

# Decision Notice

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## Decision 091/2018: Mr Rob Edwards and Transport Scotland

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### Financial model for M8 M73 M74 motorway improvements project

Reference No: 201701176

Decision Date: 27 June 2018



Scottish Information  
Commissioner

## Summary

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Transport Scotland was asked for the financial model for the M8 M73 M74 motorway improvements project (among other information not considered in this decision).

During the Commissioner's investigation, Transport Scotland disclosed additional information, including a redacted version of the summary financial model. The Commissioner accepted that the information had been correctly withheld under the exception relating to commercial confidentiality.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 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 4 September 2016, Mr Edwards made a request for information to Transport Scotland. He asked for "full copies of the original contract for the M8, M73, M74 Motorway Improvements project, including the financial model and any related correspondence, appendices, annexes or financial information." He also asked for "details of any subsequent refinancing deals for the project, including any related correspondence, reports or other financial information."
2. Transport Scotland responded on 30 September 2016. It withheld some of the requested information under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA), stating that disclosure of commercially confidential information would or would be likely to cause substantial harm to commercial interests. Transport Scotland also stated that, due to the size of the contract document and the scope of the redactions to be made, it would cost more than £600 to provide this information. Accordingly, in line with section 12 of FOISA, Transport Scotland was not required to comply with the request.
3. Transport Scotland invited Mr Edwards to consider reducing the scope of his request to bring the cost of complying below £600.
4. On 10 October 2016, Mr Edwards emailed Transport Scotland requesting a review of its decision on the basis that he was uncertain, without seeing the information, whether the information was commercially confidential. He also noted that contracts and detailed financial information had been published for similar public sector projects. He asked Transport Scotland to review whether it was really in the public interest to keep all the information secret. Mr Edwards indicated that he was willing to reduce the scope of his request to a summary of the outputs of the original financial model for the M8 M73 M74 Motorway Improvements project and summary details of any subsequent refinancing deals for the project.
5. Transport Scotland notified Mr Edwards of the outcome of its review on 27 February 2017. It informed him that it been incorrect to "apply the cost limit" to the contract document, as the

cost of providing the information in that document would not exceed £600, although it had required a considerable amount of work and staff time. It informed Mr Edwards that the contract documentation had now been published online<sup>1</sup>. In relation to the information withheld under section 33(1)(b) of FOISA, Transport Scotland found that the exemption should not have been applied to some of the information.

6. On 5 July 2017, Mr Edwards 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 Edwards stated that all of the financial information had been redacted from the information disclosed at review, and that it was not possible to assess the value of a major piece of public expenditure in partnership with private companies. He noted that other public private partnership schemes had released summary financial models<sup>2</sup> and could see no reason why Transport Scotland should not do so too.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Edwards 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.
8. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified on 24 July 2017 that Mr Edwards had made a valid application. Subsequent references in this decision to submissions sought and received from Transport Scotland are to be read as including submissions sought and received from the Ministers on behalf of Transport Scotland.
9. Transport Scotland was asked to send the Commissioner the information withheld from Mr Edwards. Transport Scotland provided an unredacted copy of Schedule 6 of the project contract (Payment Mechanism)<sup>3</sup> and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and answer specific questions. It was asked to explain whether it held a financial spreadsheet for the project and why it considered that information should be withheld under section 33(1)(b) of FOISA.
11. Transport Scotland responded on 11 September 2017. It provided a copy of a summary financial spreadsheet for the project and submissions on section 33(1)(b) of FOISA.
12. On 18 September 2017, Transport Scotland was asked to clarify aspects of its submissions and was asked whether it held further financial information. It responded to the questions on 3 October 2017 and confirmed that no further financial information was held.
13. On 12 December 2017, Transport Scotland was contacted again in relation to its submissions. It was indicated, on the basis of the Commissioner's findings in other similar cases<sup>4</sup>, that Mr Edwards' request should be considered under the EIRs, and Transport

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<sup>1</sup> <https://www.transport.gov.scot/projects/m8-m73-m74-motorway-improvements/>

<sup>2</sup> <https://theferret.scot/probe-private-finance-schemes-scotland/>

<sup>3</sup> The redacted version is available here: <https://www.transport.gov.scot/media/8153/m8m73m74-motorway-improvements-contract-schedule-6-web-version.pdf>

<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602129.aspx>

Scotland was asked which exception(s) under the EIRs would apply. Noting that some financial information had been published about the project<sup>5</sup>, the investigating officer questioned again whether Transport Scotland held more financial information covered by Mr Edwards' request, such as a full financial model for the project.

14. On 16 January 2018, Transport Scotland disclosed a redacted version of the summary financial model to Mr Edwards.
15. On 24 January 2018, Transport Scotland provided further submissions to the Commissioner, confirming that the request should be considered under the EIRs solely (relying upon section 39(2) of FOISA). It considered that the requested information was excepted from disclosure under regulation 10(5)(e) of the EIRs and provided submissions to support its position. Transport Scotland also provided a CD copy of the full financial model to the Commissioner.
16. On 30 January 2018, representatives from Transport Scotland met with the Commissioner and representatives of his office to discuss in detail why some information within the summary financial model was still being withheld. Transport Scotland agreed to disclose more information from the summary financial model to Mr Edwards: this took place on 14 March 2018.

