

Decision Notice

Decision 185/2015: Mr Bill Chisholm and Scottish Borders Council

Financial security payment

Reference No: 201501199

Decision Date: 1 December 2015



Scottish Information
Commissioner

Summary

On 16 April 2015, Mr Chisholm asked Scottish Borders Council (the Council) for an explanation as to why the Council had to provide financial security to the Scottish Environment Protection Agency (SEPA) in 2012 on behalf of New Earth Solutions (Scottish Borders) Ltd (NES).

The Council withheld the information. Following a review, in which the Council notified Mr Chisholm that it was withholding the information under regulation 10(5)(e) of the EIRs, Mr Chisholm remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had failed to respond to Mr Chisholm's request for information in accordance with the EIRs. The information it had withheld was not excepted from disclosure under regulation 10(5)(e) of the EIRs. She required the Council to provide Mr Chisholm with a copy of the withheld information.

Relevant statutory provisions

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

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

Background

1. On 16 April 2015, Mr Chisholm made a request for information to the Council. In the first part of his request (the only part to be considered in this decision) he asked:
Can SBC please explain (a) why it had to provide financial security to SEPA in 2012 on behalf of New Earth Solutions (Scottish Borders) Ltd, the contractors hired by the council to build the Mechanical Biological Treatment (MBT) plant at Easter Langlee? and (b) how much of the £315,000 was in fact paid to SEPA to cover the cost of that process?
2. The Council responded on 25 May 2015. The Council provided information in response to part (b) of Mr Chisholm's request (the answer was "none"), but withheld the information covered by part (a), arguing that it was exempt from disclosure under section 33 of the Freedom of Information (Scotland) Act 2002 (FOISA) (Commercial interests and the economy).
3. On 25 May 2015, Mr Chisholm wrote to the Council requesting a review of its decision to withhold information from him.
4. The Council notified Mr Chisholm of the outcome of its review on 23 June 2015. The Council indicated that the requested information was environmental information and that his request therefore required to be handled under the EIRs. The Council then notified Mr Chisholm that it was withholding the information under regulation 10(5)(e) of the EIRs, in order to protect the confidentiality of commercial information.

5. On the same day, Mr Chisholm wrote to the Commissioner. Mr Chisholm applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Chisholm did not agree with the exception applied by the Council and commented that the information he had asked for was “of prime public interest”.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Chisholm made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 20 July 2015, the Council was notified in writing that Mr Chisholm had made a valid application. The Council was asked to send the Commissioner the information withheld from him.
8. The Council did not provide the withheld information, but instead referred the Commissioner to concerns it had previously raised with regard to the information in question being subject to a confidentiality clause.
9. Mr Chisholm has made three other applications to the Commissioner about the Council’s contract with New Earth Solutions (Scottish Borders) Ltd (NES). The Commissioner is aware of a number of trading vehicles set up by New Earth Solutions, but in this decision, NES should be taken to refer only to New Earth Solutions (Scottish Borders) Ltd.
10. The case was allocated to an investigating officer who assured the Council that any information obtained by the Commissioner with regard to an application was kept confidentially. The Council subsequently provided the withheld information.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

Withheld information

12. During the investigation, the Council re-assessed its interpretation of Mr Chisholm’s request and disclosed most of the information it held that fell within the scope of his request. It continued to withhold part of one sentence in a single document. It withheld this information on the basis that it was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs.
13. Mr Chisholm notified the Commissioner that he still required her to investigate whether the withheld information should be provided to him. This decision therefore concerns only the text redacted from paragraph 4.3 of the document provided to Mr Chisholm by the Council on 28 September 2015, the Report by Director of Environment and Infrastructure, 29 March 2012.

