

# Decision Notice

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**Decision 097/2016: Mr William Chisholm and Scottish Borders Council**

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## **Termination of contract**

Reference No: 201501461

Decision Date: 03 May 2016



Scottish Information  
Commissioner

## Summary

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On 13 June 2015, Mr Chisholm asked Scottish Borders Council (the Council) for any information that was considered by Councillors or Council Committees before the Council took the decision to terminate its contract with New Earth Solutions (Scottish Borders) Ltd (NES).

The Council did not respond to this request. Following a review, the Council notified Mr Chisholm that it was withholding information under regulation 10(5)(e) of the EIRs. Mr Chisholm remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mr Chisholm's request for information in accordance with the EIRs. This was because it wrongly withheld some information under regulation 10(5)(e) of the EIRs. She required the Council to disclose the wrongly withheld information to Mr Chisholm.

## 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"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available)

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

## Background

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1. On 13 June 2015, Mr Chisholm made a request for information to the Council:
  - (i) Please supply all information contained in reports, documents, emails, minutes and other correspondence which led councillors to take their decision on February 19<sup>th</sup> at the full council meeting. Please confirm whether the decision to end the contract was unanimous or by majority. Please also provide a copy of the relevant minute of February 19<sup>th</sup> 2015.
  - (ii) I would also request copies of all information contained in reports, documents, emails and other correspondence which received attention or consideration by any council committee or the Executive when termination of the contract was being contemplated.
2. The Council did not respond to this request.
3. On 25 July 2015, Mr Chisholm wrote to the Council requesting a review of its failure to respond.
4. The Council notified Mr Chisholm of the outcome of its review on 7 August 2015. It confirmed that the decision to terminate the contract was a unanimous decision and it provided Mr Chisholm with the public minute of the meeting of 19 February 2015. The Council also notified Mr Chisholm that while other committees had been given briefings in relation to the waste project, these briefings were verbal and there was no written record. The Council advised Mr Chisholm that it was withholding the remaining information covered by his

request under regulation 10(5)(e) of the EIRs, on the basis that it was commercial information and the Council had a duty to keep it confidential.

5. On 7 August 2015, Mr Chisholm wrote to the Commissioner. Mr Chisholm applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 Chisholm disagreed that the information was confidential, given that the contract with NES had been terminated.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Chisholm made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 12 August 2015, the Council was notified in writing that Mr Chisholm had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Chisholm. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

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

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9. 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 her by both Mr Chisholm and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

10. The Council failed to respond to the initial request, but in its review outcome it concluded that the information was environmental as it concerned environmental issues, namely waste management. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in paragraphs (a), (b) and (c) of the definition of "environmental information" in regulation 2(1) of the EIRs. The information relates to a contract which would have resulted in the construction of a new waste treatment facility.
11. Mr Chisholm has not disputed the Council's decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

### **Regulation 5(1) - duty to make environmental information available**

12. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12, requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the

