

Decision Notice



Decision 165/2010 Mr Chris Millar and tie Limited

Minutes of meetings

Reference No: 201000139

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Scottish Information Commissioner

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Summary

Mr Chris Millar requested from tie Limited (tie) sight of official minutes or other notes relating to the Tram Project Board. tie did not initially disclose any information to Mr Millar, but later, on review, did provide him with some information. Mr Millar was dissatisfied with the response and applied to the Commissioner for a decision.

During the course of the investigation, tie disclosed some additional information to Mr Millar. It also accepted that Mr Millar's information request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs), but continued to withhold the remaining information from Mr Millar on the basis that it was excepted from disclosure under the EIRs.

Following an investigation, the Commissioner found that tie should have dealt with the request under the EIRs, and that, in initially failing to do so, it had failed to comply with the EIRs.

The Commissioner also found that tie was entitled to withhold some information from Mr Millar, on the basis that it was internal communications, the disclosure of which would not be in the public interest. However, he found that tie was not entitled to withhold all of the information it had withheld from Mr Millar and ordered tie to disclose this to him.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2) and 4(e) (Exceptions from duty to make environmental information available)

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 3 November 2009, Mr Millar wrote to tie as follows:
I am requesting sight of official minutes (or other notes) of meetings held by the "Tram Project Board" referred to in minutes of the tie board meetings for the board meeting minutes published on the tiedinburgh.co.uk website covering the period January to September 2009.
2. tie responded on 3 December 2009 to the effect that since the information requested was not covered by its publication scheme under section 23(1) of FOISA it would not be released. In addition, tie stated that it was relying upon exemptions in sections 33(1)(b) (Commercial interests and the economy) and 36 (Confidentiality) of FOISA in withholding the information.
3. On 7 December 2009, Mr Millar wrote to tie requesting a review of its decision. In particular, Mr Millar questioned tie's application of section 23 of FOISA, which related to its publication scheme, and requested that tie provide him with specific details as to why either sections 33 or 36 applied to the information withheld. Mr Millar was clearly surprised that tie had decided that all of the information in all of the minutes he had asked for was exempt from disclosure.
4. tie subsequently carried out a review, and notified Mr Millar of the outcome on 15 January 2010. In doing so, tie provided Mr Millar with a redacted set of minutes..
5. On 20 January 2010, Mr Millar wrote to the Commissioner, stating that he was dissatisfied with the outcome of tie's 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 Mr Millar 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.

Investigation

7. On 11 February 2010, tie was notified in writing that an application had been received from Mr Millar and was asked to provide the Commissioner with any information withheld from him. tie responded with the information requested and the case was then allocated to an investigating officer.



8. The investigating officer subsequently contacted tie, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, tie was asked to comment on whether the information requested could be deemed to be environmental information for the purposes of the EIRs, and to justify its position in withholding certain information from Mr Millar.
9. In response, tie confirmed that the application should be considered under the EIRs and advised that it wished to rely on the exemption in section 39(2) of FOISA (see discussion below). It also submitted that it wished to rely on the exceptions in regulations 10(4)(e) and 10(5)(e) of the EIRs to withhold information from Mr Millar.
10. Further correspondence was entered into with tie in which submissions were sought in relation to tie's reliance on the exceptions in the EIRs. On both 21 June 2009 and 8 July 2009, tie advised that it no longer wanted to withhold certain information from Mr Millar. However, it maintained that it was seeking to rely on the exception in regulation 10(4)(e) for all of the remaining information and, in addition, on regulation 10(5)(e) in relation to five of the redactions. The attached Schedule of documents lists the information which tie still wishes to withhold.
11. Further information, a presentation which had been attached to the minutes of 3 June 2009, was also identified during the investigation as falling within the scope of Mr Millar's request. tie did not apply any exceptions to this presentation.
12. The relevant submissions obtained from Mr Millar and tie will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Millar and tie and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

14. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, tie confirmed in the course of the investigation that it was entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below.



