

# Decision Notice

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**Decision 250/2016: Dr Nic Honhold and City of Edinburgh Council**

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**Information relating to two planning applications**

Reference No: 201600978

Decision Date: 21 November 2016



Scottish Information  
Commissioner

## Summary

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The Council was asked for information about two planning applications. This request was first considered in Decision 033/2016, in which the Commissioner required the Council to conduct further searches for sales value information.

The Council identified some additional information. It disclosed some of this and withheld the remainder because it was confidential. Dr Honhold believed that the information should be disclosed and that the Council was likely to hold further information.

The Commissioner accepted that, during the course of her investigation, the Council carried out proportionate searches which were capable of identifying all the information it held.

She also found that the Council was correct to withhold information which was commercially confidential.

## Relevant statutory provisions

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

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

## Background

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1. On 12 February 2015, Dr Honhold made a request for information to the Council. He asked for:  
  
*"The full details of all internal and external audits undertaken for the planning applications from Mountgrange and/or Sundial of the enabling case for development of the Craighouse campus e.g. for planning applications 12/04007/FUL and 12/04007/SCH3."*
2. Following an investigation, the Commissioner issued Decision 033/2016<sup>1</sup>, which required the Council to carry out a further review of the information it held in relation to sales value information.
3. The Council notified Dr Honhold of the outcome of its review on 24 March 2016. It disclosed some information, but withheld the remainder under the exceptions in regulation 10(5)(e) of the EIRs (substantial prejudice to commercial confidentiality) and regulation 11(2) (personal data).
4. On 25 May 2016, Dr Honhold 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

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201500826.aspx>

modifications. Dr Honhold was dissatisfied with the outcome of the Council's review because he felt that all information identified by the Council should be disclosed, and believed that the Council should hold more information.

## **Investigation**

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5. The application was accepted as valid. The Commissioner confirmed that Dr Honhold 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.
6. On 1 June 2016, the Council was notified in writing that Dr Honhold had made a valid application. The Council was asked to send the Commissioner the information withheld from Dr Honhold. The Council provided the information and the case was allocated to an investigating officer.
7. 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 including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested and to provide details of the searches carried out to locate the information.
8. The Council provided its submissions to the investigating officer. Dr Honhold was also asked for his submissions, which he provided. He confirmed that he did not require disclosure of the redacted personal data, so this information is not considered by the Commissioner in this decision.

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

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Dr Honhold and the Council. She is satisfied that no matter of relevance has been overlooked.

### **The withheld information**

10. The information withheld under regulation 10(5)(e) of the EIRs is certain sales value information found in two documents: an email from the Council to the developer of the Craighouse campus; and a spreadsheet containing sales value information which was attached to the email.

### **Application of the EIRs**

11. It is evident from the subject matter (planning applications for development on a protected site) that any information falling within the scope of Dr Honhold's request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition are set out in Appendix 1). The Commissioner will therefore consider the Council's handling of the request solely in terms of the EIRs.

### **Regulation 5(1) of the EIRs**

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

13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception(s) outweighs the public interest in making the information available.

### **Regulations 10(5)(e) of the EIRs**

14. Regulation 10(5)(e) 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.
15. 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>2</sup> and the Commissioner does not intend to repeat that consideration in detail here. The Commissioner 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 prejudice to a legitimate economic interest?

#### *Is the information commercial or industrial in nature?*

16. The Council explained that the information contained within the withheld spreadsheet was a full breakdown of the projected sale values/revenues as well as costs (and financial funding) of the development at Craighouse, which was based on a working version of the development that did not form part of the final planning application. It explained that information redacted from the email had been provided by the developer in confidence, or related directly to such information.
17. The Commissioner is satisfied that the withheld information in both documents is commercial in nature.

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

18. The Council submitted that an explicit obligation of confidentiality exists in relation to the withheld information. The developers supplied the information to the Council on the basis that it would be treated confidentially and not be released into the public domain. (The Council had previously provided the Commissioner with a letter from the developer's solicitors, confirming this.) The legal representatives of the developers have confirmed what information they were prepared to release, which did not include the withheld information under consideration in this case.
19. The Commissioner accepts, in the circumstances, that the information was provided to the Council subject to an obligation of confidentiality and is not in the public domain.

