

# Decision Notice

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**Decision 099/2015: Mr X and Dunbritton Housing Association Ltd**

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**Transfer of the Brown Street Complex, Haldane by West Dunbartonshire Council**

Reference No: 201402883

Decision Date: 06 July 2015



Scottish Information  
Commissioner

## Summary

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On 21 July 2013, Mr X asked Dunbritton Housing Association Ltd (Dunbritton) for information relating to the transfer of shops and flats in Brown Street, Haldane by West Dunbartonshire Council. Dunbritton informed Mr X that it was not covered by the EIRs and refused to respond to his subsequent requirement for review. On 2 June 2014, the Commissioner issued *Decision 118/2014* finding that Dunbritton is a Scottish public authority for the purposes of the EIRs and requiring it to carry out a review. Dunbritton carried out the review and informed Mr X of the outcome on 14 July 2014. Dunbritton disclosed information to Mr X, but withheld some on the basis that it was excepted from disclosure under the EIRs.

On 21 December 2014, Mr X made a further application to the Commissioner. During her investigation Dunbritton argued that it was not a Scottish public authority for the purposes of the EIRs.

The Commissioner found that:

- (i) Dunbritton is a Scottish public authority for the purposes of the EIRs (as she had previously found in *Decision 118/2014*) and
- (ii) Dunbritton had responded to Mr X's request for information in accordance with the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "the Act"; definitions (a), (b), (c), (e) and (f) of "environmental information" and definitions of "Scottish public authority"); 5(1) and (2) (Duty to make available environmental information on request); 6(1)(a) (Form and format of information); 9(1) (Duty to provide advice and assistance); 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 21 July 2013, Mr X wrote to Dunbritton asking for all information held in connection with the transfer of the Brown Street parade of shops and flats in Haldane by West Dunbartonshire Council at nil value. Mr X stated that he was making his request under the EIRs. Mr X asked for the information to be provided in electronic format where it was held in such a format. Mr X also asked Dunbritton to explain, "under the duty to advise and assist", what information it held in connection with the transfer and where it was held.
2. Dunbritton responded on 31 July 2013. It informed Mr X that the EIRs did not apply to it and that it would not be responding to his request.
3. On 2 August 2013, Mr X wrote to Dunbritton requesting a review of its decision (in line with regulation 16 of the EIRs). Mr X disagreed that the EIRs did not apply to Dunbritton.
4. Dunbritton did not respond to Mr X's request for review.

5. On 18 September 2013, Mr X applied to the Commissioner for a decision. The Commissioner subsequently issued *Decision 118/2014 Mr X and Dunbritton Housing Association Ltd*<sup>1</sup>. The Commissioner found that Dunbritton was a Scottish public authority for the purposes of the EIRs and required it to carry out a review and to notify Mr X of the outcome. The Commissioner was satisfied that Dunbritton was a Scottish public authority by virtue of definition (d) of regulation 2(1) (definition of Scottish public authorities) of the EIRs. This was on the basis that Dunbritton had public responsibilities relating to the environment and was under the control of the Scottish Housing Regulator (SHR).
6. On 14 July 2014, Dunbritton notified Mr X of the outcome of its review. Dunbritton disclosed information to Mr X which it considered comprised environmental information falling within the scope of his request. Dunbritton withheld some information on the basis that it was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. This was on the basis 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. Dunbritton also withheld some information in terms of regulation 11(2) of the EIRs on the basis that it comprised personal data, the disclosure of which would breach the first data protection principle in the Data Protection Act 1998 (the DPA). Dunbritton informed Mr X that it held relevant information in both its paper and electronic filing systems.
7. On 21 December 2014, Mr X wrote to the Commissioner. Mr X 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 X stated that he was dissatisfied with the outcome of Dunbritton's review. Mr X did not accept that the information disclosed to him by Dunbritton was the entire information falling within the scope of his request. He also considered Dunbritton was not entitled to withhold information in terms of regulations 10(5)(e) and 11(2) of the EIRs. Additionally, he considered Dunbritton had failed to provide him with adequate advice and assistance. Finally, he expressed dissatisfaction with the provision of information in the form of electronic pdf files.

