

# Decision Notice

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**Decision 156/2017: Company X and Dumfries and Galloway Council**

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**Waste: contracts, correspondence, data and licences**

Reference No: 201700196

Decision Date: 18 September 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for a range of information about waste management, including contracts, correspondence, data and licences.

The Council initially stated that the request was manifestly unreasonable. The Commissioner considered this matter in her Decision 230/2016 (dated 27 October 2016). She did not find the request manifestly unreasonable and ordered the Council to carry out a further review. The Council did so, disclosing some information. The remainder was withheld under exceptions in the EIRs, including those relating to information not held and commercial confidentiality.

The requester did not accept the Council's reasons for withholding information and appealed to the Commissioner. It believed more information was held by the Council and ought to be disclosed. It complained that the Council had been unhelpful in its handling of this request.

During the investigation, the Council identified more information which it disclosed to the requester. The Commissioner is satisfied that the Council correctly applied an exception to some information and that it has now responded to this 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) (definitions (a), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), (4)(a) 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of the Freedom of Information (Scotland) Act 2002 (FOISA).

## Background

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1. On 14 January 2016, Company X made a request for information to Dumfries and Galloway Council (the Council). The information requested was:
    - a. any contracts or other agreements between the Council and Oakbank Services ("Oakbank") relating to or governing:
      - (i) the provision or delivery of waste by or on behalf of Oakbank Services to the Council; and/or
      - (ii) the collection of waste by Oakbank from the Council; and/or
      - (iii) the delivery of waste to Locharmoss MBT [mechanical biological treatment] plant, which is operated by Company X
- during the period April 2013 to July 2014 inclusive.

- b. correspondence (either electronic or in written form) and any notes of meetings or deliberations both a) internally within the Council and b) between the Council and Oakbank relating to:
    - (i) the provision or delivery of waste by or on behalf of Oakbank to the Council;
    - (ii) the collection of waste by Oakbank from the Council; and
    - (iii) the delivery of waste by Oakbank to Locharmoss MBT plant.
  - c. tonnage details by calendar month of all waste collected by Oakbank from 31 December 2011 until 30 June 2014;
  - d. any contracts or other agreements between the Council and the producers of waste which is being collected on the Council's behalf by Oakbank;
  - e. copies of all Waste Carrier's Licences held by the Council during each of the past three years; and
  - f. copies of all Waste Broker's Licences held by the Council.
2. The Council responded on 12 February 2016. The Council considered the request was manifestly unreasonable, in line with regulation 10(4)(b) of the EIRs.
  3. On 18 February 2016, Company X wrote to the Council, requesting a review of its decision that this request was manifestly unreasonable.
  4. The Council notified Company X of the outcome of its review on 18 March 2016. It upheld its original decision without modification.
  5. Company X appealed to the Commissioner (5 April 2016). The Commissioner investigated and issued her *Decision 230/2016: Company X and Dumfries and Galloway Council*<sup>1</sup> on 27 October 2016. She ordered the Council to respond afresh to the request for review. She also identified a failure to provide reasonable advice and assistance to Company X in respect of matters raised in that application.
  6. The Council carried out a further review and issued the outcome to Company X on 16 December 2016, disclosing some information. The Council redacted personal data from the disclosures, citing regulation 11(2) of the EIRs. It also stated that some information was not held, citing regulation 10(4)(a). It withheld the remainder of the information, applying exceptions under regulation 10(4)(e), 10(5)(d), 10(5)(e) and 10(5)(f) of the EIRs (see further below).
  7. On 27 January 2017, Company X wrote to the Commissioner's office, applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Company X stated it was dissatisfied with the outcome of the Council's review because it believed further relevant information was held by the Council and could be disclosed. Company X provided reasons why it did not agree with the Council's application of exceptions. Company X also submitted that it did not consider the Council to have provided adequate advice and assistance in relation to the request, contrary to regulation 9 of the EIRs.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600615.aspx>

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Company X 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.
9. On 21 February 2017, the Council was notified in writing that Company X had made a valid application. 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. The Council was invited to comment on this application and answer specific questions, with reference to the points raised by Company X in its application. The Council provided submissions in response to this invitation.

