

Decision Notice



Decision 199/2011 Andrew Picken of the Scottish Daily Mail and tie Ltd

Estimates of costs associated with the Edinburgh tram project

Reference No: 201100496

Decision Date: 30 September 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Picken requested from tie Ltd (tie) expenditure estimates prepared regarding the eventual cost of the Edinburgh tram project depending on the different scenarios arising from the ongoing contractual dispute with the Bilfinger Berger Siemens consortium (BBS). In its initial response, tie indicated that it did not hold such information. Following a review, during which tie accepted that it held the requested information, but withheld this under exceptions contained in the Environmental Information (Scotland) Regulations 2004 (the EIRs), Mr Picken remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that tie had dealt with Mr Picken's request for information in accordance with the EIRs. He accepted that the information was excepted from disclosure under regulation 10(5)(e) of the EIRs, which applies where 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.

Relevant statutory provisions and other sources

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), (b), (c) and (e) of "environmental information"); 5(1) and 2(b) (Duty to make environmental information available on request) and 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 3 February 2011, Mr Picken, Scottish Political Reporter for the Scottish Daily Mail emailed tie requesting full details of the range of expenditure estimates prepared by tie on how much the Edinburgh trams project will eventually cost depending on the different scenarios arising from the ongoing contractual dispute with the Bilfinger Berger Siemens consortium (BBS).



2. On 21 February 2011, tie responded to Mr Picken's request, advising him that, as it considered the requested information to be environmental information, it had handled his request under the EIRs. It notified Mr Picken that it did not hold the information he had requested, and so it was excepted from disclosure under regulation 10(4)(a) of the EIRs.
3. Mr Picken wrote to tie requesting a review of its decision on the same day. He drew tie's attention to the following text, contained in paragraph 55 of a report produced by Audit Scotland¹ concerning the Edinburgh tram project:

"While **tie** considers it can accurately predict the final outturn expenditure for most elements of the project, it is unable to report a robust final cost estimate for infrastructure construction. **tie** says that, until the key contractual issues with BBS are resolved, it is not possible to forecast accurately what the trams project will finally cost. *It has developed a range of expenditure estimates based on different scenarios but the contractual dispute with BBS needs to be resolved before these figures can be verified.*" (emphasis added)

Mr Picken noted that this indicated that some form of expenditure estimates were held.

4. On 17 March 2011, tie notified Mr Picken of the outcome of its review. It acknowledged that it was incorrect to indicate in its previous response that it did not hold the requested information. However, it now refused to supply the information on the grounds that it was excepted from disclosure under regulations 10(4)(d) and 10(5)(e) of the EIRs.
5. On 21 March 2011, Mr Picken 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 Picken 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 30 March 2011, tie was notified in writing that an application had been received from Mr Picken and was asked to provide the Commissioner with the information withheld from Mr Picken. On 9 May 2011, tie responded with the information requested and the case was then allocated to an investigating officer.

¹ www.audit-scotland.gov.uk/docs/central/2010/nr_110202_trams.pdf



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 which also, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking it to respond to specific questions. In particular, tie was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested, with particular reference to regulations 10(4)(d) and 10(5)(e) of the EIRs.
9. In its response, tie explained that, having considered the nature of the information requested by Mr Picken, it was now of the view that the request should have been dealt with in line with FOISA rather than the EIRs. As a consequence, tie indicated that it wished to apply the exemption in section 33(1)(b) of FOISA when withholding the requested information, and it provided submissions to justify its application of this exemption.
10. In further communications, tie was advised that the Commissioner was likely to find that it had been correct to consider Mr Picken's request under the EIRs in the first instance. In response to this point, tie confirmed that it would want the Commissioner to consider its submissions on section 33(1)(b) of FOISA in relation to the exception in regulation 10(5)(e) of the EIRs if he concluded that the information under consideration was environmental information. It also confirmed that, should the Commissioner conclude that the information withheld was environmental information, it would apply the exemption in section 39(2) of FOISA (which applies to environmental information, and removes the need for its further consideration under FOISA).
11. The investigating officer also contacted Mr Picken during the investigation seeking his submissions on the matters considered in this case, in particular as to why he considered it to be in the public interest for the information to be disclosed. Mr Picken's submissions, along with those of tie, are summarised and considered (where relevant) in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Handling under the EIRs

13. When responding to Mr Picken's request and subsequent request for review, tie considered Mr Picken's request as one seeking environmental information in terms of the EIRs.
14. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.