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority (as defined in regulation 2 of the EIRs) and asked the authority to review its response to that request before applying to her for a decision.
9. On 13 January 2015, Dunbritton was notified in writing that Mr X had made a valid application. Dunbritton was asked to send the Commissioner the information withheld from him. Dunbritton provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Dunbritton 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.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201302209.aspx>

11. Dunbritton responded on 27 March 2015. Dunbritton provided submissions justifying its reliance on regulations 10(5)(e) and 11(2) of the EIRs to withhold information from Mr X. It also explained the searches it had undertaken in order to locate and retrieve all relevant information and commented on the additional matters raised in Mr X's application. At this stage, Dunbritton also argued that it was not a Scottish public authority for the purposes of the EIRs.
12. During the investigation, Mr X also provided submissions to the Commissioner in support of his application.

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

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13. 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 X and Dunbritton. She is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

14. Having viewed the withheld information, the Commissioner is satisfied that it comprises environmental information as defined in regulation 2(1) of the EIRs. It comprises information on factors affecting or likely to affect the state of the elements of the environment in definition (a) (definition (b)); information on measures affecting or likely to affect those elements (definition (c)) and information on cost benefits or other economic analyses and assumptions used within the framework of the measures and activities referred to in definition (c) (definition (e)). Dunbritton has not disputed that the information comprises environmental information and the Commissioner will consider her decision in what follows solely in terms of that regime.

### **Is Dunbritton a Scottish public authority as defined in the EIRs?**

15. The Commissioner had previously found (in *Decision 118/2014*) that Dunbritton **is** a Scottish public authority for the purposes of the EIRs. The Commissioner was satisfied that Dunbritton was under the control of SHR on the basis that SHR could oversee and direct Dunbritton's affairs by virtue of its extensive powers of regulation and intervention. These powers of regulation and intervention are contained in the Housing (Scotland) Act 2010 (the 2010 Act). The Commissioner was also satisfied that Dunbritton had public responsibilities relating to the environment. Accordingly, Dunbritton met definition (d)(i) of "Scottish public authority" in regulation 2(1) of the EIRs.

#### *Dunbritton's submissions*

16. In its submissions to the Commissioner in this case, Dunbritton argued that it did not fall within the scope of the definition of "Scottish public authority" for the purposes of the EIRs. Dunbritton accepted that it has public responsibilities relating to the environment, but argued that it was not under the control of SHR.
17. Dunbritton argued that, whilst SHR could exercise a range of powers against Dunbritton, the requisite control was not present. In Dunbritton's view, the control test contained in the EIRs was a high threshold test to the extent that the party exerting control must have the power to direct the affairs of the party against which control was being exerted from a statutory, financial or contractual point of view.
18. Dunbritton considered that, whilst SHR has extensive regulatory powers of intervention in relation to registered social landlords (RSLs), it does not exercise those powers as a matter

of course. Dunbritton argued that these powers are only exercisable to the extent that SHR considers an RSL “is in default in the carrying out of its functions in a manner not conducive to the RSL’s core service users”. By this, the Commissioner understands Dunbritton to be arguing that SHR will only become involved if it considers that an RSL is failing in some way. In Dunbritton’s view, unless and until this occurs, RSLs are free to determine in a genuinely autonomous manner the way in which they exercise their core functions. Dunbritton considered the fact that this autonomy exists serves in itself to relinquish the practical efficacy of any such control by SHR on a day to day basis.

19. Dunbritton also submitted that the potential for control is not enough; in its view, the control has to be operating in practice and have a decisive impact on the target’s decision-making.
20. Dunbritton referred to the decision of the Upper Tribunal (Administrative Appeals Chamber) in *Fish Legal v Information Commissioner, United Utilities plc, Yorkshire Water Services Ltd and the Secretary of State for the Environment, Food and Rural Affairs* [2015] UKUT 52 (AAC)<sup>2</sup>. This decision considered whether private water companies are public authorities for the purposes of the (UK) Environmental Information Regulations 2004 (the UK EIRs)). Dunbritton noted that the Upper Tribunal had concluded that the water companies were not under the control of any other public body.
21. Dunbritton referred to paragraph 141 of the Upper Tribunal’s decision which stated:

“... autonomy has to be judged not by reference to absolute liberty, but against the normal background radiation of the constraints that limit the freedom of action for every business”.
22. Dunbritton also quoted paragraph 155 which stated:

“The control test is a demanding one that few commercial enterprises will satisfy. The companies’ functions may be fixed by law and by their Licenses, but the test is concerned with the way in which they exercise those functions. They are subject to stringent regulation and oversight and there is the potential for extensive involvement and influence over the way in which they perform their services. But the evidence falls far short of showing that the Secretary of State, [Water Services Regulation Authority] and the [Environment Agency] influence their performance, individually or collectively, whether by actual intervention or by more subtle forms of influence, to such an extent that the companies have no genuine autonomy of action.”
23. In Dunbritton’s view, the circumstances considered by the Upper Tribunal, although relating to the UK EIRs, were analogous to the position of RSLs in Scotland. It submitted that the control test contained in regulation 2 of the EIRs in relation to SHR was not satisfied and Dunbritton was not a public authority for the purposes of the EIRs.

#### *The Commissioner’s view*

24. The Commissioner has considered firstly Dunbritton’s submissions concerning the decision of the Upper Tribunal. The Commissioner notes that the decision of the Upper Tribunal concerned the application of the UK EIRs. This decision is not binding on the Commissioner, who is considering the application of the Scottish EIRs.

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<sup>2</sup> [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKUT/AAC/2015/52.html&query="freedom+of+information+act+2000"&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKUT/AAC/2015/52.html&query=)

25. The Upper Tribunal had previously referred the case to the Court of Justice of the European Union (CJEU) to answer five questions. This included a request to the CJEU to define what was meant by a person being “under the control of” a body or person for the purposes of Article 2(2)(c) of Directive 2003/4/EC<sup>3</sup> (the Directive). (This is the source of part (d) of the definition of “Scottish public authority” in regulation 2(1) of the EIRs.)
26. The CJEU delivered its ruling on 19 December 2013<sup>4</sup>. The CJEU ruled that bodies such as the water companies which provided public services relating to the environment were under the control of a body or person falling within Article 2(2)(a) or (b) of the Directive. Accordingly, in the CJEU’s view, they should be classified as public authorities by virtue of Article 2(2)(c) of the Directive.
27. As the decision of the Upper Tribunal is not binding on the Commissioner, she has looked to the ruling of the CJEU for guidance on the control test laid down in Article 2(2)(c) of the Directive.
28. In the CJEU’s view, the precise meaning of the concept of “control” in Article 2(2)(c) of the Directive must be sought by taking account of the Directive’s own objectives. The objectives are, in particular, to guarantee the right of access to environmental information, to set out the basic terms and conditions and arrangements for exercise of that right, and to achieve the widest possible availability and dissemination of such information to the public.
29. The CJEU considered that Article 2(2)(c) of the Directive covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority is in a position to exert decisive influence on the entity’s action in that field.
30. The CJEU commented (at paragraph 69):

“The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned ... the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence”.
31. The CJEU also referred to the legal framework which laid down rules determining the way in which such companies must perform the (environmental) public functions with which they are entrusted. It stated that, where this framework includes administrative supervision intended to ensure that those rules are complied with by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy. This applied even where the “controlling” authority did not determine the companies’ day to day management (paragraph 71).
32. In conclusion, the CJEU’s view was that the water companies in this case were under the control of a relevant body. Therefore, they were considered to be public authorities by virtue of Article 2(2)(c) of the Directive, since a relevant public authority covered by Article 2(2)(a) or (b) of the Directive was in a position to exert decisive influence on their action in the environmental field.

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<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML>

