

# Decision Notice

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**Decision 153/2018: West Craigs Ltd and City of Edinburgh Council**

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**West Edinburgh Transport Appraisal (WETA) Refresh Report**

Reference No: 201701750

Decision Date: 4 October 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for information relating to the West Edinburgh Transport Appraisal (WETA) Refresh Report. The Council provided some information, but withheld other information, arguing that disclosure of that information would cause substantial harm to commercial confidentiality.

The Commissioner investigated. He did not accept that all the information was excepted from disclosure under regulation 10(5)(e) of the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information 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

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1. By way of background, in 2008, the Scottish Government published the West Edinburgh Planning Framework (WEPF)<sup>1</sup> recognising West Edinburgh as one of the most important gateways to Scotland and as a key national economic asset. To realise West Edinburgh's potential as a significant business investment location that is internationally competitive, the land adjoining the airport was subsequently identified as a national development site. This was supported by the Council's Local Development Plan (LDP) citing West Edinburgh as a primary location for growth and investment. A core development within the WEPF was the allocation, preparation and promotion of sites to be known as the International Business Gateway (IBG).
2. The scale of the development proposed, and forecast airport growth, had a potentially significant impact on the strategic transport network. This required a series of Transport Appraisals (TA) to be undertaken evaluating, forward planning and providing the appraisal of the strategic transport interventions necessary to support the levels of development and growth identified. The West Edinburgh Transport Appraisal 2016 (WETA) Refresh was the key strategic document of reference. (The original WETA Study was published in February 2010 and was developed as a strategic appraisal of possible transport interventions to support WEPF's implementation.) The WETA Refresh was prepared by Jacobs Consultancy Ltd (Jacobs). WETA was collaboratively delivered by the Council (as lead), West Lothian Council, the Scottish Government (represented by Transport Scotland), Edinburgh Airport Limited, Royal Highland and Agriculture Society Scotland (RHASS), Transport Operators and International Business Gateway developers.
3. On 7 December 2015, the Council received a Planning Permission in Principle (PPP) application [PPP15/05580/PPP] for the development of the IBG site. In support of this

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<sup>1</sup> <https://www.gov.scot/Publications/2008/05/12134122/1>

application, the Council agreed to lead a Transport Appraisal: essentially, a 2016 refresh of the WETA Study, accounting for changes in traffic growth, airport demand, class of development (office, hotels, residential), geographical area in scope and other related actions or influences. The WETA Refresh Report was dated 2 December 2016 and is publicly available<sup>2</sup>.

4. The correspondence leading up to this application for decision was complex, and is summarised below.
5. On 9 December 2016, an agent for West Craigs Ltd (West Craigs) made a request for information to the City of Edinburgh Council (the Council). For convenience, the requester will be referred to as “West Craigs” in this decision notice and that reference includes any communication to or from West Craigs and their agents. In its email, which was not set out as an information request, West Craigs referred to a previous information request made to the Council and stated that the previous request had “covered far more than the WETA Refresh Report”. West Craigs made it clear it required all background and supporting papers to WETA (the Refresh study), including written instructions about the scope of the report, and “all plans, documents, etc.”
6. This email was acknowledged by the Council on 12 December 2016. West Craigs was told that it would be “referred back to the Information Rights Team”. The Council commented about the extent of the original WETA study and the WETA Refresh study.
7. On 20 December 2016, the Council stated that it was unable to proceed with the request, and asked West Craigs to clarify which part of its previous request had not been addressed in the Council’s response of 12 December 2016.
8. On 20 January 2017, the Council wrote to West Craigs, stating that on 20 December 2016 it had asked West Craigs to clarify the information requested, but that West Craigs had not responded. The Council said that it was therefore unable to proceed with West Craigs’ request, but would do so on receipt of the clarification it required.
9. On 23 January 2017, West Craigs sent the Council a copy of an email from 25 November 2016, raising several questions, and stated “this is what I need please”.
10. On 20 February 2017, the Council wrote to West Craigs to indicate that it would be unable to respond within 20 working days, and stated it hoped to reply on 24 February 2017. On 22 February 2017, the Council apologised to West Craigs and stated it would not be able to reply on 24 February 2017.
11. West Craigs wrote to the Council on 1 and 2 March 2017 and expressed dissatisfaction at having received no information. On 2 March 2017, West Craigs asked the Council why it could not release the requested information.
12. On 9 March 2017, the Council again apologised for the delay. It disclosed some information to West Craigs. It withheld information under regulation 10(5)(e) of the EIRs and explained that the public interest favoured withholding that information. The Council believed disclosure of the information would harm the economic interests of the Council and other stakeholders, as the information included discussions on the City Deal and draft proposals. The Council also withheld some personal data.