15. As noted above, during the investigation, tie advised the Commissioner that it no longer considered that the request was for environmental information (implying that it had incorrectly considered the request under the EIRs in the first instance). The Commissioner has therefore first considered whether tie was correct to deal with Mr Picken's request under the terms of the EIRs.
16. Having had regard to the subject matter of Mr Picken's request and the information which has been withheld (concerning the estimated cost of various options in relation to the future of a major infrastructure project), the Commissioner considers that it falls within the scope of part (e) of the definition of environmental information. He reached this conclusion having noted that the cost estimates regarding options for the future of the tram project constitute an economic analysis. This analysis is clearly designed for use in the context of measures relevant for part (c) of the definition of environmental information (in particular policy and decision-making with respect to the building of a tram system) which would be likely to affect the elements of the environment and factors affecting those elements, as detailed in parts (a) and (b) of that definition. (The relevant parts of the definition are set out in the Appendix.)
17. The Commissioner therefore concludes that (notwithstanding its change of view during the investigation of this case) tie was correct to recognise Mr Picken's information request as one seeking environmental information and respond to it in terms of the EIRs.

Section 39(2) of FOISA – environmental information

18. 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 required by section 2(1)(b) of FOISA.
19. In this case, tie applied this exemption when responding to Mr Picken's request and requirement for review. It also indicated during the investigation that it would continue to do so should the Commissioner conclude that the information under consideration is environmental information.
20. The Commissioner finds that tie was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given his conclusion that it is properly considered to be environmental information.
21. 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.



The withheld information

22. When asked to supply the information withheld from Mr Picken to the Commissioner, tie provided a copy of a report containing the relevant information. It indicated that the information requested by Mr Picken was restricted to the content of tables within that report, which set out, in numeric form, the estimated costs associated with different options for the future of the tram project.
23. The report also includes narrative text explaining in more detail the nature of the options under consideration and the rationale underlying the cost estimates. When asked about this information, tie indicated that it did not consider this information to fall within the scope of Mr Picken's information request. However, it did indicate that, in any event, many of the narratives within the document were likely to be viewed as sensitive, for the same reasons that had been submitted in relation to the numerical information.
24. The Commissioner has considered the content of the report supplied to him, along with the terms of Mr Picken's request. He has noted that this asked for "*full details* of the range of expenditure estimates..." prepared by tie, and he considers that "*full details*" would include not just the financial calculations (as set out in the tables identified by tie), but also associated information providing an explanation of the assumptions and rationale behind these calculations.
25. The Commissioner has therefore concluded that tie had identified only part of the relevant information contained within the report provided to him. He finds that where the narrative text within the report explains the basis of the cost calculations, the scenarios they apply to, and any caveats attached to them, this information would also fall within the scope of Mr Picken's request for full details of the range of expenditure estimates.
26. Having reached this conclusion, the Commissioner went on to consider tie's application of the exception in regulation 10(5)(e) in relation to all of the information he found to fall within scope of Mr Picken's information request.

Regulation 10(5)(e) of the EIRs

27. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that 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.



28. The Aarhus Convention: an Implementation Guide² (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: it must, the guidance states, explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
29. The Commissioner has taken this guidance into consideration when considering this exception, for example in *Decision 071/2011 Mr Craig Mitchell and Fife Council*. It is the Commissioner's view 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

Is the information commercial or industrial in nature?

30. In its response to Mr Picken's request for review, tie commented that the withheld information clearly relates to cost estimates which are of a commercial nature in relation to the industrial programme associated with the construction of the Edinburgh tram system.
31. The Commissioner is satisfied that all of the information that he has found to fall within the scope of Mr Picken's request is clearly commercial and industrial in nature, since it relates to in its entirety to the options for the future of the tram project and associated costs.

Does a legally binding duty of confidence exist?

32. The Commissioner considers that "provided by law" in terms of regulation 10(5)(e) will include confidentiality imposed by any person under the common law duty of confidence, under a contractual obligation or by statute. There is no need, under the exception in regulation 10(5)(e), for the information to have been obtained from another person and in that respect it differs from the "confidentiality" exemption in section 36(2) of FOISA. The exception can therefore cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party.
33. With respect to this test, tie has maintained that there is an implied obligation that the withheld information should be confidential.