case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

### **Scope of the request**

14. In part (i) of Mr Chisholm's request he asked for "all information contained in reports, documents, emails, minutes and other correspondence which led councillors to take their decision on February 19<sup>th</sup> at the full council meeting".
15. The Commissioner understood this request to mean that Mr Chisholm was seeking all documents that had been consulted or reviewed by Councillors prior to them reaching a decision to terminate the NES contract. However, she accepts that the request could be understood to be broader in scope, and to seek all information held by the Council that had any bearing on the Council's decision to terminate the NES contract.
16. In part (ii) of Mr Chisholm's request he asked for  
*"...copies of all information contained in reports, documents, emails and other correspondence which received attention or consideration by any council committee or the Executive when termination of the contract was being contemplated"*.
17. The Council provided the Commissioner with over 500 documents which it claimed would fall within the scope of Mr Chisholm's requests. After reviewing each of these documents, the Commissioner found that none of the documents contained information which appeared to fall within the scope of part (ii) of Mr Chisholm's request. It was not clear whether any of the information was captured by part (i) of his request.
18. To clarify the scope of part (i) of Mr Chisholm's request, the Commissioner asked him to confirm what information he was looking for, when he made his request. In response, Mr Chisholm stated:  
*"The relevant documentation in this instance are the reports considered by elected members before they terminated the contract with NES on February 19 2015"*.
19. From this, the Commissioner understood that Mr Chisholm's request should be understood to cover only information which had been actively considered by elected members, and not all information which may have had a bearing on their decision. The Commissioner notified the Council of the clarification provided by Mr Chisholm and asked it to confirm whether any of the documents provided to her had been directly considered by an elected member prior to the Council meeting of 19 February 2015.
20. The Commissioner also asked the Council to note that none of the documents provided to her appeared to have been laid before a committee (as required if the information was to be covered by part (ii) of Mr Chisholm's request). She pointed out there were no committee papers or emails to committee members with agenda points, and that all the documents appeared to be communications between members of the Council's project team, their external advisors and NES itself. The Council was asked to confirm which (if any) of the documents provided to the Commissioner had been laid before a Council committee.
21. The Council confirmed that none of the documents provided to the Commissioner fell within the scope of part (ii) of Mr Chisholm's request. The Council stated that there were no papers relating to this part of his request "as it was only Council who received written reports in respect of the project". It confirmed that the matter was presented to Council in the report of 19 February 2015. The Council provided the Commissioner with a copy of the report.

22. With regard to part (i) of Mr Chisholm's request, the Council argued that Mr Chisholm's email clarifying that he only wanted documents which had been seen by Councillors was significantly more refined than his original request, which sought "*all information...and reports, documents, e-mails and other correspondence*". The Council commented that it had taken a considerable number of office hours to compile the volumes of information submitted to the Commissioner in relation to part (i) of Mr Chisholm's request.
23. The Council submitted that, apart from the report of 19 February 2015, elected members were kept abreast of the developments of NES on an informal basis. (This is consistent with the Council's response to Mr Chisholm's request for review, which stated that "committees were given briefings in relation to the waste management contract, but these were verbal in nature and there is no written record".) The Council explained that it has an informal committee called the Admin Policy Working Group (APWG) which meets every six weeks and has a standing agenda item for "waste". The APWG is made up from members of the Council's Executive, but it meets on a less formal basis. The Council stated that the APWG was kept abreast of developments in the NES project with regular verbal updates by the Director of Environment and Infrastructure / Corporate Transformation and Services Director.
24. The Council explained that, prior to the report going to Council on 19 February 2015, a briefing trip was organised whereby elected members, through their political groups, were offered the opportunity to attend the NES plant at Avonmouth; briefings were provided to members in connection with this visit. Members who attended the Avonmouth trip were briefed informally as to the recommendation in the 19 February report relating to the NES contract. The Council noted that senior officers also attended each political group to informally brief them regarding this recommendation
25. It is clear that the Council took a very broad view of the information potentially covered by Mr Chisholm's request. If Mr Chisholm had been given the opportunity to clarify or discuss his request, the Council might have avoided spending significant time and effort in collating the large volume of information it considered relevant to the request. Additionally, it would have prevented the Commissioner from having to commit considerable resources in printing, collating and reading information which was not relevant to Mr Chisholm's request.
26. The Commissioner has reviewed the report of 19 February 2015 and accepts that it falls under the scope of part (i) of Mr Chisholm's request, as it is information which was considered by elected members prior to the decision to terminate the contract with NES.
27. The Commissioner notes the Council's comments about the APWG meetings and the fact that these were held every six weeks and attendees were given regular verbal updates on the waste project. The Commissioner's remit is limited to considering the information actually held by an authority. However, she is surprised that the Council failed to record any details of these meetings and briefings on the NES project, given the significant expenditure which the Council was committing to this project, and the onus and expectation on Scottish public authorities to be transparent and accountable.
28. The Commissioner accepts that the Council does not hold any recorded information which shows that elected members (separately, or as part of a committee) were informed about developments relating to the NES contract before the meeting of 19 February 2015 at which the decision was taken to terminate the contract. She accepts the Council's explanation that all briefings to elected members were verbal and informal, and that the Council retains no written record of these briefings.

29. The Commissioner notes that the termination of this contract led the Council to “write off” some two million pounds worth of public funds; in the circumstances, the Council’s decision to rely on informal briefings generating no recorded information during the lifetime of the project appears questionable at least, in terms of accountability and transparency.