33. Having considered the CJEU's ruling, the Commissioner remains satisfied that Dunbritton is a Scottish public authority for the purposes of the EIRs. The Commissioner considers that SHR's extensive powers of regulation and intervention (which she described in *Decision 118/2014*) equate to the decisive influence envisaged by the CJEU and which can be exerted on Dunbritton (and other RSLs) by SHR.
34. As noted at paragraph 30 above, the CJEU gave examples of the manner in which public authorities may exert decisive influence over a body. The Commissioner will not repeat all of the possible interventions which can be undertaken by SHR under its powers in the 2010 Act as these are set out in detail in *Decision 118/2014*. Nonetheless, she considers the actions which SHR can take, and can require bodies such as Dunbritton to take, do amount to "control" as defined in Article 2(2)(c) of the Directive and consequently as defined in regulation 2(1)(d) of the EIRs.
35. The Commissioner has also noted Dunbritton's position regarding SHR's regulatory intervention powers and its view that these powers were only exercisable when SHR considered a RSL was carrying out its functions in a manner not conducive to the RSL's core service users.
36. The Commissioner disagrees with Dunbritton's arguments on this point. The Commissioner concurs with the CJEU's view that, even where the controlling authority did not determine the water companies' day to day management, those bodies did not enjoy genuine autonomy. The Commissioner considers the position of Dunbritton to be analogous to that outlined by the CJEU in relation to the water companies.
37. The Commissioner considers that SHR's significant powers of oversight and direction contained in the 2010 Act, along with its extensive powers of intervention, amount to "control" for the purposes of the EIRs. In particular, the Commissioner notes the monitoring role of SHR in ensuring that RSLs progress towards achieving the standards required by the Scottish Government's Social Housing Charter (SSHC). The SSHC includes a criterion that tenants' homes should, as a minimum, meet the Scottish Housing Quality Standard (SHQS) by April 2015 and continue to meet it thereafter. (In *Decision 118/2014*, the Commissioner noted that the criteria of the SHQS fell within the definition of environmental information in regulation 2(1)(b), (c) and (f) of the EIRs.) The Commissioner considers that such administrative supervision meets the definition of "control" in the EIRs in relation to a body with public responsibilities in relation to the environment.

#### **Whether all relevant information has been identified by Dunbritton**

38. In his application to the Commissioner, Mr X stated that he did not accept that the information disclosed to him by Dunbritton was all the information it held which fell within the scope of his request.
39. Mr X referred to information concerning the Brown Street complex that had been disclosed to him previously by two Scottish public authorities. Mr X stated that the information disclosed to him was voluminous. He commented that the process surrounding the transfer of the complex took several years and involved numerous emails over the period in question. He considered such emails would have covered a range of matters concerning the process. He considered the information disclosed by Dunbritton could not be the only information which existed.
40. In its submissions to the Commissioner, Dunbritton explained the searches that it had undertaken of electronic and paper records in order to locate and retrieve relevant

information. Dunbritton explained that the searches had been undertaken by one of the principal officers involved in the overall regeneration programme (which included the Brown Street complex) and who knew the location of all relevant information.

41. Dunbritton stated that it had checked the appropriate directory in its server relating to the transfer. It had also checked relevant paper files within its Development filing system or within archived storage boxes. These covered the acquisition process for the Brown Street complex and subsequent feasibility study. Dunbritton explained that it had adopted a wide definition of environmental information within the context of the transfer of the Brown Street complex.
42. The Commissioner has considered Mr X's submissions. She has also considered Dunbritton's submissions, including its explanation of the searches undertaken and why these would have retrieved any recorded information falling within the scope of Mr X's request.
43. Having done so, the Commissioner is satisfied that Dunbritton has conducted adequate, proportionate searches in order to retrieve any relevant recorded environmental information falling within the scope of Mr X's request. She is satisfied, on the balance of probabilities, that Dunbritton holds no further information falling within the scope of the request. Consequently, the Commissioner is satisfied that, in this respect, Dunbritton complied with regulation 5(1) of the EIRs in responding to Mr X's request for information.

#### **Regulation 10(5)(e)**

44. 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.
45. As with all exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret it 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)).
46. The Aarhus Convention: an Implementation Guide (second edition)<sup>5</sup> offers guidance on the interpretation of the Aarhus Convention from which Directive 2003/4/EC and, subsequently, the EIRs, are derived. The Guide notes (at page 88) that the first test for considering 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 Guide, but its meaning is considered further below.
47. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>6</sup>. The Commissioner does not intend to repeat

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<sup>5</sup>[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)

<sup>6</sup><http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>



that consideration in detail here. The Commissioner has concluded 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?

48. The relevant submissions made by both Mr X and Dunbritton in relation to this exception are summarised below. Mr X made comprehensive and substantial submissions in support of his position that the exemption was not engaged. The Commissioner has considered all of these carefully. Although the Commissioner has taken full account of all of Mr X's submissions, only some of these are summarised below.