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

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17. 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 Edwards and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

18. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) to (c) of the definition of "environmental information"). The information is the financial information underpinning the contract that resulted in improvements to several motorways; improvements which will affect the elements of the environment.
19. Mr Edwards has not disputed Transport Scotland's handling of the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### **Information disclosed during the investigation**

20. As noted above, Transport Scotland disclosed some information to Mr Edwards during the investigation. In the covering letter, Transport Scotland commented that disclosure followed consideration given to changes in the confidentiality of the information since its response to the initial request.

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

21. 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

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<sup>5</sup> <http://www.gov.scot/Topics/Government/Finance/18232/12308/NPDhubPipelinepayments>

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 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)).
23. The Aarhus Convention: an Implementation Guide<sup>6</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.
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. Transport Scotland stated that the financial model relates to a live contract, which is currently being delivered by the Scottish Ministers and is still in its construction phase.
26. Having considered the withheld information, alongside Transport Scotland's submissions, the Commissioner is satisfied that the information is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs, given that it forms part of a commercial contract for the construction of a major infrastructure project.

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

27. Transport Scotland explained that the Scottish Roads Partnership (SRP) is a special-purpose company set up solely to deliver the M8 M73 M74 Motorway Improvements Project under a Non-Profit Distributing (NPD) contract form. The contract is long-term and live, with SRP still actively involved in constructing the new infrastructure.
28. Transport Scotland stated that, once the construction phase is complete, SRP will continue to contract with suppliers for the operation and maintenance of these key routes for 30 years. Transport Scotland commented that SRP's key concern was the degradation of its negotiating position for future contracts (works, supply and services, including financial

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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)

services) should the special-purpose company's financial allowances, makeup and fixed margins become public information.

29. Transport Scotland considered that a duty of confidence exists in relation to the withheld information, to protect the legitimate economic interests of SRP. Part 59 of the M8 M73 M74 Motorway Improvements Agreement sets out the confidentiality agreement between the parties, including provisions for making information available under FOISA and the EIRs. Schedule 17 of the Agreement lists information which the contracting parties have agreed to treat as commercially sensitive. It provides that the financial model is information which will remain confidential:

*From the date of the relevant Financial Model until the date falling 2 years after the later of:*

- *the first Permit to Use; and*
- *the date on which the amendments to Financial Model are agreed in accordance with this Agreement.*

30. Transport Scotland stated that the first Permit to Use was issued on 1 June 2017. Transport Scotland has not confirmed whether amendments to the Financial Model have been made in accordance with the Agreement but, in any event, given the date of the issue of the first Permit to Use, it is clear that the financial model still remains confidential in accordance with the terms of the Agreement.

31. As in *Decision 033/2009: Mr Paul Drury and East Renfrewshire Council*<sup>7</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.

32. In this case, having viewed the withheld information, and being satisfied that it is listed in Schedule 17 of the Agreement, the Commissioner accepts that it is information which the contracting parties have identified 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?*

33. 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.

#### Transport Scotland's submissions

34. Transport Scotland stated that, even if the contract had concluded, the withheld information would still be considered commercially sensitive.

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<sup>7</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

35. Transport Scotland argued that, while the contract remains live, it would substantially prejudice SRP to disclose commercially sensitive information with regard to this contract. This would be likely to undermine negotiations with sub-contractors and third parties, if those parties were aware of the amount paid to SRP, what those payments were for in the project cycle, and of contingencies within the cost allowances.
36. Transport Scotland argued that the consequences of disclosure, as outlined above, would substantially prejudice SRP's ability to secure competitive rates in negotiations with contractors. Disclosure of this information would be likely to give advantages to competitors in future, similar tendering exercises and would prejudice SRP in relation to its on-going commercial relationships with third-parties/sub-contractors engaged or to be engaged in the delivery of construction and operational activities as part of the project.
37. At the meeting with the Commissioner on 30 January 2018, Transport Scotland explained in more detail why it believed the remaining financial information should be withheld, and why disclosure would cause substantial harm to SRP. For part of the meeting, representatives from SRP were also in attendance.
38. Transport Scotland expanded upon what it considered to be the likely harm to both the contractor and the project if the remaining financial information was disclosed. It explained that contracts for maintenance of the project were still being let. It believed that if the withheld financial information was disclosed under the EIRs, it would become common knowledge what rates, contingencies and insurances it had obtained and worked to. SRP considered disclosure would substantially affect its future bidding capability and there would little point in submitting future bids. SRP commented that it operates on a global basis.
39. Transport Scotland submitted that, by providing tenderers with information on the likely amounts Transport Scotland is able to pay, it would prejudice its ability to achieve best value in future tendering exercises. Disclosure could result in reducing the numbers of contractors willing to bid for contracts due to concerns about the potential release of their commercially sensitive information. Difficulties in securing appropriate contractors would be likely to lead to higher costs (from public funds). It was likely that tendering companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.
40. In addition, Transport Scotland argued that publication of the details requested from this contract would prejudice its ability to engage with the non-profit distributing contract form alternative to the Private Finance Initiative (PFI) method by which government can utilise private funds to invest in public infrastructure.
41. During the meeting on 30 January 2018, Transport Scotland stated that it had reviewed the information within the summary financial model and discussed the sensitivity of the withheld information with SRP. It had reached a view that some of the financial information was no longer sensitive, as some of the project had been delivered. Accordingly, it had disclosed some information on 24 January 2018 to Mr Edwards. Transport Scotland stated that further information could be disclosed to Mr Edwards. This information was provided to Mr Edwards on 14 March 2018. The Commissioner welcomes the approach taken by Transport Scotland in reassessing its position in this way.