### **Withheld information**

30. Given the lack of recorded information falling within scope of Mr Chisholm’s request, the only information being considered in this case is the report that was laid before the Council on 19 February 2015, which is covered by part (i) of Mr Chisholm’s request. The Council has withheld this information in its entirety.

### **Regulation 10(5)(e) - prejudice to confidentiality of commercial or industrial information**

31. 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.
32. As with all of the 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)).
33. The Aarhus Convention: an Implementation Guide<sup>1</sup> (second edition), which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (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.
34. 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?*

35. The Council indicated that the information in question is commercial, relating as it does to the technology development and funding arrangements of a commercial company which is involved in commercial endeavours.

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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)

36. The Commissioner has reviewed the withheld information and is satisfied that, while the purpose of the report was to present recommendations for a decision by the Council, it is also commercial information, for the reasons given by the Council

*Does a legally binding duty of confidence exist?*

37. 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.
38. The Council submitted that clause 50 of the contract between the Council and NES ("Confidentiality") applied to the information withheld from Mr Chisholm. Clause 50.1 defines confidential information as:

*any and all information of a confidential nature relating to the other Party (whether before or after the Commencement Date), either in writing, orally or in any other form, directly from or pursuant to discussions with the other Party...*

39. The Council told the Commissioner that the withheld information was provided to the Council by NES. It argued that the withheld information is confidential as it relates to the financial health of NES and its ability to meet a regulatory requirement of the project.
40. Clause 50.2 of the contract states that, except in specified circumstances as set out in the clause (none of which are relevant here):

*Each Party shall hold in confidence any Confidential Information.*

41. Clause 50.3 goes on to list other situations where the obligation to maintain confidentiality shall not apply. One of these (clause 50.3.3), states that:

*... the obligation to maintain confidentiality does not apply to Confidential Information to the extent that any person is required to disclose such Confidential Information by Law (other than under [FOISA] or the [EIRs], disclosure pursuant to which is governed by Clause 50.3.7. and Clause 51.5) or any regulatory or government authority (but only to that extent).*

42. Clause 51.5 states that:

*The Council may disclose pursuant to a Request for Information or otherwise publish pursuant to [FOISA] or the [EIRs] any Information (whether Confidential Information, Commercially Sensitive Information or otherwise) which it considers, at its absolute discretion, that:*

*51.5.1 it is required in terms of [FOISA] or the [EIRs] to so disclose or publish; or*

*51.5.2 it would otherwise be in the public interest to so disclose or publish,*

*provided that in so doing the Council acts in accordance with the guidance set out in the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004], including by consulting with [NES] prior to any such disclosure or other publication, if and to the extent necessary to comply with that guidance.*

43. The Council takes the view that clause 50 of the contract requires it to keep confidential the information which it has withheld from Mr Chisholm. It acknowledged that clause 50.3.3 (as read with clause 51.5):

*recognises the existence of the Freedom of Information and Environmental Information Regulations*

but took the view that this reference related to:

*the entire scope of those legislative interventions. In other words, where an exemption applies, the Council should seek to preserve the integrity of the confidentiality agreement and act in accordance with that exemption.*

44. As with *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>2</sup>, 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.
45. Even if the duty of confidence does stand, the Commissioner must go on to consider the other tests in regulation 10(5)(e) before determining whether information should be withheld or disclosed. It is not enough that the information is subject to a duty of confidence.
46. Clause 51.5 of the contract underlines this approach. It recognises that, regardless of the agreement entered into by the Council and NES, there will be times when information must be disclosed by the Council in order to allow it to comply with its statutory duties under the EIRs (or, as appropriate, FOISA).
47. The Commissioner will now go on to consider whether a duty of confidence is owed by the Council to NES.
48. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
  - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
  - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
  - (iii) there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

#### Necessary quality of confidence

49. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here. Although the Council has disclosed information outlining the general reasons why it terminated the contract with NES, the specific detail of the withheld information is not in the public domain. The information in question will only

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



have been viewed by a limited number of individuals. It was clearly received under circumstances from which it should reasonably have been inferred that it was confidential.