*Is the information commercial or industrial in nature?*

49. The information under consideration is contained within a feasibility and viability study carried out by a private consultancy firm in connection with the Brown Street complex and in the minutes of a meeting of Dunbritton Commercial Ltd (DCL), a now dormant subsidiary company of Dunbritton. The information relates generally to the tenancies of retail units, the costs associated with new developments, works to be carried out by Dunbritton at the Brown Street complex and possible future funding models available to Dunbritton.
50. Dunbritton submitted that the information withheld from the feasibility study was of a confidential commercial nature private to the business that was in the process of considering its options for managing the future use of the premises, and related in particular to possible rental charges and borrowing options for this commercial company. It submitted that the information withheld from the minutes relates to a commercial interest between two parties. As set out in its letter to Mr X on 14 July 2014, it argued that the information was commercial in nature as it related to tenancies, the proposed use of commercial property owned by it, works to be carried out at property owned by it and financial information relating to possible future funding models available to it. Mr X argued that the transfer of the Brown Street complex was not a commercial transaction; instead it was a governmental process involving local and central government using their respective statutory powers and an RSL acting within the parameters of the regulated social housing sector.
51. Mr X submitted that since the transfer was not a commercial transaction, it was not factually possible for it to be commercial in nature and therefore for commercial information to exist.
52. Mr X also argued that, for an operation, activity or pursuit to be commercial in nature, it had to be undertaken with a view to a profit. He submitted that Dunbritton's status as a not-for-profit organisation meant its activities could not be commercial.
53. In this case, the Commissioner is satisfied that the information in question is commercial in nature. In the Commissioner's view, the information relates to the consideration of financial options and the economic advantages and disadvantages to Dunbritton of various business-related options associated with works at the site and potential ongoing rental income. The Commissioner is satisfied that the information concerns the purchase and sale of goods and services in a commercial trading environment.

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

54. Mr X submitted that there was no blanket confidentiality accorded by law to social housing activities. He argued also that confidentiality “provided for by law” covered a situation where legislation provided for confidentiality. Mr X did not accept that any discussions with tenants and potential tenants was information received in confidence (by Dunbritton).
55. Dunbritton submitted that the information was confidential pursuant to the common law of confidence. In Dunbritton’s view, disclosure of the information would give rise to an actionable breach of confidence.
56. The Commissioner considers that, in terms of regulation 10(5)(e), confidentiality “provided for by law” will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation, or by statute.
57. Having considered the nature and context of the withheld information, which concerns negotiations and potential commercial relationships with third parties (including tenants), the Commissioner is satisfied that Dunbritton was under an implied obligation to maintain the confidentiality of the information under consideration.

*Is the information publicly available?*

58. Mr X argued that the content, context and purpose of the withheld information was the transfer of the Brown Street complex and that this was a public process devised and executed in a non-confidential environment.
59. Mr X also argued that the transfer of the Brown Street complex formed part of a public process which was neither confidential nor private. He submitted that the issue of confidentiality had not been raised in correspondence or in meetings which he had attended concerning the regeneration of the Haldane area. In Mr X’s view, it would be inconsistent for Dunbritton to argue now that the information was protected by confidentiality. He reiterated that the transfer had been a public process and Dunbritton could not assert in hindsight that the information was confidential.
60. Mr X further submitted that any construction work on the Brown Street complex was entirely funded by taxpayers’ money and was not funded by Dunbritton itself. He considered it disingenuous for Dunbritton to argue that there was a link between its ability to obtain funding for such development projects and the withheld information when such activities were funded entirely by Scottish Government grants.
61. Dunbritton submitted that the information in the feasibility and viability study was not publicly available by any means. It also contended that the information in the meeting minute comprised a minute of a meeting of a private company.
62. The Commissioner has considered the submissions from both parties. Having done so, she accepts that, at the time Dunbritton dealt with Mr X’s request and request for review, the withheld information was confidential in nature and was being treated confidentially and that no part of the withheld information was in the public domain. The Commissioner notes Mr X’s view that the context in which the information was held formed part of a public process. However, the Commissioner does not accept that this resulted in any of the information in question being placed in the public domain.