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<sup>2</sup> [http://www.edinburgh.gov.uk/downloads/download/2082/ldp\\_transport\\_appraisal](http://www.edinburgh.gov.uk/downloads/download/2082/ldp_transport_appraisal)

13. On 11 April 2017, West Craigs wrote to the Council requesting a review of its decision on the basis that its response was provided 47 working days after the information request. It stated that the Council had not relied on regulation 7 of the EIRs (to extend the timescale for response); that in terms of regulation 13 of the EIRs, the Council had failed to explain its reasons for applying an exception (and that the exception had not been applied in a restrictive way); and the Council had withheld all the information while it considered which exception applied.
14. The Council notified West Craigs of the outcome of its review on 11 May 2017. The Council apologised for the delay in responding to the initial request, acknowledging that it had not sought to extend the time under regulation 7 of the EIRs, and that (even if it had) its response would have been outwith the extended deadline allowed under regulation 7. The Council explained that it had withheld information under regulations 10(5)(e) and 11(2) of the EIRs, but apologised that it had not made clear to what information the exceptions applied. It rectified this by supplying copies of the documents indicating where information had been redacted. The Council concluded that it had complied fully with the Freedom of Information (Scotland) Act 2002 (FOISA) and the EIRs and had applied the exceptions in a restrictive way and with a presumption on disclosure. It stated that there was no requirement for it to issue a series of partial responses to an information request.
15. On 4 October 2017, West Craigs 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.)
16. West Craigs expressed dissatisfaction with:
  - (i) the way in which the Council had re-issued information with the redactions marked;
  - (ii) the Council's failure to justify withholding information;
  - (iii) the application of regulation 10(5)(e) of the EIRs was "excessive and not justified" and the Council had not considered the public interest test.
17. West Craigs accepted the redaction of information which was personal data and did not express dissatisfaction about this aspect of the Council's response. Consequently, the withholding of personal data did not form part of the Commissioner's investigation.

## Investigation

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18. The application was accepted as valid. The Commissioner confirmed that West Craigs made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
19. On 8 November 2017, the Council was notified in writing that West Craigs had made a valid application. The Council was asked to send the Commissioner the information withheld from West Craigs. The Council provided the information and the case was allocated to an investigating officer.
20. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 28 March 2018, the Council was invited to comment on this application and to answer specific questions including justifying its

reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.

