

Decision Notice

Decision 108/2015: Mr Harald Tobermann and City of Edinburgh Council

Road and Pavement Repairs

Reference No: 201402878

Decision Date: 9 July 2015



Scottish Information
Commissioner

Summary

On 17 October 2014, Mr Tobermann asked City of Edinburgh Council (the Council) for a list of defects relating to recent road and pavement works on a section of Leith Walk, Edinburgh.

The Council considered the request under the EIRs and refused to provide the information, for reasons including commercial confidentiality. Following a review, Mr Tobermann remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had correctly withheld the information under regulation 10(5)(e) of the EIRs, on the basis of commercial confidentiality.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available); 13(a) (Refusal to make information available).

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

Background

1. On 17 October 2014, Mr Tobermann made a request for information to the Council. He asked for a list of all snagging/defect items (not necessarily agreed with contractors), including location references, relating to recent road and pavement works [on Leith Walk, Edinburgh] between Iona Street and Dalmeny Street. Mr Tobermann asked that the information should include items already resolved, not yet communicated to the contractor or under dispute, although he was agreeable that the status of items might be redacted.
2. The Council responded on 19 November 2014. It informed Mr Tobermann that his request had been considered under the EIRs and refused his request on the basis that regulations 10(5)(b) and (e) applied.
3. On 20 November 2014, Mr Tobermann wrote to the Council, requesting a review of its decision and its reasons for withholding the requested information. He was unclear why disclosure of the information would hinder any possible future legal action against the contractor. Mr Tobermann also queried why the Council had not issued its response earlier than it did.
4. The Council notified Mr Tobermann of the outcome of its review on 18 December 2014. The Council maintained its position, providing further explanation to support its reliance on regulations 10(5)(b) and (e) in withholding the information. The Council also gave reasons for the time taken to provide its initial response.
5. On 19 December 2014, Mr Tobermann wrote to the Commissioner, applying 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 Tobermann did not accept the reasons given for refusing his request as adequate, or consider the Council had explained adequately why the original response was not issued earlier.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Tobermann 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 27 January 2015, the Council was notified in writing that Mr Tobermann had made a valid application. The Council was asked to send the Commissioner the information withheld from him. 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, with particular reference to the application of regulations 10(5)(b) and (e) (as highlighted in Mr Tobermann's application). The Council was also invited to comment on the time taken to issue its initial response.

Commissioner's analysis and findings

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 Tobermann and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. It is clear from the Council's correspondence with both Mr Tobermann and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. This view is confirmed by consideration of the information itself. The information relates to the condition and repair of roads and pavements, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (as information on the state of the elements of the environment, in particular land and landscape) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements). Mr Tobermann has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

11. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
12. 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.

Regulation 10(5)(e)

13. 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.
14. 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)).
15. The Aarhus Convention: an Implementation Guide¹, 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.
16. 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?

17. The Council explained that the withheld information was commercial in nature as it related directly to carriageway and footway improvements undertaken by the contractor, identified as not meeting the specifications set out in the contract. Both the Council and the contractor had clear commercial interests in the successful completion of the contract, and the information sought related directly to this.
18. Having considered the withheld information, the Commissioner accepts that the information is commercial in nature, for the reasons argued by the Council.

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

19. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
20. In his application to the Commissioner, Mr Tobermann argued that, had there been a confidentiality clause in the contract, this should have been explicitly stated when the Council

¹http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

refused his request. He further submitted that there was no evidence that disclosure of the information would have violated a confidentiality clause.

21. In its submissions to the Commissioner, the Council submitted that there were both explicit and implied obligations of confidentiality applicable to the information. It provided the Commissioner with evidence of the confidentiality clause in the contract, prohibiting either party from disclosing to a third party information obtained in connection with the contract (except where necessary to allow them to carry out their duties under the contract). In this case, it argued, the duty of confidentiality remained in force while the contract was still live, and thereafter during the defects liability period (which ended on 19 December 2015).
22. The Commissioner has considered the withheld information, in the context of the request and the confidentiality clause. In the circumstances, she is satisfied that the duty of confidence created by the confidentiality clause applied to the withheld information, at the time the Council responded to Mr Tobermann's request and his requirement for review.

Is the information publicly available?

23. In his application to the Commissioner, Mr Tobermann argued that some defects were in the public domain, being visible on pavements and streets. In its submissions, the Council did not accept that the requested information was publicly available.
24. The Commissioner acknowledges that defects in work such as this will be evident to the public, at least in part. It does not follow that what is evident to the public will correspond with what the Council has identified as aspects in which the works do not (or may not) conform to the requirements of the relevant contract. Mr Tobermann has asked for information on the latter, and the Commissioner accepts the Council's submission that this is not information which was (or is) publicly available.