50. The Commissioner is satisfied that when NES provided the withheld information to the Council, it did so in the expectation that the information contained therein would not be disclosed into the public domain during the lifecycle of the contract. The Commissioner also notes that when both parties re-signed the confidentiality agreement in March 2015 (once the contract was terminated), the confidentiality agreement restricted disclosure of confidential information for a period of six years from 31 March 2015.
51. The Commissioner considers that this indicates that the information had, and has retained, the necessary quality of confidence.

#### Obligation to maintain confidentiality

52. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
53. The Commissioner accepts that the information in question in this case was received under an explicit obligation to maintain confidentiality. Such an expectation would have been normal in relation to a contract of this kind.

#### Unauthorised disclosure would cause detriment

54. The third requirement is that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
55. In its submissions, the Council has provided the Commissioner with a number of examples of harm which it considers would result from disclosure of the information. These will be considered in more detail below. The detriment under consideration in this instance need only be potential for the test to be met, and the Commissioner is satisfied that the disclosure of the information in this case is potentially capable of causing detriment to NES.
56. The Commissioner is therefore satisfied that a legally binding duty of confidence exists.

#### *Is the information publicly available?*

57. The third factor to consider in relation to the exception in regulation 10(5)(e) is whether the information is publicly available. The Council has submitted that the withheld information is not publicly accessible and the Commissioner accepts this position.

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

58. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view the interest in question will be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial, and therefore of real and demonstrable significance.
59. The Council submitted that the withheld information is both commercial and industrial as it contains financial information about NES and its funding mechanisms, as well as details about technological processes and the testing and assessment of such processes.
60. The Council argued that disclosure of the withheld information would substantially harm the legitimate financial interests of NES. The information contains details about the technology which NES is developing as well as its financial arrangements and this information is commercially sensitive. The Council argued that disclosure of the information would reveal

confidential information about NES and its technology, and competitors would be able to use this information to the commercial disadvantage of NES. The Council indicated that if the information were to be disclosed it would cause substantial and serious harm to NES.

61. The Commissioner has considered all of these arguments carefully. While she is satisfied that some of the withheld information is highly sensitive and is critical to the commercial success of NES, she has concluded that some of it is not.
62. The Commissioner considers that disclosing information about the financial arrangements or technology developments of NES would, or would be likely to, cause substantial harm to its legitimate economic interests. The Commissioner accepts that disclosure of this information would be to the commercial disadvantage of NES and would harm both its commercial and financial interests. In the circumstances, the Commissioner accepts that the Council was entitled to apply the exception in regulation 10(5)(e) to this information.
63. However, some of the withheld information does not contain sensitive details of NES's finances or technology. Instead, it concerns the decision-making processes of the Council in relation to this matter, and shows how the Council reached the decision to terminate its contract with NES. The Commissioner does not consider that disclosure of this type of information would cause the harm that the Council has claimed, as it is not information which would enable a competitor of NES to gain any real commercial advantage.
64. Having considered all of the relevant tests, the Commissioner does not accept that the Council was entitled to apply the exception in regulation 10(5)(e) to information relating solely to the decision-making processes of the Council. She requires disclosure of this information.
65. Where the Commissioner has upheld the application of regulation 10(5)(e) of the EIRs, she will go on to consider the application of the public interest test contained in regulation 10(1)(b) of the EIRs.

#### *Consideration of the public interest*

66. Regulation 10(1)(b) of the EIRs states 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.
67. The Council acknowledged that there is a public interest in the disclosure of information to the public where a significant project has been pursued and thereafter terminated. The Council asserted that the public interest lies in securing the accountability of public bodies in such matters.
68. However, the Council argued that there is a significant public interest in withholding this particular information from the public domain. The Council submitted that the contract with NES was for a complex, technical solution and it was to be a contract of significant duration and cost. It believed there was a significant risk that contractors would be dissuaded from entering into such contracts with the public sector if they considered their confidential information was likely to be placed in the public domain as a result. Given that there is a public interest in the public sector being able to secure such contracts, to better enable it to provide vital services, the Council believed the public interest was best served by maintaining confidentiality for that reason.
69. The Council argued that it is vital, when entering into such significant contracts, that a local authority is in receipt of full and frank information on all aspects from contractors or possible

contractors. If such information was to find its way into the public domain there is a real risk that contractors would hesitate to provide such full and frank disclosure in future. This, in turn, would create a significant risk that an authority would be compromised in the diligence it could carry out. Again, the Council found a strong public interest in protecting the confidentiality of information in these circumstances.

