

Decision Notice

Decision 171/2017: Ms Rebecca Hay and South Lanarkshire Council

Shields Road Development – developer contribution

Reference No: 201701003

Decision Date: 16 October 2017



Scottish Information
Commissioner

Summary

The Council was asked for information on the developer contribution associated with a housing development.

The Council disclosed some information under the EIRs, but withheld other information it believed to be internal communications or commercially confidential.

The Commissioner investigated and found that the Council had correctly withheld the information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(e) 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

1. On 22 March 2017, Ms Hay made a request for information to South Lanarkshire Council (the Council) on the subject of the developer contributions associated with Taylor Wimpey's Shields Road development in East Kilbride. She asked for "any Council/developer correspondence, notes of discussions and minutes of meetings which relate to this issue". Expressing a particular interest in what money would be coming to the Auldhouse area, she also sought information on "any suggestions or proposals that have been made to date for where the contributions will be directed".
2. The Council responded on 20 April 2017. It identified information falling within the scope of the request, but withheld commercially confidential information under regulation 10(5)(e) of the EIRs. It also identified personal data, which it withheld under regulation 11(2) of the EIRs.
3. On 25 April 2017, Ms Hay wrote to the Council, requesting a review of its decision. As the contributions were for the benefit of the community, she considered it to be in the public interest that the information be disclosed.
4. The Council notified Ms Hay of the outcome of its review on 1 June 2017, substituting a new decision which it believed now addressed all elements of her request. The Council continued to withhold information under regulations 10(5)(e) and 11(2) for the first part of the request. For the second part, it withheld information as internal communications, under regulation 10(4)(e) of the EIRs, while explaining that no decisions had been reached as to how the contributions would be used, other than the general totals in the Section 75 Agreement.
5. On 4 June 2017, Ms Hay wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA,

subject to specified modifications. Ms Hay stated she was dissatisfied with the outcome of the Council's review because the Council had already commented on what the contributions were to be used for, submitting that there was a clear public interest in knowing more about how money intended for public benefit would be spent.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms Hay made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 16 June 2017, the Council was notified in writing that Ms Hay had made a valid application. The Council was asked to send the Commissioner the information withheld from Ms Hay. 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 exceptions applied by the Council in its review outcome.

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 him by both Ms Hay and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to a substantial housing development, and in particular to financial contributions to be paid to the Council by the developer for public infrastructure. As such, in relating to land and/or landscape, and to the associated planning processes, the Commissioner is satisfied that it would fall within paragraphs (a) or (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
11. Ms Hay has not disputed the Council's decision to handle the entire request under the EIRs and, in any case, the Commissioner is satisfied that the Council was correct to do so. He will consider the request in what follows wholly 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.

Regulation 10(5)(e) of the EIRs

14. The Council applied this exception to the majority of the withheld information for this case, relating to the first part of the request. The information in question comprises email strings, which the Council has categorised as Council/developer correspondence.
15. 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.
16. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*¹ 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?

17. The Council submitted that the information concerned negotiations with the developer. It considered there to be “a significant difference between negotiations and the outcome of those negotiations”. It considered the latter to be in the public domain, through the Section 75 Agreement and related committee reports (it did not, however, consider these to fall within the scope of the first part of the request, which the Commissioner accepts).
18. The content of the negotiations, however (which did fall within the scope of the request), was not in the public domain. These negotiations, in the Council’s view, related to a number of different interests, particularly those of the landowners and the developer. These interests, it submitted, taken with the permitted use of the land and the development to be carried out there, were commercial in nature. The negotiations entailed the use of information relating to these commercial interests, involving the assumption of obligations/undertakings that would affect the parties’ ability to undertake commercial activities upon their land.
19. The Council referred to three previous decisions of the Commissioner, all entitled *Friends of Loch Etive and Argyll and Bute Council* with numbers 242/2014, 159/2015 and 164/2016², where the Commissioner accepted that such interests were commercial in nature.
20. The Commissioner is satisfied that the withheld information is commercial in nature, given its subject matter, the interests involved and its use in this context.