#### The Commissioner's view

42. The Commissioner has considered carefully the arguments presented by both Transport Scotland and Mr Edwards in relation the remaining withheld information.

43. The Commissioner must base his conclusions on the circumstances that existed at the time when Transport Scotland responded to Mr Edwards' requirement for review. The relevant date is 27 February 2017. The Commissioner notes that a major part of the work on the M8 M73 M74 motorways improvement project was completed on 14 August 2017<sup>8</sup>, some time after Mr Edwards made his requirement for review.
44. Given the timing of Mr Edwards' request and request for review, in relation to progress with the project, the Commissioner accepts that disclosing the withheld information in response to Mr Edwards's request would have caused, or would have been likely to cause, substantial prejudice to a legitimate economic interest: in particular, to the economic interests of SRP and Transport Scotland.
45. The Commissioner accepts that disclosure of the information would allow significant insight into the rates, contingencies and insurances agreed by Transport Scotland with SRP for the project. In the Commissioner's view, this would give a commercial advantage to both contractors and competitors. Contractors would be in a position to renegotiate their payments. Competitors would be able to undercut SRP for future projects. This would place the existing lenders and SRP at a disadvantage in future competitions, thereby causing substantial prejudice to the commercial interests of those parties.
46. The Commissioner is therefore satisfied that the disclosure of this information, in response to Mr Edwards' request, would, or would be likely to, cause substantial harm to a legitimate economic interest. Consequently, he is satisfied that Transport Scotland was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld by it.

#### *Public interest*

47. 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.

#### Transport Scotland's submissions

48. Transport Scotland recognised that there is likely to be some public interest in disclosure of information relating to a large infrastructure project and how public money has been spent in relation to this particular contract. However, Transport Scotland considered that there is a strong public interest in avoiding significant harm to the commercial interests of SRP, and its own commercial interests (as outlined above in relation to regulation 10(5)(e)).

#### Mr Edwards' submissions

49. Mr Edwards provided detailed reasoning why the financial information associated within the motorway improvements project should be disclosed in the public interest.
50. On 14 December 2016, Mr Edwards published an article examining concerns about the long-term implications of some public projects<sup>9</sup> funded through private finance schemes, and made it clear that his request should be considered in this wider context, not simply in the context of the motorways improvements project. He considered that there is a powerful public interest in understanding how around £6 billion is spent to finance major public sector

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<sup>8</sup> <https://www.transport.gov.scot/news/m8-journeys-cut-by-20-minutes/>

<sup>9</sup> <https://theferret.scot/probe-private-finance-schemes-scotland/>



projects in conjunction with the Scottish Futures Trust. There could be important implications for public spending over many years, in ways that could impact everyone.

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

51. As stated, the Commissioner must consider the circumstances as they existed at the time when Transport Scotland issued its response to Mr Edwards' requirement for review (27 February 2017).
52. 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 withheld information would allow more insight into the detail of the contract entered into by Transport Scotland and whether the project was delivering value for money.
53. The Commissioner notes that the motorways improvements project involves a significant amount of money (£310m) and is a project of substantial size and complexity. There is significant public interest in transparency and accountability for public spending on this scale. The Commissioner is aware of the issues raised in the media about these publicly financed projects and whether the interest rates charges are justified. The Commissioner accepts the public interest in transparency around the awarding and financing of these projects.
54. On the other hand, the Commissioner accepts the public interest in ensuring that there is fair competition in the commercial environment in which the contracting bodies in this project are operating, and in ensuring that public authorities obtain best value for such large-scale contracted projects.
55. The Commissioner has already concluded that disclosure of the withheld information would have caused, or would have been likely to cause, substantial prejudice to the legitimate economic interests of SRP and Transport Scotland. 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.
56. 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.
57. The Commissioner has therefore concluded that, in all the circumstances of this case, the public interest in making the withheld information available was outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that Transport Scotland was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

## **Decision**

The Commissioner finds that Transport Scotland complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Edwards.

## **Appeal**

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Should either Mr Edwards or Transport Scotland 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**

**27 June 2018**

## Appendix 1: Relevant statutory provisions

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### 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;
- (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;

...

#### 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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