15. Given the subject matter of the information requested by Mr Millar (the Edinburgh Tram project), and having considered that information, the Commissioner takes the view that the information would meet the definition of environmental information within paragraphs (c) and (f) of regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of regulation 2(1). However, while he is pleased to note that tie accepted this in the course of the investigation, he must also note that it did not do so (and act accordingly under the EIRs) when initially dealing with Mr Millar's information request.
16. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that tie was correct to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
17. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
18. Having accepted that the information is environmental, tie submitted that the exception in regulation 10(4)(e) of the EIRs applied to all the withheld information, while exception in regulation 10(5)(e) also applied to some of the information. The Commissioner will first of all consider regulation 10(4)(e), and only where he is not satisfied that this applies will he go on to consider the exception under regulation 10(5)(e).

Regulation 10(4)(e) – Internal communications

19. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10(4) or (5) applies to that information and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. It should be noted that under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
20. tie claimed that regulation 10(4)(e) provided an exception to disclosure in relation to all the withheld information, arguing that the minutes of the meetings should be considered internal communications for the purposes of the EIRs. For information to fall within the scope of this exception, it need only be established that it is an internal communication. The first thing for the Commissioner to do, therefore, is to determine whether the minutes of the meetings can be described as an internal communication.



21. tie explained that the minutes of the meeting were circulated to members of the board and to four persons within the Council and that, whilst circulated to board members and limited Council staff, the minutes were internal communications for the purposes of the EIRs. In considering that the minutes were indeed internal communications for the purposes of the EIRs, tie made reference to *Decision 102/2009 Councillor David Alexander and Falkirk Council*, in which the Commissioner had considered internal communications between Falkirk Council and Councillors.
22. tie explained that, at the time the request was received it was wholly owned by the City of Edinburgh Council (the Council) and that four elected Councillors, who represent the interests of the Council on the board, were appointed directors of tie and registered as such with Companies House. Accordingly, the directors owed legal and fiduciary duties directly to tie under common law and the Companies Act 2006 to, amongst other things, act in the best interest of tie.
23. In addition to the Councillors, the minutes were also circulated to particular senior individuals within the Council. tie explained that these individuals have direct responsibility for the overall delivery of the Tram Project and that tie take directions and instructions from these individuals.
24. tie concluded that the Council at the time of the request was the parent body of tie and remains both legally and politically the owner of the Tram Project. It is the project sponsor and funder.
25. The Commissioner notes however that in Dec 2009 the Council's 100% shareholding in tie Ltd was transferred to Transport Edinburgh Ltd. (TEL) and that all members of the tie Board became members of the TEL Board. This was the position at the time tie dealt with the request for review in January 2010. However as TEL is wholly owned by the City of Edinburgh Council, this arrangement makes no material difference to the Commissioner's decision.
26. Taking account of the content of the minutes, the extent to which the minutes are circulated and the relationship between tie and the Council, the Commissioner is satisfied that the minutes are internal communications for the purposes of regulation 10(4)(e) of the EIRs. As mentioned above, however, the application of this exception is subject to the public interest test in regulation 10(1)(b).

Public Interest Test – Regulation 10(1)(b)

27. Regulation 10(2) of the EIRs states that, when considering the public interest test under regulation 10(1)(b), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of release. It is therefore up to the authorities to justify that it is in the public interest that the information should not be disclosed.
28. In its submissions to the Commissioner, tie acknowledged that there is a significant public interest in the tram project, its contracts, costs and disputes. It stated that its intention was that the minutes would be released at some time in the future; however, release of the redacted information at the time of the request, indeed at the time of the investigation, was not in the public interest.



