to apply the exception in regulation 10(5)(e) of the EIRs to this type of information.

45. The Commissioner is not satisfied that HIE has demonstrated that the exception is engaged in relation to the remainder of the information. In the Commissioner's view, this information is uncontentious and relatively innocuous. Much of the information is presented in summary form and does not contain the detailed breakdown of sensitive information claimed by HIE. The Commissioner is not persuaded that the disclosure of such information would allow any significant insight into the methodology or detailed nature of work carried out by contractors.
46. In the Commissioner's view, HIE's arguments in relation to the likely consequences of disclosure of this remaining information are somewhat speculative. It is not evident to the Commissioner that disclosure of such information 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.
47. Consequently, the Commissioner must conclude that the exception in regulation 10(5)(e) of the EIRs is not engaged and that HIE was not entitled to withhold information under this exception. As the Commissioner is not satisfied that the exception is engaged in relation to this information, he is not required to consider the public interest test in regulation 10(1)(b). He now requires HIE to disclose this information to Mr Luyken.

The public interest

48. Having accepted that the exception in regulation 10(5)(e) applies to some of the withheld information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs in relation to that information. 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.
49. HIE acknowledged that there was a significant public interest in being transparent and open about the award of grants by public authorities such as HIE, which would support disclosure of information on how public sector money was spent. However, HIE considered disclosure of the information already provided to Mr Luyken served the public interest in knowing details of the level and use of HIE's grant funding, including details of the project costs and strategic support costs.
50. HIE also submitted that it was in the public interest that fragile communities such as Coigach were encouraged to undertake community projects. In HIE's view there was a public interest in allowing such community projects to operate commercially for the benefit of the communities, and in them being free to approach HIE and agree grant funding and other arrangements with HIE, other funders and contractors, in confidence.
51. HIE submitted that disclosure of commercial information regarding community development projects would prejudice the ability of such projects to operate. In HIE's view, it would discourage private sector funding and contractor support for similar projects, particularly if private organisations were unable to enforce contractual confidentiality obligations in instances where both the private and public sector jointly supported such projects.
52. In HIE's view, it was in the public interest to encourage applications for financial support from HIE and other public bodies, to develop the Scottish economy and to support fragile economies. HIE argued that potential applicants might be discouraged from making such applications if disclosures of commercial information were to give their competitors access to information that would allow them to match or better their commercial offerings.

53. Mr Luyken noted that HIE had used data in a press release concerning the Coigach turbine, but had subsequently refused to provide a full account of that data. In his view, it was incumbent on a public body to give a full account of such data where it chose to release it into the public domain. In such circumstances, he believed the public interest in disclosure outweighed any alleged commercial confidentiality.
54. As in any case, the Commissioner must consider the circumstances as they existed at the time HIE issued its final response to Mr Luyken's requirement for review (on 24 August 2017).
55. 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 funding provided and a judgment to be made on whether the project was delivering value for money.
56. On the other hand, the Commissioner accepts there is a public interest in ensuring there is fair competition in the commercial environment in which the contracting bodies in this project are operating.
57. The Commissioner has already concluded that disclosure of this specific 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.
58. 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 to deliver services, with a consequential adverse impact on their ability to trade effectively in future.
59. The Commissioner has therefore concluded that, in all the circumstances of this case, the public interest in making this specific information available is outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that HIE was entitled to withhold the information under regulation 10(5)(e).
60. Along with this decision, the Commissioner will provide HIE with a marked up copy of the withheld information, indicating the information that should be disclosed.

Decision

The Commissioner finds that Highlands and Islands Enterprise (HIE) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr Luyken.

The Commissioner finds that HIE was correct to handle the requests under the EIRs. He also finds that HIE was entitled to withhold some information under the exception in regulation 10(5)(e) of the EIRs, but it was not entitled to withhold the remainder under this exception.

The Commissioner therefore requires HIE to disclose the information which was incorrectly withheld, by **11 June 2018**.

Appeal

Should either Mr Luyken or Highlands and Islands Enterprise 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.

Enforcement

If Highlands and Islands Enterprise (HIE) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that HIE has failed to comply. The Court has the right to inquire into the matter and may deal with HIE as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

25 April 2018

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

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

...

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;

...

(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;

...

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