

# Decision Notice



Decision 195/2010 Mr Chris Marshall and tie Limited

Overtime work on the Edinburgh Tram Project

Reference No: 201000157

Decision Date: 25 November 2010

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Marshall requested from tie Limited (tie) information relating to overtime worked on the Princes Street section of the Edinburgh tram project during November 2009. In response, tie advised Mr Marshall that the information was exempt from disclosure under a number a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Marshall remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information requested comprised environmental information and asked for tie's comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). In response, tie agreed that any information held would be environmental information, and that it wished to rely on section 39(2) of FOISA.

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. However, the Commissioner found that tie was entitled to withhold the information under regulations 10(4)(a) and 10(5)(e) of the EIRs.

## Relevant statutory provisions and other sources

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

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

## Background

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1. On 25 November 2009, Mr Marshall emailed tie requesting the following information in relation to the Edinburgh tram project:
  - a. How many overtime hours were accumulated by workers on the tram project during work on Princes Street in November?



- b. What was the rate paid for this overtime e.g. double time, time and half etc?
  - c. How much overtime was tie billed for by its contractors during work on Princes Street in November?
  - d. How much was spent on overtime during November for work on Princes Street?
2. In its response, issued on 22 December 2009, tie advised Mr Marshall that it considered this information exempt from disclosure in terms of sections 33(1)(b), 36(1) and 36(2) of FOISA.
  3. On the same day, Mr Marshall emailed tie requesting a review of its decision. In particular, Mr Marshall pointed out that public money was being spent on a public project.
  4. Mr Marshall was notified of the outcome of tie's review in a letter dated 22 January 2010, which upheld the previous decision in full.
  5. On 25 January 2010, Mr Marshall emailed 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 Marshall 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

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7. On 28 January 2010, tie was notified in writing that an application had been received from Mr Marshall and was asked to provide the Commissioner with any information withheld from him.
8. Its response of 15 February 2010 stated that it did not in fact hold any of the requested information as it had not yet received it from the contractor carrying out the work. The case was then allocated to an investigating officer.
9. 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 justify its contention that the requested information was not held by it and to provide details of the searches it had carried out to determine this.
10. In its response, tie indicated that it now considered it did in fact hold some of the information requested by Mr Marshall.



11. The investigating officer subsequently met with representatives of tie to discuss in more detail what information was actually held by it, the processes by which information concerning overtime hours were notified to tie by the contractor, and how the amounts due were charged by the contractor.
12. Following the meeting, it was established that, at the time it received Mr Marshall's request, tie held some information which would address parts a and b of his request, concerning the number of overtime hours accumulated by workers and the rate at which these hours were paid.
13. In subsequent correspondence, tie advised the Commissioner that it wished to apply the exemption in section 33(1)(b) of FOISA to this information and provided submissions in support of its position. tie also maintained that it did not, at the time it received Mr Marshall's request, hold the remaining information that had been requested. This is discussed in more detail below.
14. The investigating officer also contacted Mr Marshall seeking his submissions on tie's position and his views on the public interest in disclosure of the information. These are summarised, along with those of tie in the Commissioner's analysis and findings section below.
15. During the investigation, the investigating officer pointed out to tie that, having considered the nature of the information requested in this case, it appeared likely that any information falling within the scope of the request would be environmental information and therefore subject to the EIRs. tie was asked to comment on this point and to provide submissions as to whether it considered that the requested information fell within the scope of any of the exceptions contained in the EIRs. tie was also asked whether it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
16. In response, tie confirmed that it now considered the request should have been dealt with under the EIRs and considered the information to be exempt under section 39(2) of FOISA. tie advised the investigating officer that it now wished to apply the exception in regulation 10(5)(e) of the EIRs to the withheld information. tie also stated that it wished its submissions in respect of the exemption in section 33(1)(b) of FOISA to be applied to the exception in regulation 10(5)(e) of the EIRs.

## Commissioner's analysis and findings

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17. 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 Marshall and tie and is satisfied that no matter of relevance has been overlooked.

### FOISA or EIRs?



18. In this case, tie handled of Mr Marshall's information request and subsequent request for review in terms of FOISA. However, the Commissioner has concluded that the information requested by Mr Marshall would meet the definition of environmental information within paragraph (c) of regulation 2(1) of the EIRs, being information on measures (overtime worked and the associated payments in relation to a major infrastructure project) affecting or likely to affect the elements of the environment referred to in paragraph (a) of regulation 2(1).
19. 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. However, the central point set out therein is that when a person requests information would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded in line with the EIRs.
20. The Commissioner notes that, during the investigation, tie accepted that Mr Marshall's information request sought environmental information as defined in regulation 2(1) of the EIRs. However, it did not recognise this when initially dealing with Mr Marshall's information request and his subsequent request for review. 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, the Commissioner finds that tie failed to comply with regulation 5(1) and 2(b) of the EIRs.