Commissioner's analysis and findings

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

Application of the EIRs

15. The Council initially responded to the request under FOISA, but in its review outcome it concluded that the information was environmental as it related to activities affecting the environment and to a factor affecting or likely to affect the elements of the environment, i.e. waste. Accordingly, the Council considered that the requested information fell under the definition of environmental information provided in paragraphs (b) and (c) in regulation 2(1) of the EIRs. Mr Chisholm has not disputed this, and in his application to the Commissioner he submitted that the information he was seeking fell under the EIRs. The Commissioner accepts that the information is environmental information; accordingly, she will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) – duty to make environmental information available

16. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12, requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
17. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(5)(e) – prejudice to confidentiality of commercial or industrial information

18. 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.
19. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
20. The Aarhus Convention: an Implementation Guide¹ (second edition), which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must 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.

¹http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

21. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) Is the information commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

22. The Council stated that the requested information relates to the finances of NES. It indicated that the information in question is commercial, relating as it does to the finances of a commercial company which is involved in commercial endeavours.
23. The Commissioner has reviewed the withheld information and is satisfied that it is commercial information, for the reasons given by the Council.

Does a legally binding duty of confidence exist?

24. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
25. The Council submitted that clause 50 of the contract between the Council and NES ("Confidentiality") applied to the information withheld from Mr Chisholm. Clause 50.1 defines confidential information as:
- any and all information of a confidential nature relating to the other Party (whether before or after the Commencement Date), either in writing, orally or in any other form, directly from or pursuant to discussions with the other Party...*
26. The Council told the Commissioner that the withheld information was provided to the Council by NES. It argued that the withheld information is confidential as it relates to the financial health of NES and its ability to meet a regulatory requirement of the project.
27. Clause 50.2 of the contract states that, except in specified circumstances as set out in the clause (none of which are relevant here):
- Each Party shall hold in confidence any Confidential Information.*
28. Clause 50.3 goes on to list other situations where the obligation to maintain confidentiality shall not apply. One of these (clause 50.3.3), states that:
- ... the obligation to maintain confidentiality does not apply to Confidential Information to the extent that any person is required to disclose such Confidential Information by Law (other than under [FOISA] or the [EIRs], disclosure pursuant to which is governed by Clause 50.3.7. and Clause 51.5) or any regulatory or government authority (but only to that extent).*
29. Clause 51.5 states that:
- The Council may disclose pursuant to a Request for Information or otherwise publish pursuant to [FOISA] or the [EIRs] any Information (whether Confidential Information,*

Commercially Sensitive Information or otherwise) which it considers, at its absolute discretion, that:

51.5.1 it is required in terms of [FOISA] or the [EIRs] to so disclose or publish; or

51.5.2 it would otherwise be in the public interest to so disclose or publish,

provided that in so doing the Council acts in accordance with the guidance set out in the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004], including by consulting with [NES] prior to any such disclosure or other publication, if and to the extent necessary to comply with that guidance.

30. The Council takes the view that clause 50 of the contract requires it to keep confidential the information which it has withheld from Mr Chisholm. It acknowledged that clause 50.3.3 (as read with clause 51.5):

recognises the existence of the Freedom of Information and Environmental Information Regulations

but took the view that this reference related to:

the entire scope of those legislative interventions. In other words, where an exemption applies, the Council should seek to preserve the integrity of the confidentiality agreement and act in accordance with that exemption.

31. As with *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*², the Commissioner does not accept that the existence of a confidentiality agreement will, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to contract out of their obligations under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look beyond the confidentiality clause and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
32. Even if the duty of confidence does stand, the Commissioner must go on to consider the other tests in regulation 10(5)(e) before determining whether information should be withheld or disclosed. It is not enough that the information is subject to a duty of confidence.
33. Clause 51.5 of the contract underlines this approach. It recognises that, regardless of the agreement entered into by the Council and NES, there will be times when information must be disclosed by the Council in order to allow it to comply with its statutory duties under the EIRs (or, as appropriate, FOISA).
34. The Commissioner will now go on to consider whether a duty of confidence is owed by the Council to NES.
35. 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.

