

Decision Notice

Decision 099/2018: Mr Rob Edwards and Lothian Health Board

Financial model for the Royal Edinburgh Hospital Phase 1

Reference No: 201701179

Decision Date: 4 July 2018



Scottish Information
Commissioner

Summary

NHS Lothian was asked for the financial model for the redevelopment of the Royal Edinburgh Hospital campus (REH phase 1).

During the investigation, NHS Lothian disclosed a redacted version of the summary financial model. It withheld the remaining information from the summary and full financial model, arguing, amongst other things, that disclosure would cause substantial harm to commercial confidentiality. The Commissioner accepted that the remaining information was excepted from disclosure.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 4 September 2016, Mr Edwards made a request for information to Lothian Health Board (NHS Lothian). He asked for “full copies of the original contract for the redevelopment of Royal Edinburgh Hospital Campus 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. NHS Lothian responded on 4 October 2016, withholding the information under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). It informed Mr Edwards that redacted copies of the project agreements would be published the following month.
3. On 10 October 2016, Mr Edwards emailed NHS Lothian requesting a review of its decision, focusing on the decision to withhold the financial model and its outputs. He questioned whether withholding key financial information was in the public interest.
4. NHS Lothian notified Mr Edwards of the outcome of its review on 7 November 2016. It upheld its previous decision, and noted that documents associated with the project had now been published in redacted form¹ (“the project agreement”).
5. On 24 January 2017, following an application from Mr Edwards, the Commissioner issued *Decision 011/2017: Mr Rob Edwards and Lothian Health Board*². The decision found that the information under consideration was environmental information as defined in regulation 2(1)

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http://www.nhslothian.scot.nhs.uk/OurOrganisation/PropertyDevelopments/CurrentProjects/REHCampus/BusinessCase/Documents/REH_Phase1-DBFM_ProjectAgreement-REDACTED.pdf

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602129.aspx>

of the EIRs. The Commissioner found that NHS Lothian should, therefore, have responded under the EIRs and not under FOISA. The Commissioner required NHS Lothian to provide a response to Mr Edwards' requirement for review under the EIRs.

6. On 13 March 2017, NHS Lothian issued a new review response. The review confirmed that the request was being considered under the EIRs and the information was being withheld under regulation 10(5)(e) (substantial prejudice to the confidentiality of commercial or industrial information) and regulation 11 (personal data).
7. On 5 July 2017, Mr Edwards again 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 noted that some information had been disclosed by NHS Lothian³ but this did not include the essential information he was seeking, namely the financial model for the project and a summary of its financial inputs and outputs.

Investigation

8. 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.
9. On 26 July 2017, NHS Lothian was notified in writing that Mr Edwards had made a valid application. NHS Lothian was asked to send the Commissioner the information withheld from Mr Edwards.
10. NHS Lothian entered dialogue with the Commissioner's office as to the specific financial information sought by Mr Edwards. On 17 August 2017, NHS Lothian provided a copy of the contract for the project, with financial information redacted. Further discussion ensued, as to whether NHS Lothian held a separate financial model, because the information provided to the Commissioner comprised the contractual documents, not the financial calculations for the project.
11. On 21 September 2017, NHS Lothian disclosed a redacted version of the summary financial model to Mr Edwards.
12. On 3 October 2017, a representative of NHS Lothian attended the Commissioner's office to provide the investigating officer with a copy of the full financial model, and to explain the information in it. With the agreement of NHS Lothian, the explanation of how financial models are used in the delivery of DBFO (Design, Build, Finance and Operate) projects was provided to Mr Edwards on 12 October 2017.
13. Further discussions were held with Mr Edwards to help identify the specific information he wanted to obtain. On 17 October 2017, Mr Edwards provided an overview of the information that was of key interest to him.
14. During October and November 2017, the Commissioner's office entered into discussion with representatives of NHS Lothian. NHS Lothian had indicated that it might disclose the specific information Mr Edwards had identified.

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http://www.nhslothian.scot.nhs.uk/OurOrganisation/PropertyDevelopments/CurrentProjects/REHCampus/BusinessCase/Documents/REH_Phase1-DBFM_ProjectAgreement-REDACTED.pdf

15. However, NHS Lothian subsequently informed the Commissioner's office that the shareholders of REH Phase 1 (Sub-hubco) were not in a position to grant consents for the requested sections of the financial model to be disclosed.
16. On 11 December 2017, NHS Lothian confirmed that the financial model was being withheld under regulations 10(5)(e) and 10(5)(c) (substantial prejudice to intellectual property rights) of the EIRs. It stated that disclosure would infringe the confidentiality provisions of the project agreement.
17. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Lothian was invited to comment on this application and answer specific questions including justifying its reliance on the provisions of the EIRs it considered applicable to the information requested. It provided submissions on 15 January 2018.

