

Decision Notice



Decision 006/2011 Mr Jim Cooney and tie Limited

Value of tie contracts

Reference No: 201000792

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www.itspublicknowledge.info

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Summary

Mr Cooney requested from tie Limited (tie) the value of tie's contracts with Clancy Docwra and other contractors appointed to the Edinburgh Trams Project. tie responded by withholding the information under sections 33 and 36 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Cooney remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, tie withdrew its reliance on FOISA and instead relied on the exception contained in regulation 10(5)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Commissioner found that tie should have dealt with the request under the EIRs from the outset.

The Commissioner also found that tie was entitled to withhold the majority of information from Mr Cooney under regulation 10(5)(e), as confidential commercial information the disclosure of which was likely to cause substantial harm to a legitimate economic interest. He did not accept this argument, however, in respect of all the withheld information and required the disclosure of certain contract values.

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) (definitions (a) to (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available 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 10 December 2009, Mr Cooney wrote to tie requesting details of the value of its contract with Clancy Docwra and any other contractors appointed to the Edinburgh Tram Project (the Project), apart from Bilfinger Berger, CAF and Siemens (whose contract values were already in the public domain).



2. tie responded on 21 January 2010. For the value of its contract with Clancy Docwra, tie stated that this information was exempt under sections 33 (Commercial interests and the economy) and 36 (Confidentiality) of FOISA. It explained that disclosure of this information would damage its ability to negotiate prices with other contractors for future work. tie provided a list of the other contractors and the works to which their respective contracts related, but stated that sections 33 and 36 of FOISA also applied to the contractual values in these cases.
3. On 29 January 2010, Mr Cooney wrote to tie requesting a review of its decision to withhold the value of the contracts with Clancy Docwra and the other contractors. Mr Cooney referred to Annex C, Example 2 of the Scottish Procurement Directorate's *Freedom of Information Guidance*¹, which he said recommended disclosure of the total value of a contract (post contract award and within the first year of implementation). He also argued that the value of other contracts for the Project (see paragraph 1 above) had been put into the public domain, and there was therefore no justification for withholding the values he had requested.
4. Following further correspondence with Mr Cooney as to whether he was requesting information on his own behalf or on behalf of someone else, tie accepted that Mr Cooney was the true applicant in this case and proceeded to deal with his requirement for review on the basis that the requirement (and his request for information) were valid. This aspect of tie's handling of the case is considered further in the Commissioner's analysis and findings below.
5. On 26 February 2010, tie notified Mr Cooney of the outcome of its review. It confirmed its decision to withhold the requested information under the exemptions cited earlier, referring specifically to sections 33(1)(b), 33(2), 36(1) and 36(2) of FOISA. tie concluded that to release the information would not be in the public interest as it would prejudice the Project commercially by weakening any contractual negotiations tie might have with other contractors, thus forcing up costs. This would in turn have a negative impact on tie's ability to deliver the best value for money for the public purse. To assist, tie provided Mr Cooney with the combined figure for the original scope of utilities work for the Project, rather than a breakdown by contractor.
6. On 13 April 2010, Mr Cooney wrote to the Commissioner, stating that he was dissatisfied with the outcome of tie's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Cooney had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

¹ <http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>



Investigation

8. On 22 April 2010, tie was notified in writing that an application had been received from Mr Cooney and asked to provide the Commissioner with any information withheld from him. tie responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted tie, 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 the course of the investigation, tie was asked if it believed the EIRs applied to any information it was withholding, whether it wished to rely on section 39(2) of FOISA in relation to any environmental information, and for details of any exception from the EIRs that it wished to rely upon.
10. tie accepted that the EIRs would apply to the information requested, confirming that it wished to rely on section 39(2) of FOISA in relation to that information. It also regarded the exception in regulation 10(5)(e) of the EIRs as applying to the withheld information, referring for its reasoning to its initial submission to the Commissioner (on section 33(1)(b) of FOISA) and to a submission on regulation 10(5)(e) provided in respect of another application.
11. The relevant submissions received from both parties will be considered more fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 39(2) of FOISA – environmental information

13. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*² and need not repeat it in full here.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



14. tie confirmed during the investigation that it considered it was entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs. The definition of what constitutes environmental information should not be viewed narrowly.
15. The Commissioner is of the view that the withheld information in the present application, taken in the context of the Project as a whole, must be considered to be environmental information as defined in regulation 2(1) of the EIRs (and in particular paragraph (c) of that definition). He is pleased to note that tie arrived at the same view in the course of the investigation, but he must also note that it did not do so (and act accordingly under the EIRs) when dealing with Mr Cooney's information request or his requirement for review. In failing to do this, he considers that tie failed to comply with regulation 5(1) of the EIRs.
16. In this case the Commissioner accepts that tie was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given his conclusion that it is properly considered to be environmental information.
17. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. He has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(5)(e) of the EIRs

18. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
19. The Aarhus Convention Implementation Guide (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (at page 60) that the first requirement of this exception is that national law must expressly protect the confidentiality of the withheld information: it must, the guidance states, 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.
20. The Commissioner has taken this guidance into consideration when considering this exception, for example in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*. His view is 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?