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

- (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

- 36. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here. Although the Council has disclosed information outlining the general reasons why it provided financial security to SEPA on behalf of NES, the specific detail of the withheld information is not in the public domain. The information in question will only have been viewed by a limited number of individuals. It was clearly received under circumstances from which it should reasonably have been inferred that it was confidential.
- 37. The Commissioner is satisfied that when NES provided the withheld information to the Council, it did so in the expectation that the information contained therein would not be disclosed into the public domain during the lifecycle of the contract. The Commissioner also notes that when both parties re-signed the confidentiality agreement in March 2015 (once the contract was terminated), the confidentiality agreement restricted disclosure of confidential information for a period of six years from 31 March 2015.
- 38. The Commissioner considers that this indicates that the information had, and has retained, the necessary quality of confidence.

Obligation to maintain confidentiality

- 39. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
- 40. The Commissioner accepts that the information in question in this case was received under an explicit obligation to maintain confidentiality. Such an expectation would have been normal in relation to a contract of this kind.

Unauthorised disclosure would cause detriment

- 41. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
- 42. In its submissions, the Council has provided the Commissioner with a number of examples of harm which it considers would result from disclosure of the information. These will be considered in more detail below. The detriment under consideration in this instance need only be potential for the test to be met, and the Commissioner is satisfied that the disclosure of the information in this case is potentially capable of causing detriment to NES.
- 43. The Commissioner is therefore satisfied that a legally binding duty of confidence exists.

Is the information publicly available?

- 44. The third factor to consider in relation to the exception in regulation 10(5)(e) is whether the information is publicly available. The Council has submitted that the withheld information is not publicly accessible and the Commissioner accepts this position.

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

45. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view the interest in question will be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial, and therefore of real and demonstrable significance.
46. The Council has argued that the disclosure of the withheld information would be likely to cause substantial harm to the legitimate economic interests of NES. The Council notes that competitors of NES could utilise this intelligence to NES's disadvantage. The Council also suggested that disclosure of the withheld information could have an influence on any future business partners of NES. In either case, the Council argued that the footing of NES in a commercial setting is likely to be weakened by disclosure of the withheld information into the public domain.
47. The Commissioner has considered all of these arguments carefully, but she is not persuaded that disclosure of the withheld information would cause, or be likely to cause, substantial harm to a legitimate economic interest, for the following reasons.
48. The Council has refused to disclose part of a sentence (amounting to one line of text) from a committee report to Mr Chisholm, arguing that disclosure would prejudice substantially NES's legitimate economic interests. The Council commented that the:
sentence contains information giving a clear indication of the financial health of NES.
49. The Commissioner notes that the information dates from March 2012, some three years before Mr Chisholm made his request for information. It is therefore difficult to see how disclosure of the information, three years on, could cause substantial prejudice to NES's legitimate interests. Since March 2012, NES has submitted two sets of annual accounts to Companies House which clearly contain information on its "financial health". These annual accounts are publicly available. Given this, the Commissioner finds it difficult to accept that the withheld information would in any way dissuade future business partners from working with NES. Neither is she persuaded that disclosure of this information would enable competitors to take advantage of NES, given its age and the lack of detail.
50. Having considered the above submissions, the Commissioner is not satisfied that the Council has supplied sufficient argument or evidence to show that disclosure of the withheld information would have caused, or would have been likely to cause, substantial prejudice to a legitimate economic interest.
51. Having considered all the relevant tests, therefore, she does not accept that the Council was entitled to apply the exception in regulation 10(5)(e) to that information.
52. Given that she has not upheld the application of the exception in regulation 10(5)(e), the Commissioner is not required to go on to consider the public interest test required by regulation 10(1)(b) of the EIRs.
53. The Commissioner requires the Council to provide Mr Chisholm with the information redacted from paragraph 4.3 of the document provided to him.

Decision

The Commissioner finds that Scottish Borders Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Chisholm. She finds that the Council was not entitled to withhold the redacted information under regulation 10(5)(e) of the EIRs, and in doing so it failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide Mr Chisholm with a copy of the redacted information by **15 January 2016**.

Appeal

Should either Mr Chisholm or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If Scottish Borders Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Scottish Borders Council has failed to comply. The Court has the right to inquire into the matter and may deal with Scottish Borders Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

1 December 2015

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

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...

(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;

...

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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