## Commissioner's analysis and findings

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11. 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 Company X and the Council. She is satisfied that no matter of relevance has been overlooked.
12. Company X has not expressed dissatisfaction in respect of
  - a) part e of the request,
  - b) the personal data identified and redacted as such in the disclosures, withheld under regulation 11(2) of the EIRs.
  - c) the information withheld under regulation 10(5)(d) as legally privileged communications between the Council and its solicitors.
13. Consequently, these matters need not be considered further in this decision.

### Application of the EIRs

14. It is clear from the Council's correspondence with both Company X and the Commissioner, and from the information itself, that the information sought by Company X is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. Company X has not disputed this and the Commissioner will consider the request in what follows solely in terms of the EIRs.

### Part f – Waste Brokers Licences

15. In part f of its request, Company X requested copies of Waste Brokers Licences held by the Council.
16. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. Whilst this duty is subject to certain qualifications, none of them appear to be relevant in this case.
17. For part f of the request, the investigating officer asked the Council to re-check its searches for licences, given that the licences identified in its review outcome only pertained to the Council.

18. The Council undertook further checks to clarify the situation, during which it identified further information (14 licences) it had not previously identified or disclosed. It disclosed this information to Company X on 25 July 2017 (subject, as agreed by Company X) to the redaction of any personal data in the licences).
19. In failing to identify and disclose this information at the time of its review (16 December 2016), the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.

### **Regulation 10(4)(a) – information not held**

20. The Council applied regulation 10(4)(a) of the EIRs, to confirm that it held no information in addition to that disclosed to Company X or withheld under exceptions in the EIRs.
21. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. The exception in regulation 10(4)(a) is subject to the public interest test.
22. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

#### *Submissions from Company X*

23. Company X provided arguments in support of its view that further information was held by the Council. It explained why it considered further contractual information should be held, submitting that the Council “misdirected itself” in failing to address this question and referring solely to contracts between itself and Oakbank.” Noting the Council’s statement that Oakbank collected waste on its behalf, Company X considered it reasonable to believe that the Council held a contract with the waste producers and engaged Oakbank as contractor to collect/transport waste generated by the producers. It did not accept that the Council would be collecting (and sub-contracting the collection of) non-domestic waste without such contracts.
24. Company X also expected the Council to hold further tonnage-related information, as specified in part c of the request, and also relative correspondence falling within the scope of part b. It noted that tonnage information had been sought from Oakbank in the past (citing an email it considered relevant) and identified skip hire and food waste as categories for which it believed data should be held.

#### *Submissions from the Council*

25. The Council explained the searches it undertook. With regard to tonnage data, it explained that it had a waste management database, but the data were collected on a quarterly (not monthly) basis and did not cover all waste collected by Oakbank. It noted that this was information collected from an external source and it did not create and store such information routinely itself: it was information from these records it had used to create a table disclosed previously.

26. The Council confirmed that it had also explored the possibility of there being other relevant central records and concluded that there were none. The only other potential source of data it had identified was within invoices held in its financial record systems. However, spot checks had confirmed that not all invoices contained the relevant data, so it was not possible to provide a full response from that source.
27. With regard to contracts (parts a and d) and correspondence (part b), acknowledging that a contract might be constituted by correspondence, the Council stated that searches were also undertaken of relevant staff emails, accounts and files. Approximately ten staff were involved in the searches: it identified the relevant teams, each of which had its own database to record waste-related data, contracts and financial transactions. For all resources except the financial management system (which was searched on the basis of date range and purpose), staff knowledge had been relied on to scope the searches. The Council confirmed that none of the staff were aware of any other contracts, in addition to those already identified to Company X.
28. The investigating officer queried elements of the searches described above, noting previous explanations highlighted by Company X as having been given by the Council regarding waste received at the Oakbank transfer station. This included questions as to how the data was compiled in the table provided to Company X previously. The Council explained why it did not consider these contradicted its earlier responses.
29. The Council was also asked to recheck for contracts established through correspondence. It did so and confirmed that it held no further correspondence relating to contracts. The Council re-iterated that relevant staff had sufficient knowledge in this area to be able to identify any such contractual information. The Council also commented that even if this were not the case, and even if staff didn't acknowledge the existence of contracts in the documents searched, any information requested would still have been identified and disclosed to Company X as falling within the scope of part b of the request.