21. The information withheld comprises the values of tie's contracts with Docwra Clancy and other contractors, which relate to utility diversions and similar works. tie submitted that these values were commercial information, having been negotiated under the prevailing conditions in the construction industry at the time the contracts were drawn up. tie argued that as the withheld information comprised the rates chargeable under the contract, the information was commercial in nature.
22. In the circumstances, the Commissioner accepts tie's view that the withheld information is commercial in nature.

Does a legally binding duty of confidence exist?

23. tie submitted that the withheld information was the subject of confidentiality clauses in the relevant contracts. While acknowledging that the existence of such clauses would not necessarily mean that all information caught by them would automatically be considered confidential, it argued that there was in any event an implied duty of confidentiality given that the subject matter of the contract remained ongoing and it considered the information to have been received under an implied obligation to maintain confidentiality. It considered the contractors in question to have negotiated their contracts in the expectation that the information in them would not be disclosed while the transaction had not been concluded and remediation works had not been completed.
24. In the circumstances, the Commissioner accepts from tie's submission that a legally binding duty of confidence existed in respect of the withheld information at the time it dealt with Mr Cooney's request for information and requirement for review.

Is the information publicly available?

25. As tie has stated, the detailed nature of the contracts, including the contract values, is not in the public domain. Consequently, the Commissioner has accepted tie's submission that the information under consideration is not publicly available.

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

26. "Legitimate economic interest" is not defined in the EIRs. The Commissioner considers that to qualify the interest will be financial, commercial or otherwise "economic" in nature, and that prejudice to that interest as a consequence of disclosure must be substantial (and therefore of real and demonstrable significance).



27. tie explained that its commercial interests would be substantially prejudiced by disclosure of the information, as would the interests of its funders (the City of Edinburgh Council and Transport Scotland). It stated that its interests were entirely commercial: its sole purpose was to deliver the Edinburgh Tram project within a defined funding envelope, and consequently it had a considerable commercial task in getting the best deal for the public purse.
28. tie explained that it was still in the market procuring further utility work and that it had withheld the information to ensure it had a strong commercial position and to obtain the best price in future tenders. In support of this argument, tie supplied a copy of an advert of 3 May 2010 for the procurement of a utility works contractor. It advised that this was for similar works to those covered by the contracts to which Mr Cooney's request related, and that further similar contracts would be advertised in the near future. It submitted that disclosure would make potential suppliers aware of the price for similar work, severely impacting on its ability to obtain the best deal.
29. tie stated that the size of the contracts would make them highly competitive in the market place. It accepted the general relevance of the points Mr Cooney had made in relation to the Scottish Procurement Directorate's guidance, but submitted that these could not be taken to support disclosure in this particular case, given the nature, volume and level of competitiveness of the contracts in question.
30. The Commissioner has considered these arguments carefully. He accepts that the interests identified by tie can be accepted as "legitimate economic interests", even if they would not necessarily be accepted as "commercial interests" for the purposes of section 33(1)(b) of FOISA. It is the Commissioner's view that tie's arguments are persuasive in respect of the contracts in respect of which tie has confirmed that the work, or similar work, is to be re-tendered in the relatively near future, and consequently accepts that the release of the majority of the withheld information in response to Mr Cooney's information request or his requirement for review would have caused, or would have been likely to cause, substantial harm to legitimate economic interests. Consequently, the Commissioner is satisfied that tie was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the majority of the withheld information.
31. The Commissioner notes, however, that tie did not specify for two of the contracts in question (Burnside Relocation and Monument Removal) that the work, or similar work, was to be re-tendered. The Commissioner found tie's arguments persuasive because of the timing of projected re-tendering of work. In the absence of any indication of relevant re-tendering, he is not persuaded that there is an argument for withholding the contract values under regulation 10(5)(e).
32. Having decided that the exception is engaged for the majority of the withheld information, the Commissioner is required to go on and assess the public interest in respect of this information.