21. During the Commissioner's investigation, the investigating officer sought clarity from the Council on 28 March 2018 on what information had been released by the Council, what information had been withheld by the Council, and the exception applied to the withheld information. The Council clarified this on 1 June 2018. The Council also explained in more detail why the exception in regulation 10(5)(e) of the EIRs applied (20 April 2018). The Council provided more explanation in submissions made on 1 June 2018, at a meeting on 3 July 2018, and in submissions made on 3 August 2018.
22. Due to the passage of time since West Craigs made its request, the Council decided to disclose more information to West Craigs and on 29 June 2018 it supplied a link to an unredacted online version of the *A89/A8 Corridor – Public Transport Improvement Study*<sup>3</sup> and by providing a redacted copy of three documents:
  - Edinburgh International Development Partnership (EIDP) Principals Meeting of 26 June 2016 (redacted)
  - Liaison Meeting of 26 April 2016 (redacted)
  - Technical Steering Group – Minutes Meeting No 3 of 17 May 2016 (redacted)
23. West Craigs were invited to comment on the application of the exception in regulation 10(5)(e) of the EIRs, and the balance of public interest in disclosing or withholding the information. They wrote to the Commissioner outlining their case. They also supplied, on 3 May 2018, a copy of the Scottish Government Reporters' Notice of Intention relating to Planning Permission Appeal Reference: PPA-230-2207<sup>4</sup>.
24. West Craigs said that the information sought from the Council (i.e. the information relating to WETA) was of relevance to the development of their land. West Craigs highlighted that the Scottish Government Reporters' decision to grant planning permission (subject to a legal agreement) was relevant to the public interest test in this application and the Council's refusal to provide the information sought should be considered in the context of West Craigs' development being held to be acceptable by Scottish Government.
25. West Craigs provided additional comments on the public interest in disclosure of the information on 26 June 2018.
26. On 13 September 2018, the Council – again due to the passage of time since the request - disclosed the following additional information:
  - Steering Group No 2 – Minutes (Redacted)
  - Steering Group No 3 – Minutes (Redacted)
  - Steering Group No 5 – Minutes (Redacted)
  - Steering Group No 7 – Minutes (Redacted)
  - EDIP Principals' Meeting 14 October 2016 v.1 Minutes (Redacted)

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<sup>3</sup> [http://www.sestran.gov.uk/wp-content/uploads/2017/01/A89\\_A8\\_Corridor\\_Study\\_Report\\_ver11.pdf](http://www.sestran.gov.uk/wp-content/uploads/2017/01/A89_A8_Corridor_Study_Report_ver11.pdf)

<sup>4</sup> <https://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=118131&T=20>

27. On each occasion that the Council disclosed information to it, West Craigs stated that the remaining information should be disclosed.

## **Commissioner's analysis and findings**

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28. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the relevant submissions, or parts of submissions, made to him by both West Craig and the Council. He is satisfied that no matter of relevance has been overlooked.
29. Although the Council disclosed information to West Craigs during the Commissioner's investigation, explaining that with the passage of time it felt the information could be disclosed, the Commissioner will consider whether that information should have been disclosed by the Council at the time of the request or review.

### **Application of the EIRs**

30. The Council responded to the request in terms of the EIRs, rather than FOISA, and West Craigs has not disputed this.
31. The Council was asked by the Commissioner why it considered it appropriate to respond in terms of the EIRs. It explained that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraph (a) of the definition, as information relating to the state of the elements of the environment, and paragraph (c) of that definition, as information on measures affecting or likely to affect those elements).
32. Having studied the information and context, the Commissioner is satisfied that the information requested is environmental information as defined in regulation 2(1) of the EIRs. The information covered by the request relates to economic development opportunities in the West of Edinburgh and to negotiations on, but not limited to, major infrastructure investments to enhance the economic potential and viability of the area. The information falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition specifically the state of the elements of the environment, such as soil, land, and landscape.

### **Regulation 5(1) of the EIRs - duty to make environmental information available**

33. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
34. In the following, the Commissioner will consider if the Council was justified in withholding information under regulation 10(5)(e) of the EIRs. The Commissioner must consider whether the Council's review complied with the EIRs and must consider disclosure – and any detriment – as at the time of the request or as at date of review. He is therefore not considering the position as at the date of West Craigs' application for a decision by the Commissioner, or the intervening period between the application date and the date of this decision.