#### **Section 39(2) of FOISA – exemption for environmental information**

21. Having acknowledged that the information under consideration in this case was environmental information as defined in regulation 2(1) of the EIRs, tie also indicated during the investigation that it wished to apply the exemption in section 39(2) of FOISA to that information.
22. 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 entitled to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
23. 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.

#### **Regulation 10(4)(a) of the EIRs**

24. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.



25. In its submissions to the Commissioner, tie indicated that some of the information requested by Mr Marshall was not held by it when the request was received on 25 November 2009. In particular, tie indicated that, at the time it received the request, it did not hold any information in respect of parts c and d, concerning the overtime billed by its contractors, and the total spent on overtime over November 2009.
26. In relation to these parts of the request, tie explained that it had not (at the time it received Mr Marshall's request) been billed for any of the overtime worked in November, nor had it paid any money to the contractor in respect of overtime. It described the process by which a request for payment for specified periods of the contract is submitted to it by the contractor and explained that the payment request for November 2009 (the period covered by Mr Marshall's information request) had not been submitted by 25 November. In support of this claim, tie provided evidence which allowed the Commissioner to verify that the payment request had not been submitted by the contractor at the time of the Mr Marshall's request.
27. Having considered tie's submissions and its explanation of the process by which it is billed for payment by the contractor, the Commissioner is satisfied that no information was held by tie which would fall within the scope of parts c and d of Mr Marshall's information request, at the time when his request was received.
28. As such, the Commissioner is satisfied that the information in question is subject to the exception in regulation 10(4)(a) of the EIRs.
29. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only withhold information to which this 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. In this case, the Commissioner is satisfied that the information in question was not held by tie at the relevant time. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
30. In these circumstances, the appropriate response to these aspects of Mr Marshall's request would have been for tie to advise Mr Marshall that it did not hold any relevant information and that the information was therefore excepted from disclosure under regulation 10(4)(a) of the EIRs. Instead, tie issued a refusal notice under the terms of section 16 of FOISA claiming that relevant information was in fact held but was exempt from disclosure under a number of exemptions contained in Part 2 of FOISA. The Commissioner is also disappointed to note that tie failed to identify and rectify this error when reviewing its handling of the request.

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

31. In this case, the Commissioner is considering the application of the exception in regulation 10(5)(e) to the information held by tie at the relevant time in relation to the number of overtime hours worked, and the rate paid for this overtime (which falls within the scope of parts a and b of Mr Marshall's request respectively).



32. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
33. The Aarhus Convention: an Implementation Guide<sup>1</sup> (which offers guidance on the interpretation of the Aarhus Convention) notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information. In practical terms, this means that national law must explicitly protect the type of information in question as commercial or industrial secrets.
34. The same guidance goes on to note that the Aarhus Convention does not define “legitimate economic interest” but that there are several steps that countries have taken to help define legitimate economic interest case by case. These are:
  - Establish a process. Parties (to the Convention, i.e. relevant states) may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential;
  - Determine confidentiality. Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case;
  - Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.
35. The Commissioner has taken this guidance into consideration when considering this exception.
36. The Commissioner’s view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
  - Is the information commercial or industrial in nature?
  - Does a legally binding duty of confidence exist in relation to the information?
  - Is the information publicly available?
  - Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

<sup>1</sup> <http://www.unece.org/env/pp/acig.pdf>



37. Before setting out his consideration of these tests in detail, the Commissioner would point out that (as he must in any case) he has considered these matters (and the associated public interest test) in the circumstances that held at the time when tie notified Mr Marshall of the outcome of its review. In this case, the relevant date is 22 January 2010. The Commissioner has not taken into consideration any developments in the period since that date.

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

38. Having considered all of tie's comments and the nature of the information under consideration, the Commissioner is satisfied that the withheld information is commercial or industrial in nature, being information about work undertaken by tie's contractors and the rates charged for this work in terms of their contractual relationship.

#### **Does a legally binding duty of confidence exist?**

39. In its submissions, tie argued that the information had the necessary quality of confidence and, a duty of confidentiality existed in relation to this information.

40. The Commissioner does not accept that a confidentiality clause or a general implication of a duty of confidence will, in itself, mean that all information caught by the clause should be, or will be automatically considered confidential. To accept such a proposition would essentially give public authorities the opportunity to contract out of their obligations under FOISA and the EIRs. The Commissioner will therefore look behind any specific stipulation or implied duty of confidence to the nature of the information concerned and consider whether the duty should stand.

41. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:

- i. the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
- ii the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
- iii there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

#### *Necessary quality of confidence*

42. To have the necessary quality of confidence, the information should not be generally accessible. The Commissioner is satisfied that this is the case here. Neither the number of hours of overtime worked or the rates charged for this work was in the public domain at the relevant time (and nor was it at the time of issuing this decision) and the information in question would only have been viewed by a limited number of individuals.





43. The Commissioner is therefore of the view that the information held at the relevant time, and has subsequently retained, the necessary quality of confidence.