#### *The Commissioner's conclusions*

30. The Commissioner has considered all relevant submissions received during this investigation. She is satisfied with the searches and checks undertaken, which she considers adequate and proportionate in the circumstances. On this basis, she is satisfied that the Council does not (and did not, on receiving the request) hold any further information capable of addressing the terms of the request of 14 January 2016.
31. Consequently, the Commissioner is satisfied that the Council was correct to the extent that it applied regulation 10(4)(a) of the EIRs to the request. The exception is subject to the public interest test, but the Commissioner is satisfied that there is no conceivable public interest in requiring the disclosure of information which is not in fact held.
32. The Commissioner will now turn her attention to the information the Council confirms it is withholding under other exceptions in the EIRs.

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

33. The Council withheld some information (in 11 documents) under regulation 10(5)(e) of the EIRs. The information detailed the rates and costs per tonne of waste collected by Oakbank and related proposals for performing the contract.

34. 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.
35. As with all 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)).
36. 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 (this will include consideration of whether the information is publicly available)?
  - (iii) 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?*

37. The Council submitted that the information it was withholding was commercial in nature as the rates it related to were specific rates detailing the cost per tonne of waste collected by Oakbank, based on a unique commercial proposal from Oakbank. The Council supplied documents with details.
38. Having considered the withheld information, with the Council's submissions, the Commissioner is satisfied that the withheld information is commercial or industrial in nature for the purposes of regulation 10(5)(e) of the EIRs.

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

39. 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. The information must have the quality of confidence, and therefore cannot be publicly available otherwise.
40. The Council stated that, to the best of its knowledge, the information had never been made publicly available. An online search had failed to reveal any of it.
41. The Council submitted that the withheld information was not the kind of information any business would share with its competitors. It confirmed that it did not have Oakbank's consent to disclose this information, and provided a supporting email to this effect. The Council was satisfied that Oakbank had provided appropriate arguments as to the effects of disclosure.
42. The Commissioner accepts that the information withheld under this exception does have the necessary quality of confidence, and that it has not been placed in the public domain and is not otherwise generally accessible. Given its character, she is satisfied that it was, and remains, subject to an implied duty of confidentiality.

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

43. The Council argued that disclosure would prejudice the commercial interests of Oakbank and provided the Commissioner with correspondence from Oakbank arguing that this prejudice would be “to a very material degree”. The Council stated that disclosure would, or would be likely to, adversely affect Oakbank’s income. It would provide a commercial advantage to any competitor, without offering any public benefit, thus placing Oakbank at a commercial disadvantage.
44. Company X accepted that there may be reasons for redacting banking details under regulation 10(5)(e), but did not believe the Council had established harm in relation to the remaining withheld material. It had not explained why such harm should be considered an actual or likely consequence of disclosure, or explained the steps taken to satisfy itself that such harm would be occasioned. It submitted that the Council did not appear to have taken account of the age of the material or the passage of time since it was provided (highlighting previous decisions from the Commissioner where this had been a relevant factor in relation to tendering information). In the circumstances, Company X was not satisfied that disclosure would have caused, or would have been likely to have caused, substantial harm to a legitimate economic interest.
45. The Commissioner must base her conclusions on the circumstances at the time the Council responded to Company X’ requirement for review. Company X is quite correct that the Council has said little on the passage of time. That said, each case must be considered on its own circumstances and she notes the Council’s arguments are specific to a particular combination of information. It is presenting these arguments on the basis that they are considered to be of continuing relevance to Oakbank’s commercial situation.
46. Having taken all the submissions into account, including the withheld information, the Commissioner is satisfied that disclosure of the information would cause, or would be likely to cause, substantial prejudice to the ongoing economic interests of Oakbank. She is satisfied that the information remains of commercial relevance to Oakbank. It would be sufficiently revealing of Oakbank’s current commercial strategies to be of genuine value to competitors, creating a real risk that Oakbank would be placed at a commercial disadvantage in future.
47. In the circumstances, the Commissioner is satisfied that the Council was entitled to apply regulation 10(5)(e) of the EIRs to the withheld information.

