

Decision Notice



Decision 001/2011 Mr Edward Murray and City of Edinburgh Council

Waste collection contract

Reference No: 201001525

Decision Date: 6 January 2011

www.itspublicknowledge.info

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Summary

Mr Murray requested from City of Edinburgh Council (the Council) details of a waste collection contract between the Council and Shanks Waste Management (Shanks). The Council responded by providing certain information and withholding certain other information as personal data. Following a review, Mr Murray remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which Mr Murray confirmed that he was not interested in the withheld personal data, the Commissioner found that the Council had failed to identify all of the information falling within the scope of Mr Murray's request. While finding that the Council was entitled to withhold certain information under regulation 10(5)(e) of the EIRs (as disclosure would, or would be likely to, cause substantial prejudice to the confidentiality of the information, being commercial information and that confidentiality being provided for by law), he did not consider that it was entitled to withhold the remainder of the information and required its release.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of “environmental information” (a) to (c)); 5(1) and (2) (Duty to make available environmental information on request) and 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 the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 26 March 2010, following previous correspondence in relation to the Council's contract with Shanks to cover the collection of waste during an industrial dispute (the Contract), Mr Murray wrote to the Council requesting a full and detailed description of the information contained within the Contract, to include
 - The title and date of the Contract and the names and positions of its signatories
 - The chronological parameters of the Contract
 - The contractual obligations of all parties to the Contract, with special reference to staff required, plant required, and geographical areas covered etc
 - Any and all other information conducive to an understanding of the relationship between the parties to the Contract
 - Any and all other information conducive to an understanding of the tone of the contact
 - A full and detailed description of all appendices to the contract, indices, underlinings, footnotes, contemporary redactions, highlightings, emphasised parts (e.g. in bold print or Italics) etc.
2. On 14 May 2010, the Council responded to Mr Murray's request, informing him of the title and date of the Contract. It provided information in relation to the duration of the Contract and its signatories, summarising the contractor's obligations and advising that it held no information falling within the scope of the last bullet point in the previous paragraph. It withheld detailed information on the signatories, on the basis that this was personal data which was exempt under section 38(1)(b) of FOISA and regulation 11(2) of the EIRs.
3. On 21 June 2010, Mr Murray wrote to the Council requesting a review of its decision. He did not consider that he had been provided with all the information he had requested and suggested that the best way to resolve the issue was to provide a copy of the contract concerned (this had been the subject of an earlier request, which the Council had not considered valid).
4. The Council notified Mr Murray of the outcome of its review on 22 July 2010, clarifying that it considered the information he had requested to be environmental information and that it was therefore dealing with the request under the EIRs. Consequently, it applied 39(2) of FOISA. In practical terms, however, it confirmed its earlier decision, applying regulation 10(4)(a) of the EIRs in respect of the information not held and regulation 11(2) in relation to the personal data.



5. On 30 July 2010, Mr Murray wrote to the Commissioner stating that he was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications. In particular Mr Murray complained that, over the 10 months since his first request, he has experienced the run-around, flannel and procrastination.

Investigation

6. On 4 August 2010, the Council was notified in writing that an application had been received from Mr Murray and asked to provide the Commissioner with any information withheld from him. In its response, the Council advised that its response to Mr Murray's request had been inaccurate, having been inadvertently based on an obsolete document wrongly believed to constitute the Contract. It stated that the Contract had in fact been concluded through a series of email negotiations, a copy of which was provided along with submissions as to why the Council would wish to withhold these under regulation 10(5)(e) of the EIRs. The case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, it was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested. It was asked to confirm that the information provided was all the information the Council held which fell within the scope of Mr Murray's request, with details of the searches carried out to establish this. In response the Council provided submissions in support of its reliance on section 39(2) of FOISA and regulation 10(5)(e) of the EIRs, together with copies of further relevant emails it had located.
8. During the investigation, the Council provided further submissions to support the withholding of the personal mobile telephone numbers and email details of Shanks employees under regulation 11(2) of the EIRs. Mr Murray confirmed that he had no interest in individuals' personal data and would be content if such data were redacted should the Commissioner order release of the remainder of the withheld information. Consequently, the Commissioner does not find it necessary to give further consideration to regulation 11(2) of the EIRs.
9. The relevant submissions obtained from Mr Murray and the Council will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Murray and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

11. It is clear from the Council's correspondence with both Mr Murray and the Commissioner that it dealt with Mr Murray's request on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns waste management and the Commissioner is satisfied in the circumstances that it falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraph (c) of that definition.