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

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

20. It was the Council's view that disclosure of the information would be likely to affect the developer's ability to secure best value. Potential suppliers "would have clear indications of the levels of bid that would secure a tender, based on the specific and detailed sales values and projected profits, on a "work in progress" design that was further amended prior to the planning application being submitted".
21. The Council asserted that if all potential suppliers had access to the information, it would be likely that the bids they subsequently provided to the developer would not be a true reflection of the goods or services that they could provide for the sum quoted. This would substantially prejudice the developer's ability to assess which bid was the most favourable on the economic grounds of the bids received, and their other procurement criteria".
22. Furthermore, the Council submitted, disclosure would disadvantage the developer in preparing and making future bids for development assets. It would also substantially prejudice the developer in seeking future partners for this development, as their internal financial information in terms of value/cost inputs relating to a scheme (and not simply the audits that were undertaken for the planning application) would have been disclosed. The developers had confirmed to the Council during discussions what information they felt could be released and, due to its particular and commercially sensitive nature, they had not consented to disclosure of the sales value information.
23. The Council commented on the significance of the passing of time in relation to disclosure of this type of information. It submitted that the development process normally takes a long time for a scheme of this nature, and argued that disclosure of this detailed information would have a significant impact at the current time, when the development is ongoing and not yet completed.
24. The Council accepted that the degree of prejudice would naturally reduce following the construction of the development when disclosure of the information would not harm the procurement process.

#### *Submissions from Dr Honhold*

25. Dr Honhold argued that it was unacceptable to describe an audit of sales values as commercially sensitive. He stated that the sales values proposed by the developers were in the public domain and that all actual sales values for houses in Scotland are available to the public. Dr Honhold presumed that the Council had used the developer's sales values and compared them to actual sales values, all of which was public information: however, the Council had not disclosed which data they had selected for the audit or how the audit was carried out. He reiterated that the information was not commercial secrets and that audits were a process carried out by a public body for the public in the process of assessing a planning application.

#### *The Commissioner's conclusions*

26. In making a decision as to whether disclosure of the withheld information would have caused (or would have been likely to cause) substantial harm to the developer's legitimate economic interests, the Commissioner must base her conclusions on the circumstances at the time the Council responded to Dr Honhold's requirement for review.

27. Having taken all of the submissions into account, and considered 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 the developer.
28. She accepts the arguments put forward by the Council that disclosure would be likely to affect the developer's ability to secure best value in future procurement exercises. Disclosure of the information would substantially prejudice the developer's ability to assess future competitive bids and to discern which would be most favourable in the circumstances.
29. She accepts that disclosing the sales value information would allow potential tenderers to estimate the level of bid which the developer was likely to accept and this would be likely to substantially prejudice the developer's ability to secure competitive tenders from contractors who would know how much the developer would be willing to pay.
30. Consequently, 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*

31. 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. This 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.

#### *Submissions from Dr Honhold*

32. Dr Honhold submitted that the planning application in question related to the development of a site of Great Landscape Value and was closely contested, with over 1000 objections and public opposition from all local politicians. He stated that the Council's decision to grant the application was based solely on the supposed demonstration of a "conservation deficit". Dr Honhold explained that this referred to a situation where converting the existing listed properties and then selling them would not generate enough profit for developers who therefore "require new build to generate their deficit of profits".
33. Dr Honhold stated that demonstrating a conservation deficit depends entirely on the balance of costs of conversions and likely sales values of the existing listed buildings. These costs and sales values were put forward for both the conversions and the new builds in the financial assessment prepared by the developer and submitted as part of the planning application. In Dr Honhold's view, the issue of the projected costs of conversion and sales values of the converted premises were vital (in demonstrating a conservation deficit).
34. Dr Honhold acknowledged that the Council had now disclosed a lot of information on the projected costs and the external audit carried out for these. However, the Council had refused to disclose any details of the audits supposedly carried out of sales values. He submitted that there was a public interest in the disclosure of the withheld spreadsheet (relating to the audit of sales values). He stated that the audit was a key element of a planning decision which, in his view, breached many Council policies, was strongly opposed by the local community, was against the data presented to the Council by the community on sales values and set a precedent for other planning decisions which would depend on the demonstration of a "conservation deficit".
35. Dr Honhold stated that withholding the information meant that the planning process would not be as open and transparent as it should be. He noted that this planning decision was

one of the first times that the issue of a conservation deficit has been so central to a planning application in Edinburgh, and could set precedent for other decisions.