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

63. The term “legitimate economic interest” is not defined in the EIRs or in the Aarhus Convention Implementation Guide. In the Commissioner’s view, the interest(s) in question will be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
64. Mr X argued that Dunbritton’s activities did not have commercial sensitivity. In his view, Dunbritton did not compete with others in the open marketplace: competition was not a relevant factor in social housing, and the concept of profits was irrelevant to Dunbritton’s core operation of social housing. Mr X submitted that Dunbritton’s development costs were funded by taxpayers’ money awarded by the Scottish Government and so commercial and economic interests were irrelevant.
65. Dunbritton submitted that disclosure of the information would substantially prejudice its legitimate economic interests in the form of its commercial interests. It argued that disclosure of information relating to its approach to commercial tenancies could be used by prospective future tenants to their advantage and to Dunbritton’s disadvantage: it would reveal Dunbritton’s “bottom line” or negotiated position in relation to rent levels and acceptable uses to which commercial property could be put.
66. Dunbritton also argued that disclosure of the withheld information relating to its financial options would reveal its financial position, which could affect its ability to obtain funding in connection with such development and regeneration projects in future.
67. The Commissioner has considered all of the submissions from both Mr X and Dunbritton. Having done so, she is satisfied that disclosure of the withheld information would have been likely to cause significant harm to a legitimate economic interest.
68. The Commissioner accepts that, given the level of detail contained within the withheld information, disclosure would have a significant detrimental effect on Dunbritton. In particular the Commissioner accepts that disclosure of the information would affect Dunbritton’s ability to obtain funding for future projects. She also accepts that disclosure would allow significant insight into Dunbritton’s general approach to commercial tenancies which could be used to its disadvantage in future negotiations with tenants and prospective tenants, thereby inhibiting substantially its ongoing commercial activities.
69. For these reasons, the Commissioner accepts that disclosure of the withheld information would have been likely to cause substantial prejudice to Dunbritton’s legitimate economic interests and that it was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the withheld information.

*The public interest test*

70. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Mr X, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. The public interest test 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.

71. In Mr X's view, it was in the public interest, as well as for the common good of society at large, for the process of the transfer of the Brown Street complex to be subject to openness, transparency and accountability through disclosure of the withheld information.
72. Mr X provided additional submissions explaining why he considered it was in the public interest for the information to be disclosed. In his view, disclosure would allow scrutiny of the actions of public bodies to ensure they had acted in accordance with the law and on the basis of factually accurate information. Mr X also considered that disclosure of the information would allow individuals in a position of power and influence to be held to account.
73. Mr X further submitted that disclosure of the information would allow scrutiny of the actions of various public authority employees and would shed light on the system which allowed the transfer to take place by subjecting it to transparency, openness and accountability.
74. Dunbritton acknowledged that there was a broad public interest in the transparency of Scottish public authorities in order to enhance understanding of their decision-making and the management of their assets.
75. However, Dunbritton considered there was an overwhelming public interest in authorities being able to enter into and negotiate commercial relationships with third parties without fear of their thinking, financial position and options relative to such matters being made publicly available. In Dunbritton's view, disclosure could, in turn, have a consequential impact upon the ability of an authority to enter into future commercial arrangements.
76. The Commissioner has considered carefully the public interest arguments presented by both parties. She must consider the actual circumstances of each case, taking into account the arguments presented to her.
77. The Commissioner recognises the clear public interest in understanding the processes followed by Dunbritton in relation to the transfer of the Brown Street complex, including its consideration of financial and other options available at the time. The Commissioner accepts that this would improve public understanding of the decisions taken by Dunbritton.
78. On the other hand, the Commissioner has already concluded that disclosure of the withheld information would be likely to cause substantial harm to a legitimate economic interest and also that an implied duty of confidence exists in relation to this information. As she has recognised in previous cases, there is a strong public interest in maintaining confidentiality.
79. The Commissioner has accepted that disclosure of the information would place Dunbritton in an unfavourable position (to the extent of causing substantial prejudice to its legitimate economic interests) by adversely affecting its ability to secure future funding and its ability to negotiate with tenants and prospective tenants. In the Commissioner's view, it is strongly in the public interest for organisations such as Dunbritton to be able to carry out their commercial activities in an equitable manner.
80. While there will be circumstances in which the public interest requires the disclosure of information, even if substantial prejudice may result, the Commissioner does not believe that this is justified in this case. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(5)(e). The Commissioner therefore finds that Dunbritton was entitled to withhold the information under this exception.