Consideration of the public interest test

33. Regulation 10(1)(b) of the EIRs requires 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.
34. Mr Cooney referred to Annex C, Example 2 of the Scottish Procurement Directorate's *Freedom of Information Guidance* in favour of disclosure. He also said that there was a strong public interest in assessing the financial implications of the Project for the City, local Council Tax payers and the tram scheme itself.
35. tie acknowledged a significant public interest in transparency, in particular in relation to the cost of the Project (which it appreciated was a matter of genuine public concern). It also argued, however, that the best way to address this concern was for it to be able to negotiate with suppliers on best price and best value, in the process securing contractors who would behave in the best interests of the public.
36. On the question of transparency, tie pointed to a City of Edinburgh Council report of 24 June 2010 which, it submitted, addressed many of the public's legitimate concerns. tie advised that it had taken into account the information already available in the public domain, and how disclosure of the withheld information would add to public debate, but also referred to its duty to protect the long term viability of the Project. tie explained that it intended to release the withheld information at an appropriate time, but was of the view that at present the balance of the public interest favoured obtaining the best commercial deal in the remaining contracts, and this meant withholding the information.
37. The Commissioner has considered fully all the submissions on the public interest made by both Mr Cooney and tie, taking into consideration the specific content and wider context of the withheld information.
38. The Commissioner acknowledges the strong public interest in the Project generally, and also in the withheld information in particular. The Commissioner accepts the general public interest in transparency and accountability, and specifically in this case in public awareness of the costs associated with the Project with a view to making it possible to assess whether it is providing value for money. In this context, he has noted the information already in the public domain in relation to the contracts in question, whether as a result of Mr Cooney's request or otherwise.
39. At the same time, the Commissioner recognises that there is a considerable public interest in tie being able to obtain the best contracts at the best price, with a view to the Project being completed and the Edinburgh tram system becoming operational. Having accepted that the withheld information is the subject of a legally binding duty of confidence, the Commissioner must also recognise a strong public interest in the maintenance of confidences.



40. Having carefully weighed up the arguments, therefore, the Commissioner has concluded that in all the circumstances of the case, the public interest in making the information available in this instance is outweighed by the public interest in maintaining the exception. He is satisfied that the public interest in maintaining the exception, and in particular in protecting the competitive advantages conferred by the withheld information, outweighed that in disclosure at the time tie dealt with Mr Cooney's request for information and his request for review.
41. The Commissioner therefore concludes that tie correctly withheld the majority of the contract values from Mr Cooney under regulation 10(5)(e) of the EIRs. He is not satisfied, however, that tie's arguments can be sustained in relation to the values of the contracts for Burnside Relocation and Monument Removal, and therefore requires the disclosure of this information.

Validity of request

42. Mr Cooney's application expressed dissatisfaction that tie had questioned the validity of his request, on the basis that he was believed to be making it on behalf of another (undisclosed) person. This belief appeared to derive from an inference drawn from correspondence with a journalist in relation to a similar information request. Following further discussions with Mr Cooney, tie accepted that he was the true applicant and was not making the request on behalf of anyone else.
43. The Commissioner has published guidance³ on this issue. An information request will be invalid if it is in fact made on behalf of another person, who is not named. A public authority should therefore attempt to clarify who is the real applicant if it believes a person is acting for a third party, but only where there are reasonable grounds for believing this to be the case. Otherwise, the Commissioner will expect the authority to deal with the request.
44. In this case, while acknowledging that the issue in question was resolved within a relatively short time and tie proceeded to deal with Mr Cooney's requirement for review, the Commissioner is somewhat surprised that tie appears to have arrived at the conclusion that Mr Cooney was not the true applicant on the basis of relatively ambiguous information, notwithstanding that he appears to have been in communication with tie on various aspects of the Project (without any suggestion that he was acting on behalf of anyone else) for a number of years. It is perhaps unsurprising in the circumstances that this initial reaction to the requirement for review caused Mr Cooney a degree of concern, and the Commissioner would urge Scottish public authorities to consider whether it is truly reasonable to raise the question of whether a particular request has been made on behalf of another person, giving full consideration to the relevant circumstances of that case before doing so.

³ <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>



DECISION

The Commissioner finds that tie Limited (tie) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Cooney's request for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner finds that tie was entitled to withhold the majority of the requested information under regulation 10(5)(e) of the EIRs. In withholding certain information under this exception, however, he finds that tie failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires tie to provide Mr Cooney with the values of the contracts in respect of Burnside Relocation and Monument Removal.

The information must be provided to Mr Cooney by 2 March 2011.

Appeal

Should either Mr Cooney or tie Limited 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
11 January 2011



Appendix

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)-

...

(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;
- ...