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

21. The Council referred once more to the three decisions identified above to support its contention that there was a legally binding duty of confidence. In its review outcome, it concluded that the nature of the information gave rise to an implied obligation of

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.aspx>

² http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decision_Listing.aspx

confidentiality. There was an expectation among the parties that information used in the negotiations would be kept confidential. It should not lose that protection, in the Council's view, as individual points were negotiated and agreed.

22. The Commissioner accepts, in the circumstances, that the information was obtained by the Council subject to an obligation of confidentiality. Assuming it has not since found its way in to the public domain (considered below), the Commissioner is satisfied that it would remain subject that obligation.

Is the information publicly available?

23. The Council noted that it had not made any part of the negotiations publicly available. None of it would be made available through its Planning Portal, for example. It could not be certain that the other parties had not made any of the information available, but it considered it reasonable to conclude that this would be of no benefit to the parties concerned and therefore was unlikely.
24. In the circumstances, the Commissioner accepts, on the balance of probabilities, that the information in question has not been made available publicly.

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

25. The Council's submissions focused on arguments regarding harm to the confidentiality of the information as a result of disclosure. It suggested that there could be no more substantial prejudice to that confidentiality than making the information available to the public.
26. The Council commented that the level of harm required, in the context of the common law duty of confidentiality, was not high. It referred to Lord Keith's judgement in *Attorney-General v Guardian newspapers Ltd (No. 2) [1990] 1 AC 109* at page 256, where he decided that it would be "sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him any positive way." This argument, the Council commented, was accepted by the Commissioner in *Decision 067/2010 Mark Irvine and South Lanarkshire Council*³.
27. The Commissioner would note that *Decision 067/2010* relates to the application of section 36(2) of the Freedom of Information (Scotland) Act (FOISA). While similar in many respects to regulation 10(5)(e), the FOISA provision does not contain a test of substantial prejudice to the confidentiality in question. In addition, regulation 10(5)(e) relates not to confidentiality in general, but to confidentiality which exists for a specific purpose – to protect a legitimate economic interest. The Commissioner would suggest that it is artificial to attempt to divorce the harm required from the impact of disclosure on that interest – that impact must be taken into account, even if the key consideration is the impact of disclosure on the confidentiality itself. The impact on confidentiality must be substantial – perhaps, given the nature of confidentiality, not as substantial as would be required for other exceptions with a test of substantial prejudice, but the requirement of substance is still there and it must connote something more than negligible.
28. The Commissioner notes the Council's reliance on a decision of the Information Rights Tribunal, but would suggest that the view expressed above is supported by *The Aarhus*

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200901273.aspx>

*Convention: an implementation guide*⁴ (see page 88) with sufficient clarity that he is unable to ignore it, even allowing for differences in the law of confidentiality between jurisdictions.

29. That said, the Commissioner is satisfied, taking all of the Council's submissions into account, that disclosure in this case would have been likely to cause substantial prejudice to confidentiality provided for by law to protect a legitimate economic interest. As indicated above, the Commissioner is satisfied that this was commercial information, which remained the subject of an obligation of confidentiality at the time of the Council's review. Disclosure in the face of such an obligation would inevitably be harmful and it would be reasonable to conclude that such harm, given the impact on the legitimate economic interest of the parties to the negotiations, would be likely to be substantial. Such harm might pass over time, but the Commissioner accepts that it is appropriate to distinguish the content of negotiations from their outcome, and take into account the legitimate expectations of the negotiating parties in relation to matters central to the commercial activities proposed for the development site.
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 – regulation 10(5)(e)

31. Having accepted that the exception in regulation 10(5)(e) was correctly applied 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.
32. Ms Hay submitted that there was a clear public interest in understanding how – and where – such a sum (£5million) was to be spent. Given these monies were to benefit the community, she submitted there was a valid public interest in disclosing the details she sought.
33. The Council set out and balanced the public interest arguments in its review outcome. It acknowledged the public interest in the Council being accountable for justifying any terms reached in relation to the regulation of land use in the planning process, as it understood Ms Hay to be arguing. In this regard, it believed the public interest lay in the concluded outcome of the negotiations and not the negotiations themselves.
34. The Council also considered it to be in the public interest to maintain a competitive environment for businesses, and emphasised the public interest in maintaining confidentiality in this context.
35. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this relates to the developing planning process and to the application of payments for public infrastructure derived from that process. Within this context, there is a clear public interest in understanding the matters identified by Ms Hay. As the Council has concluded, however, the Commissioner is not satisfied that the information withheld under regulation 10(5)(e) would contribute significantly to understanding these matters.
36. Having carefully considered the public interest arguments advanced by both parties for and against disclosure, the Commissioner accepts that the public interest in making the

4

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

information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e).