*The public interest test*

48. Having accepted that the exception in regulation 10(5)(e) applies to the information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. An 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.
49. Company X did not believe the Council had evidenced the harm claimed. It identified the overarching objective of the EIRs as being to ensure transparency in relation to the activities of any public authority. It submitted that the Council’s withholding of the information was indicative of an intention to avoid proper scrutiny of the manner in which it had gone about its business.



50. The Council acknowledged the public interest in openness and transparency, allowing scrutiny of value for money for the public purse in relation to waste management. On the other hand, disclosure would affect the economic position of key suppliers and potentially place them in breach of third-party confidentiality arrangements, which would not benefit the public interest in obtaining best value and maintaining effective working relationships.
51. The Commissioner acknowledges there is a strong public interest in transparency and accountability, in relation to public expenditure generally and particularly where it involves contracts and protecting the environment. In considering that public interest, she has noted the information which has already been disclosed in response to this and related requests and which is, therefore, already available in the public domain.
52. At the same time, there is a considerable public interest in being able to obtain the best contracts at the best price in a competitive market, and in maintaining effective working relationships to deliver such contracts. It is clear from the submissions presented that Company X has a commercial concern of its own, which may not fully align with the more general public interest in transparency and scrutiny. There is evidence of an ongoing dispute with the Council which, at the time of the requirement for review (16 December 2016), had yet to be resolved, making the information requested of heightened significance and relevance to Company X in this context.
53. Having carefully considered the public interest arguments advanced by both parties, the Commissioner concludes, bearing in mind the information which has already been disclosed, that the public interest in making the withheld information available is outweighed by that in maintain the exception in regulation 10(5)(e). Accordingly, the Commissioner is satisfied that the information was correctly withheld under that exception.

### **Regulation 9 of the EIRs – duty to provide advice and assistance**

54. Regulation 9 of the EIRs requires a Scottish public authority, so far as it would be reasonable to expect it do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the EIRs<sup>2</sup> (the Section 60 Code) gives guidance to authorities on providing such advice and assistance.
55. In its previous application, Company X asked the Commissioner to consider the levels of advice and assistance provided by the Council. The Commissioner has already considered matters up to that point (i.e. 27 October 2016). The Commissioner need not revisit matters already considered in that that decision.
56. The investigating officer asked Company X to be more precise as to any matters which required further advice or assistance (since the previous decision). Company X has given very little specific indication as to what advice or assistance was absent or deficient, other than a lack of contact to discuss the request.
57. As in *Decision 125/2017: Company X and Dumfries and Galloway Council*<sup>3</sup>, which considers a very similar point raised by Company X in relation to a related information request, the Commissioner considers it relevant to bear in mind that Company X is represented here by a firm of solicitors experienced in this area of law. Having considered the circumstances of this case and all relevant submissions, she finds that she must reach the same conclusion on

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<sup>2</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

<sup>3</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700195.aspx>

regulation 9 as in the earlier decision: she can identify no obvious requirement for advice and assistance in relation to information which might be held in this case. In the absence of more specific comment from Company X as to what kind(s) of advice and assistance might reasonably have been expected in the circumstances, the Commissioner is satisfied that the Council was not required – in carrying out its review following *Decision 230/2016* – to provide any advice and assistance to comply with regulation 9.

## Decision

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The Commissioner finds that, in respect of the matters specified in the application, Dumfries and Galloway Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company X.

The Commissioner finds that

- (i) regulation 10(5)(e) was correctly applied to the withheld information;
- (ii) regulation 10(4)(a) was correctly applied to parts 1 to 4 of the request as no further information was held;
- (iii) there was no breach of regulation 9(1) of the EIRs.

However, the Commissioner also finds that the Council failed to comply with the EIRs, in particular regulation 5(1), by failing to identify and disclose all the information capable of addressing part f of the request

Given that information for part f was identified and disclosed during this investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to Company X's application.

## Appeal

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Should either Company X or Dumfries and Galloway 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.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**18 September 2017**

### 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.

...

#### 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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

- (a) it does not hold that information when an applicant's request is received;

...

- (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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