Commissioner's analysis and findings

18. 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 NHS Lothian. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

19. As was made clear in *Decision 011/2017*, the Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (in particular, paragraphs (a) to (c) of the definition). The financial information covered by the request relates to a contract that resulted in the construction of the REH Phase 1.
20. Mr Edwards has not disputed that the EIRs were the correct regime under which his request should have been considered and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Information falling in scope

21. During the investigation, Mr Edwards identified the type of financial information that was of key interest to him. NHS Lothian was informed of this and identified sections of the financial model that would fulfil Mr Edwards' requirements.
22. NHS Lothian indicated that it would be willing to disclose this information to Mr Edwards if Sub-hubco consented. However, Sub-hubco withheld consent. Following this refusal, NHS Lothian confirmed that the entire financial model was being withheld under exceptions in the EIRs.
23. NHS Lothian stated that Mr Edwards' request covered the full financial model or information contained in it and that would allow him to calculate or discern the level of return or profit that the private sector will obtain from the project. NHS Lothian submitted its position would be the same, irrespective of whether the entire model was provided or only extracts from it: both would present the same issues for NHS Lothian and Sub-hubco, given that Mr Edwards would be able to calculate the IRR (Internal Rate of Return) of the project (information which is covered by a confidentiality clause in the project agreement).

Information disclosed during the investigation

24. As noted above, NHS Lothian disclosed some of the previously withheld information to Mr Edwards during the investigation (i.e. a redacted version of the summary financial model).
25. NHS Lothian did not explain to the Commissioner why information which it had previously withheld was no longer excepted from disclosure. In failing to disclose this information when responding to Mr Edwards' request, the Commissioner finds that NHS Lothian failed to comply with regulation 5(1) of the EIRs.

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

26. 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.
27. NHS Lothian applied this exception to the full financial model, and to information redacted from the summary financial model provided to Mr Edwards.
28. 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)).
29. The Aarhus Convention: An Implementation Guide⁴, 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 Convention, but its meaning is considered further below.
30. 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?

31. NHS Lothian submitted that the information is classed as commercially sensitive information within the contract.
32. Having considered the withheld information, Schedule Part 26 of the contract which defines Commercially Sensitive Information and NHS Lothian's submissions, the Commissioner

⁴ http://www.unece.org/env/pp/implementation_guide.html

accepts that the withheld information is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs.

Does a legally binding duty of confidence exist?

33. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
34. NHS Lothian stated that there was an explicit duty of confidence present, as set out in the project agreement (clause 61 (Confidentiality) and Schedule Part 26 (Commercially sensitive information)).
35. Clause 61.1 of the project agreement states that, subject to clause 61.2, NHS Lothian shall be entitled to make the financial model available to the public, but that the provisions of the financial model which have been designated as commercially sensitive (i.e. the information withheld from Mr Edwards) must be kept confidential "from the Effective Date until the date falling 2 years after the Actual Completion Date."
36. NHS Lothian confirmed that REH Phase 1 was completed in December 2016; therefore, in terms of the project agreement, the commercially sensitive information in the financial model must be kept confidential until December 2018.
37. NHS Lothian stated that the confidentiality provisions within the project agreement are designed to allow information about the contract to be made public at the discretion of NHS Lothian, but with limitations for specific areas where commercial confidentiality applies. The confidentiality provisions in the project agreement were put in place to protect the competitive positions of the funders and investors in Sub-hubco. These legal obligations are part of a standard contract devised by Scottish Futures Trust on behalf of Scottish Government to cover all hub and Non Profit Distributing (NPD) projects. Such projects, and the funding inherent within them, are subject to a competitive process, whereby the pricing of debt and the target level of return set by bidders are key differentiators in the process. NHS Lothian submitted that knowledge of such pricing would be of considerable value to competitors.
38. As set out in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*⁵, the Commissioner does not accept that the existence of a confidentiality 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 beyond the confidentiality clause and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
39. The project agreement reflects this: clause 61.3.10(d) recognises that, regardless of the express duty of confidentiality, the duty will not apply for the purpose of compliance with FOISA and/or the EIRs.

In this case, having viewed the withheld information, and the terms of Clause 61 of and Schedule Part 26 to the project agreement, the Commissioner accepts that the information withheld from Mr Edwards 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

⁵ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

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?

40. As noted above, 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.

NHS Lothian's submissions

41. NHS Lothian has argued that disclosure of the information requested by Mr Edwards would reveal information about the pricing of debt and the target level of return which would be of considerable value to commercial competitors bidding for similar contracts. NHS Lothian submitted that, if the information was disclosed, the worst case scenario would be that it would be in breach of contract and Sub-hubco would seek to terminate the contract. The timescale for such action would likely be a matter of months. At the very least, NHS Lothian would suffer reputational damage as an entity that does not abide by its contractual obligations and cannot maintain confidentiality. As hub projects continue to be a key route through which major capital projects are delivered across Scotland, there could be reputational damage to the programme as a whole.