² <http://www.unece.org/env/pp/acig.pdf>



34. The Commissioner has considered the submissions made by tie, together with the content of the report containing the withheld information. He notes that this report indicates that tie has a duty to the Council and the Scottish Government to keep the information contained within the report confidential.
35. The Commissioner accepts that tie was under an obligation to maintain confidentiality with respect to all of the information falling within the scope of Mr Picken's information request.

Is the information publicly available?

36. In his submissions, Mr Picken highlighted the publication of information relating to the costs of different options for the future of the tram project in an article on the BBC news website, dated 23 June 2011.
37. The Commissioner is aware that information regarding estimated costs for options for the future of the tram project was reported by various sources in the media during the course of his investigation. He cannot confirm in this decision whether the published figures are the same as those under consideration in this case.
38. However, regardless of whether the information now in the public domain is the same as that under consideration, the Commissioner is mindful that, when considering the application of any exception in the EIRs or the associated public interest test, he must base his conclusions on the circumstances that held when the authority responded to the applicant's requirement for review. In this case, that was on 17 March 2011, three months before the publication highlighted by Mr Picken.
39. The Commissioner is satisfied that no information of the type sought by Mr Picken's request was publicly available at the time when tie notified Mr Picken of the outcome of its review.
40. Having considered the information falling within the scope of Mr Picken's request, the Commissioner is satisfied that this information would only have been viewed by a very limited number of individuals and was not available in the public domain at the time that tie responded to Mr Picken's requirement for review.

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

41. 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.
42. In its submissions, tie indicated that the interests at stake in this case were those of tie and the Council, its owner and guarantor of the tram project. It argued that disclosure of the information at a time when mediation talks and attempts at reaching a resolution to commercial disputes with BBS were ongoing would have a lasting outcome on the final cost of the Edinburgh tram project.
43. tie noted that the withheld information provided a very clear insight into its thinking about the financial commitments that would be required to deliver the tram project or parts of it.



44. tie explained that a report from the Council was due to be provided at the end of June 2011, and this report was likely to make definitive decisions regarding the future of the project, including its financing as well as decisions regarding the relationship with the Consortium.
45. It submitted that, in advance of that time, disclosure of information around the financial estimates for the project could be used by BBS to its commercial advantage to ensure the best financial deal possible on the best commercial terms. This would, tie considered, impact on the ability of tie or the Council to maintain a robust position to extract the best possible outcome for the public purse.
46. The Commissioner has considered these submissions carefully, again noting that his consideration must focus on the circumstances prevailing at the time of tie's review in March 2011. At that date, the negotiations to resolve the dispute between tie and the Council and BBS were ongoing, and the future of the tram project was unclear. While matters have moved on significantly in the period since that date, the Commissioner must disregard these developments in his consideration of this case.
47. In coming to a conclusion on this matter, the Commissioner has taken account of the timing of Mr Picken's request and of tie's review with respect to the negotiations with BBS, and the preparations for the Council to make a decision on where the future of the Edinburgh tram project lay. He has recognised the bearing that these estimated costs and associated narrative would have on both of these processes. The Commissioner has also considered the historic and ongoing relationship difficulties between tie and BBS.
48. Taking these factors into consideration, the Commissioner recognises that, while negotiations were ongoing, the information under consideration constituted highly commercially sensitive information, revealing in considerable detail the options available to tie and the Council for the future of the tram project and the associated costs and implications.
49. The Commissioner accepts that if this information had been disclosed to Mr Picken when it notified him of the outcome of its review, it would have been highly likely to undermine the Council and tie's position within negotiations with BBS, to the detriment of their ability to achieve the best possible outcome in financial and commercial terms. He accepts, as a result, that disclosure would have been likely to cause substantial prejudice to tie and the Council's legitimate economic interests.
50. Accordingly, the Commissioner is satisfied that tie was entitled to apply the exception in regulation 10(5)(e) to the information falling within the scope of Mr Picken's request.

Consideration of the public interest test

51. 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. This 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.