81. As the Commissioner has concluded that Dunbritton was entitled to withhold the information under the exception in regulation 10(5)(e), she is not required to consider whether Dunbritton was entitled to withhold any part of that information in terms of regulation 11(2) of the EIRs.

### **Advice and assistance**

82. Regulation 9(1) of the EIRs provides that a Scottish public authority shall “provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants”.
83. In his application to the Commissioner, Mr X stated that Dunbritton had failed to provide advice and assistance. He notes that he had asked Dunbritton for an explanation of what information it held and where it was held. He stated that Dunbritton had not provided an explanation.
84. Dunbritton argued that it had provided an explanation to Mr X. It stated that, in its review response of 14 July 2014, it had informed Mr X that it held information in both its paper and electronic filing systems. It had also provided him with a list of all relevant documents falling within the scope of his request which comprised environmental information.
85. In this case, the Commissioner notes that, although Mr X prefaced this part of his request with the words “*under the duty to advise and assist*”, he was essentially making an information request under regulation 5(1) of the EIRs. The Commissioner is satisfied that Dunbritton responded to this part of the request in its review response of 14 July 2014. As such, the Commissioner does not consider that it would have been reasonable to expect Dunbritton to provide any further advice and assistance to Mr X. Accordingly, the Commissioner does not accept that Dunbritton failed to comply with regulation 9(1) of the EIRs in responding to Mr X’s request.

### **Form and format of information**

86. Regulation 6(1)(a) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless it is reasonable for it to make the information available in another format.
87. In his request to Dunbritton, Mr X stated that he “*would like the information in electronic format where it is held in electronic format*”. Dunbritton subsequently disclosed information to Mr X in the form of electronic documents in pdf format.
88. In his application to the Commissioner, Mr X stated that the provision of information to him as pdf files was not in the format that he had requested. Mr X argued that FOI was a right to information held by a public body; it was not a right to documents prepared containing that information and presented in a pdf format. Mr X believed that disclosing information as pdf documents was inconsistent with the provisions of relevant legislation and the spirit of the EIRs.
89. Dunbritton explained that all of the information falling within the scope of Mr X’s request existed in electronic and paper format at the date of his request. In light of the environmental and accessibility benefits associated with electronic information and Mr X’s prima facie desire for information to be provided in electronic format where available, Dunbritton considered the most reasonable means of providing the information was in electronic format.
90. Having considered the terms of Mr X’s request, the Commissioner is unable to accept that his request should be interpreted as requiring access to the information specified in any particular electronic format (or otherwise than in any particular format). The request simply

asks for the information in electronic format where it is held in electronic format. In the circumstances, the Commissioner considers it reasonable for any information held electronically to have been provided in electronic pdf format. The Commissioner also considers it reasonable for any information held in paper format to have been provided by way of pdf documents.

91. In the circumstances, the Commissioner does not consider that Dunbritton was obliged in terms of regulation 6(1)(a) of the EIRs to provide the information requested by Mr X in any particular electronic format. She is satisfied that the information provided to Mr X satisfied the terms of his request as specified to Dunbritton.

## **Decision**

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The Commissioner finds that Dunbritton Housing Association Ltd complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr X.

## **Appeal**

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Should either Mr X or Dunbritton Housing Association Ltd 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.

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

**06 July 2015**

### 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

-

- (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;

...

- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

“Scottish public authority” means –

- (a) any body which, any other person who, or the holder of any office which is-
  - (i) listed in schedule 1 to the Act (but subject to any qualification in that schedule), or
  - (ii) designated by order under section 5(1) of the Act;
- (b) a publicly-owned company as defined by section 6 of the Act;
- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and
- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and-

- (i) has public responsibilities relating to the environment;
- (ii) exercises functions of a public nature relating to the environment; or
- (iii) provides public services relating to the environment;

...

## **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.

...

## **6 Form and format of information**

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
  - (a) it is reasonable for it to make the information available in another form or format;
  - or

...

## **9 Duty to provide advice and assistance**

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

## **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;

...



**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**