#### *Submissions from the Council*

36. The Council accepted that there was a clear public interest in its promoting transparency and accountability through the disclosure of information relating to planning applications. It submitted that it sought to meet this public interest by making information available through its Planning Portal, and “by presuming in favour of the disclosure of information when a request is made under the Freedom of Information legislation”.
37. However, the Council considered that the public interest in providing the information was outweighed by the need to avoid substantial harm to the legitimate economic interests of the developer and the public interest in allowing the developer to achieve best value, through ensuring fair, open and transparent competition in any future contract procurements for the development of the project.
38. The Council also believed there to be a public interest in local authorities maintaining confidentiality and protecting the legitimate economic interests of commercial organisations in situations where it has been agreed that information would be held confidentially.
39. The Council stated that the planning application had been approved at the point Dr Honhold’s request for information was received, and it would not be in the public interest for the Council to undermine the successful implementation of the planning application.
40. The Council emphasised that it had sought to disclose all of the information that would not result in substantial economic harm.

#### **The Commissioner’s conclusions**

41. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves the development of assets such as land. In relation to the information withheld in this case, she acknowledges that its disclosure might add to public understanding of how the developer demonstrated the conservation deficit.
42. Against this, she must take into account that disclosure of the information would provide potential tenderers with an insight into the level of bid which the developer would find acceptable. Such disclosure would not be conducive to an open and procurement exercise, and, as such, not in the public interest.
43. The Commissioner has considered Dr Honhold’s concerns that the planning application was closely contested but notes that it was approved (and the development is now underway). The planning committee accepted that the developer satisfactorily demonstrated a sufficient conservation deficit.
44. The Commissioner, having carefully considered the public interest arguments advanced by both parties, has concluded that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. She is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

#### **Does the Council hold any further information?**

45. Where an application is made to the Commissioner on the basis that the applicant believes the public authority holds further information, the Commissioner must satisfy herself that adequate steps have been taken by the authority to identify all the information relevant to the

request (or, alternatively, be given a reasonable explanation as to why no further information is held). It is not sufficient for an authority simply to assert that it does not hold more information.

46. The Commissioner is concerned that the Council did not attempt to carry out any fresh searches for information when complying with Decision 033/2016. Instead, it relied on the search outcomes produced during the previous investigation.
47. The Council was therefore asked to carry out further searches to ascertain whether it held any information not already located.

#### *Submissions from the Council*

48. The Council provided a copy of its search template, showing the searches conducted in response to the Commissioner's request. It confirmed that it did not hold any further sales value information, other than the documents previously identified.
49. The Council submitted that the information was held within dedicated folders and that the searches were undertaken on all files and emails held by Estates Services in relation to the request. The searches did not identify any additional information.
50. Staff in the Council's Planning and Transport departments also confirmed that no additional information was held.

#### *Submissions from Dr Honhold*

51. Dr Honhold submitted that the spreadsheet from 2013 appeared to be the only form of an audit of sales values that the Council was prepared to admit to holding, despite the planning appraisal report referring to audits of the financial submission made by the developers in 2014.

#### *The Commissioner's conclusions*

52. The Commissioner can only consider whether information is actually held by the Council, not what information it should hold or what an applicant believes it should hold.
53. Having considered the submissions from the Council and from Dr Honhold, the Commissioner is satisfied that the searches conducted by the Council, during the course of the investigation, were proportionate in the circumstances and capable of identifying any further relevant information that the Council held. On the balance of probabilities, she is satisfied that the Council holds no further relevant information falling within the scope of Dr Honhold's request.

## **Decision**

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



## **Appeal**

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Should either Dr Honhold or the 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  
Head of Enforcement**

**21 November 2016**

### 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;

...

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