52. In its submissions, tie recognised a number of factors favouring disclosure of the withheld information. These included the general public interest in ensuring financial transparency by public authorities and the proper management of contracts, together with the public interest in understanding the continuing financial impact on the Council and its tax payers for delivering a controversial major infrastructure project.
53. However, tie submitted that, given the timing of Mr Picken's request in light of the (then) forthcoming Council report regarding the project's future and the ability to strike a new deal with BBS, coupled with the nature of the financial estimates requested, it had concluded that the public interest tipped in favour of withholding the information.
54. It indicated that factors favouring the maintenance of the exception included the current negotiations with BBS, and the fact that disclosure would give the contractor insights into the Council and tie's thinking and financial position. It also noted that the estimates were just that, and likely to change due to the outcome of negotiations and policy decisions to be taken by the Council as to the project scope. It indicated that these were of limited value, and would not shed light on the budget for the project.
55. In his submissions, Mr Picken commented that, given the turbulent nature of the project, and the myriad of unexpected cost increases there have been since it started, he considers that it is wholly in the public interest to set out the range of expenditure estimates because tax payers have a right to know if tie is effectively throwing good money after bad.
56. Mr Picken also made reference to the recent disclosures by the media of the latest costs for the future of the tram project, and contended that it is very much in the public interest that the information under consideration be disclosed, and made public, to allow an understanding of whether these figures tally with the information published by the media, given the lack of public confidence there has been in tie's figures to date.
57. As mentioned previously, the Commissioner's decision is required to consider the application by tie of the exception in regulation 10(5)(e), and the resulting public interest test arguments, at the time at which tie responded to Mr Picken's requirement for review. As a consequence he is unable to take into account the recent disclosures by the media.
58. As in *Decision 116/2011 Daniel Harvey and Transport Scotland* (which also considered information relating to the Edinburgh tram project), the Commissioner accepts that there is a general public interest in making information held by public authorities accessible to enhance the public's knowledge of decision making and to encourage participation.
59. The Commissioner is acutely aware of the substantial public interest that exists in relation to the Edinburgh tram project, a major infrastructure project incurring significant and increasing costs. This is particularly so in the current economic climate, in which the public quite rightly expects to be reassured that the finances available to public authorities are being managed effectively and with due regard to achieving best value. The Commissioner also recognises that the public interest in understanding the circumstances and costs surrounding the Edinburgh tram project has been heightened as a result of the uncertainty surrounding it as a result of the dispute between tie/the Council and BBS.



60. The Commissioner accepts that release of the information under consideration would enhance the public's understanding of the options and solutions open to tie and the Council regarding the future of the Edinburgh tram project. It would also assist the public in understanding the decisions that the Council and tie have to take, and their implications for the future of the tram project and the public purse. While the Commissioner recognises that the cost estimates would be of limited value as actual costings for the future of the project, and could be misleading if read as such, he considers the details of the estimated costs of the various options and the explanation of how these were reached would contribute to some extent to public understanding, and so to the public interest.
61. However, the Commissioner also recognises that there are compelling 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.
62. As in previous decisions, the Commissioner recognises that there is a general public interest in confidences being maintained. He also recognises that there was at the relevant time a substantial public interest in enabling tie and the Council to participate in the ongoing mediation process and successfully negotiate the outcome bringing the greatest possible economic and commercial benefit to the Council and the public.
63. Having accepted that disclosure of the information under consideration in this case at the relevant time would have been likely to undermine tie and the Council's negotiating position and ability to secure the best possible deal for the future of the project, he concludes that this would have also been contrary to the public interest.
64. Having carefully weighed up the arguments, the Commissioner has concluded that, in all the circumstances of the case, the public interest in making the information available in this case was at the relevant time outweighed by the public interest in maintaining the exception.
65. The Commissioner therefore concludes that tie was entitled to apply the exception in regulation 10(5)(e) of the EIRs to all of the information falling within the scope of Mr Picken's request. Therefore, the Commissioner has concluded that tie complied with the EIRs in withholding this information.

DECISION

The Commissioner finds that tie Ltd complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Picken. He finds that tie Ltd correctly relied on regulation 10(5)(e) of the EIRs to withhold the requested information and thereby complied with regulation 5(1).

Decision 199/2011
Mr Andrew Picken
and tie Ltd



Appeal

Should either Mr Picken 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.

Margaret Keyse
Head of Enforcement
30 September 2011



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 –

- (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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

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

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(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;

...