

Decision Notice



Decision 176/2012 Unison Scotland and the Scottish Ministers

Full business cases for specified waste water PFI contracts

Reference No: 201201214

Decision Date: 29 October 2012

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle

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Summary

Unison Scotland (Unison) asked the Scottish Ministers (the Ministers) for the full business cases for a number of specified PFI contracts for waste water and related projects. Unison did not accept that the Ministers had provided them with all of the information they held within the scope of the request. Following an investigation, the Commissioner found that the Ministers had provided Unison with all relevant, recorded information they held.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) to (c) and (e) of “environmental information”); 5(1) (Duty to make environmental information available on request)

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

Background

1. On 12 September 2012, Unison wrote to the Ministers to request the Full Business Cases (FBCs) for :
 - a) The Tay Waste Water and Aberdeen, Stonehaven, Fraserburgh and Peterhead Sewage and Sludge Treatment PFI contracts.
 - b) The other seven Scottish Water PFI contracts. i.e.:
 - Moray Coast Waste Water Project;
 - Levenmouth Purification Scheme;
 - Dalmuir Sewage Treatment;
 - Daldowie/Shieldhall Sludge Treatment Centres;
 - Meadowhead (Irvine), Ayr, Stevenston and Inverclyde Sewage Treatment;
 - Almond Valley, Esk Valley & Seafield Sewage Scheme;
 - Inverness Main Drainage/Fort William Sewage Treatment.



If the Ministers' response to a) and/or b) was that they did not hold one or more of these documents, Unison requested (as an alternative) the financial information/documents upon which the Ministers based their decisions to approve that/those projects. It noted that these might have been described as Outline Business Cases (OBCs), but (if later information was provided following an OBC) it sought the latest documentation. It expected (and therefore sought financial details of) a comparison of the cost of the proposed PFI project with a public sector comparator of some sort, but (if no comparator was used for one or more projects) wished to see the financial information upon which Ministers based decisions to approve that/those projects.

2. The Ministers responded on 10 October 2011 by releasing two pieces of information to Unison:
 - a. a request to Project Team Leaders to update financial information for the Treasury, and
 - b. a record of public cost comparators for each project (subject to the redaction of information falling outwith the scope of the request).
3. On 2 December 2011, Unison wrote to the Ministers requesting a review of their decision. It expressed surprise that this was the only relevant information held by the Ministers, and in particular expected the Ministers to have the original information from which the public cost comparator record had been created. It cited other reasons why it expected further information to be held and queried the measures taken to identify and locate the requested information.
4. The Ministers notified Unison of the outcome of their review on 21 December 2011. They advised that an additional paper file had been identified in the course of the review. This had been examined, together with the files considered in relation to the original request, but the reviewer had been unable to identify any further relevant information. They responded to other points raised by Unison and concluded that the request had been correctly handled in accordance with the Ministers' procedures and legislative requirements.
5. On 21 June 2012, Unison wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and 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 certain specified modifications.
6. The application was validated by establishing that Unison had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



Investigation

7. On 29 June 2012, the Ministers were notified in writing that an application had been received from Unison and were invited to provide comments on the application (as required by section 49(3)(a) of FOISA). The Ministers were also asked a number of specific questions, focusing mainly on the steps they had taken to identify and locate all recorded information which fell within scope of Unison's request. They were also invited to comment on certain specific points raised by Unison in its request for review.
8. The Ministers' responses described their searches and explained why they considered all relevant information to have been disclosed to Unison already. They also provided additional comments on certain of Unison's specific points, while further submissions were sought and received from the Ministers during the investigation.
9. A meeting was also held between the investigating officer and relevant Scottish Government officials to allow the investigating officer to examine information that had been identified, but considered (by the Ministers) to be outwith the scope of Unison's request.
10. The relevant submissions received from both the Ministers and Unison will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Unison and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
13. The Ministers provided submissions setting out the searches and enquiries they had undertaken in relevant sections and departments in order to identify what information they held which fell within the scope of Unison's request.