The Commissioner's view

42. The Commissioner must base his decision on the circumstances existing at the time NHS Lothian responded to Mr Edwards' requirement for review. The relevant date is 13 March 2017. By this date, REH Phase 1 had been built and had been operational for four months.
43. The Commissioner has taken note of NHS Lothian's explanation of what could happen if it were to disclose the financial model before the end of the two year confidentiality time period. The Commissioner is satisfied that the harm identified by NHS Lothian is a real threat, not just a hypothetical possibility.
44. The Commissioner notes that the period of confidentiality imposed by the project agreement is finite: two years in total.
45. NHS Lothian has indicated strongly that it is likely to take a different view, once the two year confidentiality period has expired, and would be inclined to disclose further information.
46. NHS Lothian appears to accept (in line with the Commissioner's guidance) that under this exception, information should be withheld for the minimum time necessary to safeguard the commercial interests.
47. Having taken all the submissions into account and having considered the withheld information, the Commissioner is satisfied that disclosure would, or would be likely to cause, substantial prejudice to the ongoing economic interests of NHS Lothian. He is satisfied that disclosure of the information would be likely to result in Sub-hubco considering NHS Lothian to be in breach of its contract and taking action to remedy the breach.
48. In the circumstances, the Commissioner is satisfied that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the withheld information.

Public interest test

49. Having accepted that the exception in regulation 10(5)(e) was correctly applied to the 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.

Mr Edwards' submissions

50. Mr Edwards provided detailed reasoning why the financial information associated with REH Phase 1 should be disclosed, in the public interest. He argued that there is a powerful public interest in understanding how £6 billion or so is spent to finance major public sector projects in conjunction with the Scottish Futures Trust. He believed there could be important implications for public spending over many years, in ways that could impact everyone.
51. On 14 December 2016, Mr Edwards published an article outlining concerns about the costs involved in some publicly funded projects⁶, and focusing on questions about the extent to which the risk involved in financing these projects was actually transferred to the private sector.

NHS Lothian's submissions

52. NHS Lothian considered that there were some reasons why disclosure would be in the public interest:
- NHS Lothian is committed to openness and transparency and would prefer to be able to disclose the information were it not bound by its contractual obligations;
 - the information relates to public expenditure and the details of such expenditure ought, in principle, to be in the public domain whenever possible or appropriate.
53. However, it considered that, overall, the public interest favoured withholding of the information:
- NHS Lothian would be in breach of its contract and Sub-hubco have indicated that its investors would not be prepared to relax this contractual obligation;
 - the contractual provisions fall away after two years (i.e. December 2018), at which point there would be no impediment to providing any information relating to the project.
54. NHS Lothian stated that it would make the information freely available after 5 December 2018. Release of the information before that date would expose NHS Lothian to considerable risks, carrying high financial penalties.

The Commissioner's conclusions

55. In reaching a decision on the balance of public interest, the Commissioner must consider the circumstances as they existed at the time the Council issued its response to Mr Edwards' requirement for review (on 13 March 2017).
56. 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 financial

⁶ <https://theferret.scot/probe-private-finance-schemes-scotland/>

arrangements agreed with Sub-hubco for building, developing and maintaining Phase 1 of REH. Disclosure would also inform judgement on whether the project was delivering value for money.

57. The Commissioner notes that Sub-hubco were not just responsible for building REH Phase 1, but for its operation and maintenance. The Commissioner considers that continuation of this support now that the REH Phase 1 is up and running is essential, in relation to the public health services delivered in that building and any action which would, or would be likely to, disrupt these services would not be in the public interest.
58. Mr Edwards has put forward very strong public interest arguments as to why the financial information should be disclosed, and the Commissioner is cognisant of the fact that substantial sums of public money has been spent on a project which very few parties have had the opportunity to review, in terms of being satisfied that public monies have been well spent.
59. 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 has been particularly persuaded by the arguments put forward by NHS Lothian on behalf of Sub-hubco of the action it may take if the financial information was disclosed. The Commissioner considers such harm, if it occurred, would be contrary to the public interest.
60. The Commissioner has taken note of the fact that NHS Lothian's contract was binding for two years, and it has indicated that it is likely to disclose further financial information at the end of this period.
61. The Commissioner considers that, on balance, the public interest lies in withholding the information.
62. 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 NHS Lothian was entitled to withhold the information under regulation 10(5)(e) of the EIRs.
63. 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)(c).

Decision

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

The Commissioner finds that NHS Lothian:

- was entitled to withhold commercially sensitive information under the exception in regulation 10(5)(e) of the EIRs
- breached regulation 5(1) by failing to disclose the redacted summary financial model in response to Mr Edwards' request.

The Commissioner does not require NHS Lothian to take any further action in relation to this breach.

Appeal

Should either Mr Edwards or NHS Lothian 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.

Margaret Keyse
Head of Enforcement

4 July 2018

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;

...

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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