29. tie explained that the minutes contain free and frank discussions in relation to critical management decisions regarding the project and agreements on strategy for dealing with certain situations as they arose. The project had been subject to disputes concerning the role of contractors and costing issues. It explained that certain disputes and costing issues had still to be finalised and the redactions were necessary to protect tie's position in relation to negotiations or any future litigation that may take place.
30. tie also stated that release of the information would undermine its position in negotiations and, in addition to the above generic argument regarding the public interest, made specific arguments for each of the redactions, which have been considered by the Commissioner.
31. tie explained that whilst redactions had been made to the information released, some of that redacted information had been released, albeit in summary form, within Council papers between 12 March 2009 and 24 June 2010. tie believed that the release of the information within the Council Papers meets the interest of the public and that it was therefore unnecessary to release the information as redacted. tie also stated that it did not see the public interest being supported to any real value by the release of certain costing information, stating that the public interest lies in the public being aware of the overall cost of the project.
32. tie also indicated that it could have been more helpful to Mr Millar by referring him to the existence of the Council papers and in particular the Council's portal where the information is held.
33. The Commissioner notes, however, that some of the Council papers referred to in tie's submissions were created *after* Mr Millar's request for information (3 November 2009) and, indeed, after the review was carried out (15 January 2010). He has to consider what was held by tie at the time of the request and whether the redactions were correctly withheld in terms of regulation 10(4)(e) of the EIRs at that time.
34. The Commissioner has taken account of all the submissions made by tie in relation to tie's opinion that the public interest is satisfied by the release of a summary of the information in the form of update summaries presented to the Council and available on the Council website. The Commissioner also acknowledges tie's opinion that Mr Millar could have been directed to some of these reports, which were available at the time of his review. The Commissioner does not, however, share the view that because a summary of information is available elsewhere, that the information within the minutes can automatically be redacted and withheld.
35. The Commissioner accepts that there is a strong public interest in ensuring accountability for the way in which public money is used, and in enabling scrutiny of publicly-funded projects such as the Edinburgh trams to ensure that the public obtains value for money.
36. Given the history of rising costs and mounting controversy associated with the trams project, the Commissioner also accepts that there is a strong public interest in favour of the release of information about the project, including information relating to the management of contractual disputes and that disclosure of such information would help inform the public debate on whether the project represents value for money for the taxpayer.



37. However, the Commissioner accepts that in order to produce the best outcome in terms of limiting future costs of the trams project, it is essential for tie to preserve a strong negotiating position in the formal dispute resolution procedure now invoked to resolve outstanding issues between tie and the contractors. The issue is whether the public interest in disclosure outweighs the need for tie to have the ability to discuss and negotiate in private to secure the best outcome for tie and the public purse.
38. Having considered all of the arguments put forward by tie and by Mr Millar, the information redacted and the context of that information, the Commissioner is satisfied that, in all the circumstances, the public interest in making information available, where its disclosure would have an adverse effect on tie's negotiating position, is outweighed by that in maintaining the exception, particularly given that the disclosure of such information may result in more expense for the public purse.
39. The Commissioner is therefore satisfied that certain information was correctly withheld from Mr Millar in terms of regulation 10(4)(e) of the EIRs. This information is indicated on the attached Schedule of documents.
40. However, while tie claimed that the disclosure of *any* of the information which had been withheld from Mr Millar would have an adverse effect on its negotiations relating to the ongoing success of the project and in relation to outstanding disputes with the contractor, the Commissioner is not satisfied this is the case. Having considered all the submissions made by tie in relation to each redaction (for example that minutes contains speculative comments; information had been summarised elsewhere; information would be unhelpful without further explanation or that the minutes have been overtaken by commercial events), the Commissioner cannot accept that disclosure of all of the information would (or would be likely to) have any of the harmful effects effect claimed by tie. Indeed the content of the minutes and some of the redactions are what would be expected in a major project of this kind and there is a degree of public reassurance to be gained from knowing that such matters were considered.
41. In all the circumstances, the Commissioner has determined that the disclosure of some of the information withheld from Mr Millar (marked as "disclose" on the attached Schedule of documents) would not have such an effect and that, in all the circumstances, the public interest in making that information available is not outweighed by that in maintaining the exception.
42. As noted above, tie relied on the exception in regulation 10(5)(e) of the EIRs to withhold certain information. However, given that the Commissioner has determined that tie was entitled to withhold all of this information under regulation 10(4)(e), he is not required (and does not intend) to go on to consider whether the exception in regulation 10(5)(e) applies.
43. The Commissioner therefore requires tie to provide Mr Millar with the information contained in the minutes with only the information marked as "withhold" in the attached Schedule of documents redacted. (The effect of this will also be to disclose to Mr Millar the information which tie advised the Commissioner in correspondence dated 21 June 2010 and 8 July 2010 it no longer proposed to withhold from Mr Millar.)



44. The Commissioner also requires tie to provide Mr Millar with a copy of the presentation attached to the minute of 3 June 2009 as mentioned above.