Searches carried out following receipt of request

14. The Ministers explained that the time period covered by Unison's request pre-dated by some years the electronic filing system in operation since 2005. As a consequence, recourse had to be made to the paper files used to store information prior to then. All that was held in relation to those paper files was a list of file names and related numbers – there was no information on what might be contained within the files.
15. Having reviewed the list of file names, the Ministers advised that the majority of files identified as having potential to contain relevant information had been destroyed in line with records management procedures. Searches of those files which had not been destroyed led to the identification of only the two documents released to Unison in response to their request.
16. The Ministers went on to explain that a small number of files could not be located by the Registry holding the paper files, and although searches were carried out of other areas (including the relevant service area) none of these could be found. The Ministers explained that it was over seven years since these files had been in use.
17. The Ministers also advised that keyword searches on their ERDM system had failed to identify any relevant recorded information. Their review of the surviving paper files had, however, identified three pieces of evidence which suggested that the Ministers or their predecessors were not involved in the approval of these PFI projects.
18. The Ministers provided copies of these three pieces of evidence to the Commissioner, and having reviewed these, the Commissioner accepts that decision making in relation to the PFI projects lay with the water authorities and not with the Ministers or their predecessors.

Searches carried out following receipt of requirement for review

19. Following receipt of Unison's requirement for review, the Ministers advised that they had undertaken further searches, including searches of their ERDM system. As a preliminary step, they had reviewed which files they considered relevant and identified one additional file. A former advisor had also confirmed that no other files were likely to be relevant.
20. The Ministers advised that these further searches did identify four further documents, but nothing within any of them which they considered to fall within the scope of Unison's request.
21. Three of the four documents were provided to the Commissioner during the course of the investigation. Having reviewed these, the Commissioner accepts that the information in them falls outwith the scope of Unison's request. Further enquiry confirmed that the Ministers were unable to locate the fourth document.
22. The additional file of information was examined during a meeting with relevant officials from the Scottish Government and no information from it was found to fall within scope of Unison's request.



Matters raised by Unison in its application

23. In its application, Unison asked the Commissioner to pursue the points it raised in its requirement for review with the Ministers. While providing some additional comment, generally the Ministers considered these points to have been addressed adequately in its response to Unison's request for review.
24. In addressing Unison's surprise at how little information was held (and that more had not been retained), the Ministers explained that the FBCs were considered at the time to be an operational matter for the individual water authorities (and subsequently Scottish Water), rather than the Ministers or their predecessors. They considered a reference on their website to the publication of certain FBCs to mean publication by the water authorities rather than themselves.
25. The Ministers noted Unison's view that enquiries might have been made of other organisations, but pointed out (correctly) that information held by other organisations should be sought from them directly. They did, however, provide relevant contact details for Scottish Water. Similarly, the Ministers advised that they would not be privy to confidential evidence provided to a committee of the Scottish Parliament by the water authorities (referred to in Unison's information request and request for review), but provided information on making a request to the Parliament.
26. Within its application, Unison also quoted sections from Hansard, which documented statements made by the late Donald Dewar, as Secretary of State for Scotland, in relation to the water authorities' PFI projects. Unison considered that these statements added weight to their belief that far more information would be (and certainly should be) held by Ministers about the financial "cases" for these extremely high value contracts.
27. The Ministers advised that they had no further comment to make in response to this reference. From the evidence they provided of the searches and other enquiries undertaken, they remained satisfied that no further relevant information was held.

Commissioner's conclusions

28. Having considered the submissions received from the Ministers, the Commissioner is satisfied that the searches carried out by the Ministers in dealing with the request and during the review process were adequate and would have identified any information they held and which fell within the scope of Unison's request. The Commissioner is also satisfied that the Ministers provided Unison with any relevant information they located.



DECISION

The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Unison Scotland.

Appeal

Should either Unison Scotland or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
29 October 2012



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

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.

...

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