70. On balance, the Council submitted that the public interest in withholding the information outweighed the public interest in disclosure, in these circumstances.
71. Mr Chisholm submitted that when the Council entered into this contract, taxpayers were told it was a £65 million contract over 24 years which would divert 80 per cent of waste from landfill, provide heat and power for hundreds of homes in Galashiels and place the Council as the leading waste management authority in Scotland. Instead, the Council has lost sizeable sums of public money on a project which could not be funded and did not have the necessary technology to guarantee success. Mr Chisholm told the Commissioner that the Council is now at, or near, the bottom of the Scottish recycling league.
72. Mr Chisholm stated that, after attending a two-day trip to the NES energy recovery plant at Avonmouth, Bristol in October 2014, leading councillors expressed public satisfaction with what they had seen and were convinced the Council would see wide-ranging benefits by developing a plant using the same technology. Mr Chisholm asserted that within a few weeks of this meeting (19 February 2015) the entire project and the accompanying contract were terminated and completely abandoned during a private sitting of the Council. Mr Chisholm submitted that £2.2 million, which was expended on the scheme between 2011 and 2015, was written off without any public explanation.
73. Mr Chisholm argued that there is an overwhelming public interest argument for full disclosure.

#### *Commissioner's conclusions*

74. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves large sums of public money. The Commissioner notes that the Council had to "write off" more than £2,000,000 worth of public money when the contract with NES was terminated. This alone ensures that there is significant public interest in information which would promote public understanding of the background to this decision.
75. Having considered the specific information to which the exception in regulation 10(5)(e) has been found to apply, the Commissioner notes that it focuses primarily on the technology and financial arrangements of NES.
76. The Commissioner has considered the public interest arguments put forward by the Council. She does not consider it likely that businesses would refrain from entering into contracts with the Council if information in this case were disclosed, but she accepts that businesses may be less willing to share sensitive information with the Council if this happened. The information contains sensitive details about NES's financial arrangements and technological developments, and the Commissioner accepts that its disclosure could result in contractors being more reticent about sharing information with the Council in future.
77. It is in the public interest for any business that enters into contract with the Council to feel able to share detailed information with it, so that the Council can make decisions based on a full understanding of the contractor's position. If businesses withheld critical information from the Council for fear that it might be disclosed into the public domain, the Council would be

disadvantaged in any contract as it would be forced into making decisions without being in possession of all of the facts. This would not be in the public interest.

78. The Commissioner has acknowledged that disclosure of information about the financial arrangements and technology developments of NES would, or would be likely to, cause substantial harm to the legitimate economic interests of NES. She accepts that this would not be in the public interest.
79. On balance, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
80. The Commissioner will provide the Council with a marked up version of the information which has been withheld from Mr Chisholm showing what additional information should be disclosed (i.e. the information which was wrongly withheld under regulation 10(5)(e)).

## Decision

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The Commissioner finds that Scottish Borders Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Chisholm.

The Commissioner finds that by correctly applying the exception contained in regulation 10(5)(e) of the EIRs to some of the information it was withholding from Mr Chisholm, the Council complied with the EIRs.

However, by wrongly applying the exception contained in regulation 10(5)(e) to other information it was withholding from Mr Chisholm, the Council failed to comply with part 5 of the EIRs.

The Commissioner therefore requires the Council to disclose information that was wrongly withheld under regulation 10(5)(e) of the EIRs by **17 June 2016**.

## Appeal

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Should either Mr Chisholm or Scottish Borders Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## Enforcement

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If Scottish Borders Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Scottish Borders Council has failed to comply. The Court has the right to inquire into the matter and may deal with Scottish Borders Council as if it had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**03 May 2016**

## Appendix 1: Relevant statutory provisions

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### 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

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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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