DECISION

The Commissioner finds that tie Limited (tie) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Millar's request for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner finds that tie was entitled to withhold some of the information contained in the minutes under regulation 10(4)(e) of the EIRs and that by withholding information which it was not entitled to withhold, tie also failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires tie to provide Mr Millar with the information contained in the minutes with only the information marked as "withhold" in the attached Schedule of documents redacted. The Commissioner also requires tie to provide Mr Millar a copy of the presentation attached to the minutes of 3 June 2009.

The information must be provided to Mr Millar by 31 October 2010.

Appeal

Should either Mr Millar or tie Limited 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.

Kevin Dunion
Scottish Information Commissioner
15 September 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.
- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.
- (4) A Scottish public authority shall, in making environmental information compiled by it available in accordance with paragraph (1), ensure so far as practicable that that information is up to date, accurate and comparable.
- (5) Where information of the kind referred to in paragraph (b) of the definition of "environmental information" in regulation 2(1) is made available, the authority shall, if the applicant so requests, provide such information as is available to it of the place where information can be found on the measurement procedures, including methods of analysis, sampling and pre treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

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
 - ...
 - (e) the request involves making available internal communications.
- ...



Schedule of documents

Schedule of redactions.

Minute	Paragraph	Exception(s) Applied	Correctly withheld?
22.01.2009	2.11	10(4)(e)	No - disclose
11.03.2009	4.5	10(4)(e)	Yes - withhold
	8.3	10(4)(e)	Yes - withhold
	9.2	10(4)(e)	Yes - withhold
24.03.2009	1.4	10(4)(e)	Yes - withhold
	1.5	10(4)(e)	Yes - withhold
	1.8	10(4)(e)	Yes - withhold
	1.11	10(4)(e) 10(5)(e)	Yes - withhold Not considered (n/c)
	1.12	10(4)(e)	Yes - withhold
	1.14	10(4)(e)	Yes - withhold
15.04.2009	2.4	10(4)(e)	No - disclose
	2.8	10(4)(e)	Yes - withhold
	3.1	10(4)(e)	Yes - withhold
	3.2	10(4)(e)	No - disclose
	3.3	10(4)(e)	Yes - withhold
	4.1	10(4)(e)	Yes - withhold
6.05.2009	3.5	10(4)(e)	Yes - withhold
	3.7	10(4)(e)	No - disclose
	3.8	10(4)(e)	Yes - withhold
	3.9	10(4)(e)	Yes - withhold
	4.1	10(4)(e)	No - disclose
	5.1	10(4)(e) 10(5)(e)	Yes - withhold n/c
	5.2	10(4)(e)	Yes - withhold
3.06.2009	4.4	10(4)(e)	Yes - withhold
	4.6	10(4)(e)	Partial – withhold final paragraph
	8.3	10(4)(e)	Yes - withhold
8.07.2009	2.1	10(4)(e)	Yes - withhold
	3.2	10(4)(e) 10(5)(e)	Yes - withhold n/c
	3.5	10(4)(e)	No - disclose
	6.1	10(4)(e)	No - disclose
29.07.2009	2.1	10(4)(e)	No - disclose
	3.3	10(4)(e)	Yes - withhold
	3.5	10(4)(e)	Yes - withhold
	3.6	10(4)(e)	No - disclose



	3.7	10(4)(e)	Yes - withhold
	5.1	10(4)(e)	No - disclose
26.08.2009	3.1	10(4)(e)	Yes - withhold
	3.2	10(4)(e)	Yes - withhold
	3.4	10(4)(e)	Yes - withhold
	3.5	10(4)(e)	Yes - withhold
	3.8	10(4)(e)	Yes - withhold
	3.9	10(4)(e)	Yes - withhold
23.09.2009	3.3	10(4)(e)	Yes - withhold
	3.4	10(4)(e)	Yes - withhold
	3.5	10(4)(e)	Yes - withhold
21.10.2009	3.1	10(4)(e)	Yes - withhold
	3.2	10(4)(e)	Yes - withhold
	3.4	10(4)(e)	Yes - withhold
	3.5	10(4)(e)	Yes - withhold
18.11.2009	3.1	10(4)(e)	Yes - withhold
	3.2	10(4)(e)	No - disclose
	3.3	10(4)(e) 10(5)(e)	Yes - withhold n/c
	3.4	10(4)(e) 10(5)(e)	Yes - withhold n/c
	3.5	10(4)(e)	Yes - withhold
	5.1	10(4)(e)	Yes - withhold