37. Given that regulation 10(5)(e) is fully engaged, the Commissioner need not consider the application of regulation 11(2) of the EIRs to any personal data identified by the Council within these email strings.

Regulation 10(4)(e) – Internal communications

38. The Council withheld some information under this exception.
39. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication – although the exception is also subject to the public interest test..
40. In its submissions, the Council explained that the withheld information comprised internal communications discussing the use of the developer contribution, but emphasised that no final decisions had been reached (at the time of the review).
41. Having viewed the information withheld under this exception, the Commissioner is satisfied that it comprises entirely internal communications prepared by the Council and not circulated anywhere else. The Commissioner therefore finds that the Council was entitled to apply the exception in regulation 10(4)(e) to this information.
42. Having reached this conclusion, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

The public interest – regulation 10(4)(e)

43. Ms Hay's public interest submissions were the same in relation to both exceptions – see above.
44. The Council submitted that it had not received the developer contribution and that (at the time of writing its submissions) decisions as to allocations from the developer contributions had not yet been made, beyond the general totals contained in the Section 75 Agreement. To the extent that relevant information was held, outwith that Agreement, the Council highlighted the importance of being able to make fully informed decisions on such matters, with the benefit of free and frank deliberation on all essential aspects.
45. The Commissioner recognises there is a public interest in ensuring the Council is transparent and accountable for its actions and decisions, with particular reference in this case to the matters highlighted in paragraph 35 above. He also acknowledges, however, that to a very large extent the relevant decisions have yet to be made. Where relevant information is held, it relates to an early stage of deliberation on the matters of concern to Ms Hay. At that point, the Commissioner acknowledges the relevance of the arguments advanced by the Council in relation to effective decision making. On balance, at the time of the Council's review, the Commissioner is satisfied that the Council was correct in concluding that the public interest in maintaining the regulation 10(4)(e) exception outweighed that in making the information available.

The Section 75 Agreement

46. The Council did not consider the Section 75 Agreement to be pertinent to the first part of the request. As indicated above, the Commissioner agrees. With regard to the second part, it confirmed that the Agreement contained the only information held on the allocation of the developer contributions. Its review outcome provided information allowing a copy of the Agreement to be obtained from the General Register of Sasines, submitting that its availability there meant the Council was not required to provide information from the Agreement in response to the request. It referred to regulation 6(1)(b) of the EIRs, which allows a Scottish public authority not to comply with a request where the information is already publicly available and easily accessible to the applicant in another form or format.
47. Ms Hay did not raise the availability of the Agreement specifically in her application to the Commissioner, so the Commissioner is unable to make a formal finding on the application of regulation 6(1)(b) in this case. The relevant parts of the review outcome do appear to meet the requirements of that regulation, however. Ms Hay would be able to obtain a copy of the Agreement quite readily from the Registers, should she wish to do so.
48. In comments in its submissions to the Commissioner, the Council questioned whether disclosure of the Agreement would “serve any beneficial purpose” in addressing the matters highlighted in Ms Hay’s request. To a large extent, that is true: in most respects, the Agreement does not go into any detail on where the contributions should be spent within the Council’s area. It does, however, stipulate quite specifically where the contribution in respect of road works shall be used. Perhaps the Council assumed Ms Hay would have been aware of these provisions already: it would have done no harm, however, to draw them to her attention in applying regulation 6(1)(b).

Decision

The Commissioner finds that the Council complied with Part 1 of the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms Hay.

Appeal

Should either Ms Hay or South Lanarkshire 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

16 October 2017

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

(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.

...

(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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info