Section 39(2) of FOISA – environmental information

12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given his conclusion that this is environmental information.
13. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Handling of the request

14. During the investigation, it became clear that the information held by the Council which fell within the scope of Mr Murray's request was that contained within the emails between the Council and Shanks, referred to in paragraph 6 above. Having considered the document on which the Council based its initial response to Mr Murray, the Commissioner accepts that the information in this document does not fall within the scope of Mr Murray's request.
15. The Commissioner acknowledges that the information contained in the series of emails (including the emails located in the course of the investigation) falls within the scope of Mr Murray's request and was held by the Council at the time it received the request. In failing to identify and locate this information when dealing with Mr Murray's request, and thereafter deal with it in accordance with each of the relevant regimes, the Commissioner considers that the Council failed to comply with both section 1(1) of FOISA and regulation 5(1) of the EIRs.



Regulation 10(5)(e) of the EIRs

16. The Council submitted that the information was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
17. 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.
18. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released 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)).
19. The Commissioner fully considered the application of regulation 10(5)(e) of the EIRs in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*¹ and does not intend to repeat that consideration in detail here. There, the Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - 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?

20. It is apparent that the information relates to an agreement regarding the provision of waste management services by Shanks and as such the Commissioner is satisfied that the information is commercial in nature.

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

21. The Council has presented the Commissioner with no specific submissions as to why there is a legally binding duty of confidence existing in relation to the withheld information, other than to say that the contract between the parties gives rise to an implied duty of confidentiality.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.asp>



22. The Commissioner notes that there is a standard statement at the end of all emails sent by Shanks which specifically states; *The information in this email (and its attachments) is confidential and may be legally privileged and is intended for the addressee only.* Although it is relatively common for such statements to be applied to business emails without a great deal of discrimination, in the circumstances of the contractual negotiations in the course of which the information was produced, the Commissioner is prepared to accept that an implied duty of confidence existed in relation to the information.

Is the information publicly available?

23. The Council submitted that it would not be possible for competitors to reproduce the price-sensitive information referred to within the emails constituting the Contract between the Council and Shanks. It made no further submissions as to whether the information was publicly available or otherwise.
24. While the Council did not make entirely clear which elements of the withheld information it considered price-sensitive, the Commissioner is prepared to accept in the circumstances that those elements of the withheld information relating to pricing, at least, were not publicly available when the Council dealt with Mr Murray's request for information, or when it dealt with his request for review. In other words, that information retained the essential quality of confidence.

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

25. Noting that Shanks was currently a bidder in a related Council services procurement, the Council argued that the disclosure of price-sensitive information or details of the quality or specification of goods and services would potentially put them at a disadvantage in this process and result in a claim against the Council under regulation 4(3) of the Public Contracts (Scotland) Regulations 2006² (which provides that, in the context of a regulated procurement exercise, a contracting authority (such as the Council) shall (a) treat economic operators (such as Shanks) equally and without discrimination; and (b) act in a transparent and proportionate manner).
26. The Council intimated that the information contained in the email exchange set out in a comprehensive manner the quality and specification of the goods and services to be provided by Shanks as well as how the contract was to be performed, the deployment of staff, financial information, and pricing structures. The Council submitted that all of this information was commercially sensitive and that its release would substantially prejudice Shanks' economic and commercial interests, which the Council was legally obliged to protect. The commercial sensitivity of the information, the Council argued, had in no way been diminished by the passage of time. Concerns expressed in similar terms were set out in correspondence the Council had received from Shanks.