*Obligation to maintain confidentiality*

44. The next test is that information must have been communicated in circumstances which imposed an obligation on it to maintain confidentiality. In this case, the Commissioner accepts that the relationship between the parties and the process followed in relation to the charging of overtime payments brought with it an implied obligation of confidentiality, which remained in place at the relevant time.
45. Again, having reviewed all of tie's submissions, the Commissioner accepts in all the circumstances that the information in question in this case was communicated in circumstances imposing an obligation on tie to maintain confidentiality.

*Unauthorised disclosure would cause detriment*

46. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
47. The Commissioner is satisfied that disclosure of the information under consideration has not been authorised by the contractor in this case. Having carefully considered tie's submissions, he is also persuaded that disclosure in response to Mr Marshall's information request at the relevant time would have caused some detriment to the contractor.
48. The Commissioner is therefore satisfied that a legally binding duty of confidence existed at the relevant time in relation to the information under consideration.

**Is the information publicly available?**

49. As noted above, the information under consideration is not in the public domain.

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

50. The term legitimate economic interest is not defined within the EIRs. The interest in question will however be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
51. In its submissions, tie commented upon the information under consideration along with the wider context of its ongoing contractual dispute with the contractor undertaking the tram works. Within this context, tie maintained that disclosure of this information would be likely to significantly harm its own commercial interests.



52. The Commissioner has considered these arguments carefully, noting the timing of Mr Marshall's information request and the wider context of tie's relationship with its contractor, which includes disputes over the nature and extent of the work done under contract. The Commissioner cannot further provide even in summary the substance of the submission detailing the harm which would or would be likely to occur from the release of this information but it is the Commissioner's view that tie's arguments are persuasive and that the release of the information would, or would be likely to, cause substantial harm to tie's legitimate economic interests.
53. As such, the Commissioner is satisfied that tie was entitled to apply the exception in regulation 10(5)(e) to the withheld information concerning the number of overtime hours worked and the overtime rates payable by tie under the contract.

#### **Consideration of the public interest test**

54. Having upheld the use of the exception contained within regulation 10(5)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a 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.
55. In his submissions to the Commissioner, Mr Marshall argued that by refusing to release any details of spending, tie was avoiding any kind of public scrutiny. He submitted that many people feared that the first they would hear about the finances of the project would be when they learned that it had gone substantially over budget.
56. Mr Marshall submitted that releasing the information would not cause any substantial prejudice to the commercial interests of the project and argued that tie was attempting to hide behind the cloak of commercial confidentiality.
57. In its submissions, tie reiterated that the release of the information would place it in a disadvantageous position, given the wider context of its ongoing dispute with the contractor.
58. The Commissioner has considered fully all of the submissions on the public interest made by both Mr Marshall and tie taking into consideration the specific content and wider context of the withheld information. In considering the public interest test, the Commissioner is aware of the high level of public interest that exists regarding the tram project, particularly in Edinburgh, but also across Scotland. Where such a major infrastructure programme of this type is taking place, it is inevitable and appropriate that the public will be keen to understand how public monies are being spent and whether it is value for money.
59. The Commissioner acknowledges that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In this case, it would contribute to the debate on a matter of public interest and may allow the public to make a judgement as to whether the tram project is providing value for money for the local community and taxpayers.



60. The Commissioner also accepts that there are relevant and valid arguments in this case which suggest that the public interest in making the information available is outweighed by the public interest in maintaining the exception. These include:
- The general public interest in confidences being maintained,
  - The likelihood of commercial damage being caused to tie through disclosure of the information under consideration,
  - The likelihood that disclosure would have a detrimental effect on the ability of the parties involved in ongoing discussions around their contractual obligations and liabilities to work effectively together on an ongoing basis.
61. Having carefully weighed up the arguments, the Commissioner has concluded that in all the circumstances of the case, the public interest in making this information available in this instance is outweighed by the public interest in maintaining the exception.
62. The Commissioner therefore concludes that tie was entitled to apply the exemption in regulation 10(5)(e) of the EIRs to the information sought in parts a and b of Mr Marshall's information request. Therefore, the Commissioner has concluded that tie acted in accordance with the EIRs in withholding this information.

## DECISION

The Commissioner finds that tie Limited (tie) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Marshall's request for information.

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, tie failed to comply with regulation 5(1) and (2)(b) of the EIRs.

However, the Commissioner finds that tie was entitled to withhold the information requested by Mr Marshall under regulations 10(4)(a) and 10(5)(e) of the EIRs, and so tie acted in accordance with the EIRs by refusing to supply this information to Mr Marshall.

The Commissioner does not require tie to take any action in response to this decision.

Decision 195/2010  
Mr Chris Marshall  
and tie Limited



## Appeal

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Should either Mr Marshall or tie 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**  
**25 November 2010**



## Appendix

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### 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 –

- (a) the provision does not confer absolute exemption; and
- (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;

...

(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;...