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

25. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
26. In his application to the Commissioner, Mr Tobermann argued that it was not unusual for defective works to be identified and addressed during a contract. He did not see why disclosure of such information should impact on the successful completion of the contract. If there were concerns about the reputation of the contractor, he submitted, the information could be suitably qualified to protect this.
27. Mr Tobermann also queried whether the Council had consulted the contractor about disclosure of the information, or had considered disclosing the information in a redacted form.
28. The Council submitted that disclosure of the withheld information would, or would have been likely to, cause substantial harm to the contractor's economic interests when tendering for future work. It argued that competitors could use this information to imply quality issues with the contractor's work, without the contractor having had the opportunity to correct any defective works, and this would disadvantage the contractor when competing for future tenders.
29. The Council supplied copies of correspondence evidencing consultation with the contractor on disclosure of the withheld information. From these, it is apparent that the contractor

highlighted the concerns identified in the preceding paragraph. It highlighted (as did the Council) that defects are commonly identified during a contract but not always due to the contractor: taking such information out of context would have the potential to unfairly harm its reputation, and compromise its ability to be competitive when tendering for future work.

30. The Council acknowledged that it had withheld the information in full, rather than providing redacted versions. It submitted that to provide redacted versions of the notices, at the time of Mr Tobermann's request or subsequently, would place into the public domain information relating to the ongoing contract. The Council argued that this would adversely impact upon its ability to achieve the best value outcome for its citizens.
31. Having considered these submissions and the information itself, the Commissioner that accepts that disclosure of the information, even in redacted form, would link the defects to the contractor. While the Commissioner notes that it is not uncommon for defects to be identified during the course of a contract, and would query the Council's (and the contractor's) assertion that this will not readily be understood, she acknowledges that the risk of (potentially unfair) harm to the contractor's reputation is a real one. She accepts that it is unlikely to be practicable to separate the defects information from the contractor's information, so that the risk of harm can be mitigated. In the circumstances, the Commissioner is satisfied that disclosure of the withheld information would have been likely to cause substantial harm to a legitimate economic interest.
32. The Commissioner is satisfied, therefore, that the Council was entitled to apply the exception in regulation 10(5)(e) to the information requested.

The public interest

33. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Mr Tobermann, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This 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.
34. Although he was given the opportunity to do so, no submissions were provided by Mr Tobermann as to why he considered public interest to favour disclosure of the information.
35. The Council acknowledged there was a public interest test in being open and transparent in relation to its commercial dealings, demonstrating it was achieving best value in its use of public funds. It argued, however, that this was already catered for through reports to its Committees, particularly its Finance and Resources Committee. The Council also recognised that disclosure of the withheld information would illustrate it was not accepting sub-standard works, and was having these addressed by the contractor.
36. In contrast, the Council considered there was no public interest in disclosing information that would have an unfair adverse impact on the contractor's reputation, and consequently on its commercial interests. The Council further submitted there was a public interest in maintaining an expectation of confidentiality, and sustaining positive working relations with contractors, to achieve successful completion of the contract.
37. The Council concluded that it was not in the public interest for the information to be disclosed, as the public interest in being open and transparent was outweighed by the public interest in maintaining confidentiality and ensuring that a legitimate economic interest was not harmed substantially.

The Commissioner's view

38. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial harm to a legitimate economic interest, and also that a duty of confidence existed (and continues to exist) in relation to this information. As she has recognised in previous cases, there is a strong public interest in maintaining confidentiality.
39. The Commissioner also recognises there is a considerable public interest in transparency and accountability in relation to contracted works funded by the public purse. There is a public interest in ensuring that such works are completed effectively, to the standard required by the relevant contract.
40. The Commissioner has considered carefully all the public interest arguments she has received. She must consider the actual circumstances of the case, including the timing where relevant. The question is whether the Council was correct in its decision, at the time it responded to the request. That position may change in time: the Council has acknowledged that it will, as the status of the contract changes, but the issue here is whether the Council responded to this particular request correctly.
41. In all of the circumstances of the case, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Council responded to Mr Tobermann's request. She therefore concludes that the Council was entitled to withhold this information under regulation 10(5)(e) of the EIRs.
42. As the Commissioner has determined that the information has been correctly withheld under regulation 10(5)(e), she is not required to go on to consider the application of regulation 10(5)(b).

Other area of dissatisfaction

43. Mr Tobermann also submitted that the Council failed to fully address why its initial response was not issued earlier.
44. Regulation 13(a) of the EIRs (subject to qualifications which are not relevant here) requires a Scottish public authority, when refusing to make environmental information available, to issue the refusal as soon as possible, and in any event no later than 20 working days following the date of receipt of the request for the information.
45. Mr Tobermann made his information request on 17 October 2014 and the Council responded on 19 November 2014. This was outside the statutory timescale. The Council acknowledged this, both in responding to Mr Tobermann's requirement for review and in its submissions to the Commissioner.
46. The Commissioner is critical of any failure to meet statutory timescales, but given the Council's acknowledgement at review, and given the review response was issued within statutory timescales, the Commissioner makes no finding on the matter. She urges the Council to reflect on what lessons might be learned from this case and how the situation might be avoided in the future.

Decision

The Commissioner finds that City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Tobermann.

Appeal

Should either Mr Tobermann or City of Edinburgh 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.

Rosemary Agnew
Scottish Information Commissioner

9 July 2015

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;

...

(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;

...

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;

...

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