² SSI 2006 No.1



27. Having taken all of the Council's submissions into consideration, the Commissioner is satisfied that release of the pricing information at the time the Council dealt with Mr Murray's request, or at the time it dealt with his requirement for review, would have caused, or would have been likely to cause, substantial harm to a legitimate economic interest of Shanks (which remained involved in a tendering exercise for services of the same kind) and was therefore properly excepted in terms of regulation 10(5)(e) of the EIRs. He considers the pricing information covered by this exception to be the rates, costs, charges and percentage margins set out in documents 2, 3, 4, 12 and 13 in the schedule of documents provided at the commencement of the investigation, together with those in documents 2, 4, 5 and 6 in the schedule of additional documents provided in the course of the investigation.
28. In relation to the remaining information, however, the Commissioner is not persuaded by the Council's submissions that its disclosure would, or would be likely to, result in the harm the Council has referred to. The Council has referred to the commercial sensitivity of the information and described the harm, but has given no further indication as to why this should be considered an actual or likely consequence of disclosure. In the circumstances, bearing in mind the nature of the remaining information and the specific, *ad hoc* nature of the service provided under the Contract, it is not evident to the Commissioner that disclosure of the remaining information would have caused, or would have been likely to cause, substantial harm to a legitimate economic interest.

Consideration of the public interest

29. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to the withheld pricing information, the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs. The test specifies that a 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.
30. The Council stated that it had taken into account the following issues when considering the public interest test:
- For disclosure
- compliance with the principal intentions of the FOI legislation; and
 - the discharge of its duties as a public authority to act with transparency and accountability.
- Against disclosure
- the protection of commercial and economic interests;
 - the risk of court action against it for breach of confidence and/or of regulation 43 of the Public Contracts (Scotland) Regulations 2006 (which requires that a contracting authority shall not disclose information forwarded to it by an economic operator which the operator has reasonably designated as confidential).



31. The Council acknowledged a genuine public interest in ensuring that it discharged its fiscal responsibilities in a robust manner and with due diligence, and that the transparency and accountability of decisions in relation to public spending might be facilitated by the release of this information. It went on to argue, however, that this was outweighed by the public interest in maintaining the exception, as disclosure would significantly undermine confidence in it as a commercial operator of good faith.
32. The withheld information clearly relates to public expenditure and the provision of a service relative to a public function, and the Commissioner recognises the public interest in transparency in relation to the amounts paid to Shanks for the provision of this service. Equally, however, given the strong public interest in the maintenance of confidences and in fair competition, he is satisfied that there is a strong public interest in the pricing information not being made public (which would be the effect of disclosure). On balance, therefore, in all the circumstances of this case, he concludes that the public interest in making the pricing information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
33. The Commissioner therefore requires the Council to provide Mr Murray with the information contained in the email correspondence identified at the commencement of and in the course of the investigation, with any pricing information (as described in paragraph 27 above) redacted. As outlined above (see paragraph 8), any personal data relating to telephone numbers and email addresses of Shanks employees should also be redacted prior to the information being provided to Mr Murray.

DECISION

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Murray. By failing to identify and locate all of the information falling within the scope of Mr Murray's request, and thereafter deal with it in accordance with each of the relevant regimes, the Council failed to comply with section 1(1) of FOISA and regulation 5(1) of the EIRs.

The Commissioner also finds that while the Council was entitled to withhold certain pricing information under regulation 10(5)(e) of the EIRs, it was not entitled to withhold the remainder of the information falling within the scope of Mr Murray's request, and in doing so failed to comply with the EIRs. The Commissioner therefore requires the Council to provide Mr Murray with a copy of the emails with the redaction of pricing information as described in paragraph 27 of this decision, and personal data as described in paragraph 8 of this decision, by 21 February 2011.



Appeal

Should either Mr Murray or City of Edinburgh Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
6 January 2011



Appendix

Relevant statutory provisions

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;
- (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)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (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;
 - ...