35. West Craigs specifically asked for written instructions to Jacobs about the scope of the WETA Report. The Council was asked to check whether it held information instructing Jacobs to carry out the work. The Council conducted further searches and told the Commissioner on 3 August 2018 that it had not located any recorded information other than the information already disclosed to West Craigs on this point: “the two key documents containing details of project scope were already released.” These documents were:
- Document 1 – Meeting Note of 31 March 16 and
  - Document 21 - West Edinburgh PPP 120416
36. The Council stated:
- “Jacobs scope of work was almost solely conveyed verbally and not in writing. The scope was very simple, refresh the 2010 WETA and bring up to date for 2016 (as detailed in Docs No1 & 21).”
37. Having considered all the relevant submissions, the Commissioner accepts that the Council has taken adequate and proportionate steps to establish the information it held which fell within the scope of this part of West Craigs’ request. He is satisfied, on the balance of probabilities, that the Council has identified all relevant information.
38. The Commissioner accepts that it would be likely that information comprising instructions to Jacobs about the scope of the WETA Report would be readily identifiable, as (if it existed) it would be a key document for the WETA refresh project. The communication would have been made within a known time period and would have involved specific members of the Council staff.
39. The Commissioner notes that the Council has identified some information which falls within the scope of this part of the request, and has given reasons why no further information is held (the communication being made verbally, not in writing). On the balance of probabilities, the Commissioner accepts that the Council does not hold any more recorded information relating to the instructions given to Jacobs.
40. As stated in many previous decisions, the Commissioner’s remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA or the EIRs in responding to a request: the Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.

### **Regulation 10(5)(e) - prejudice to confidentiality of commercial or industrial information**

41. 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. The Council applied this exception to the information it withheld.
42. A Scottish public authority applying an 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)).

43. *The Aarhus Convention: an Implementation Guide*<sup>5</sup>, which offers guidance on the interpretation of the Convention from which the EIRs are derived, notes (at 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.
44. 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?
45. The majority of the information withheld by the Council comprises minutes, meeting notes and information presented to meetings. In most cases, West Craigs have received a redacted version of the documents, but a few documents have been withheld in full.
46. The Council submitted that regulation 10(5)(e) of the EIRs applied as, at the time of the request and its review, the Council was negotiating with organisations to address opportunities and challenges in the local area. Specifically, it was negotiating with the Scottish Government and UK Government on investment for the area through the Edinburgh and South East Scotland City Region Deal (which at that point had not yet been agreed).

*Is the information commercial or industrial in nature?*

47. The Council submitted that the information was commercial, as it related to economic development opportunities in the West of Edinburgh. These negotiations included, but were not limited to, major infrastructure investments to enhance the economic potential and viability of the area. The information showed specific and detailed information regarding the proposed actions of the stakeholders and participants in the EIDP in relation to the transport proposals and the development of the location. The Council detailed areas of potential development including the Royal Highland Showground, Cammo, West Craigs, Industrial and Hotel Developments. The Council said the information discussed the public transport measures that would be required to support these developments, along with other public infrastructure measures, and the current status of the programme.
48. The Council explained that the information was produced as a consequence of the EIDP for the development of the WETA Refresh. It submitted that disclosing the requested information could lead to significant commercial and economic implications for parties involved in both WETA and the City Regional Deal.
49. The Council also submitted that disclosure of the withheld information would also harm its ability to conduct future negotiations.

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[https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)



50. The Commissioner accepts that the Council and the organisations involved in these negotiations have commercial interests in relation to the development and that the WETA Refresh has obvious commercial implications. The Commissioner has viewed the withheld information, which in broad terms relates to the development of an area and the transport measures associated with that development. He is satisfied that the information is information that is commercial or industrial in nature.

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

51. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.

52. The Council submitted that there existed an obligation of confidentiality in relation to the withheld information: it was only shared on the basis of it being held as confidential and not for disclosure into the public domain.

53. On 1 June 2018, the Council provided the Commissioner with the confidentiality and freedom of information clauses from the Memorandum of Understanding (MoU) between the Council and other parties. The Council later provided a full copy of the MoU.

54. 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.

Is the information publicly available?

55. The Council said there was an obligation of confidentiality in relation to the withheld information: it was only shared by the Council (and others) on the basis of it being held as confidential and that it would not be released into the public domain.

56. The Commissioner accepts that the withheld information was not publicly available when the Council responded to West Craigs' request or requirement for review.

Necessary quality of confidence

57. To have the necessary quality of confidence, the information should not be generally accessible. The Commissioner has already considered this above. In this case, the Commissioner notes that the Council is withholding information which has not already been disclosed under the EIRs, including information shared amongst the organisations involved in WETA Refresh.

58. The Commissioner accepts that the remaining withheld information is confidential in that it has not previously been put into the public domain, and has only been viewed by a limited number of individuals, who shared an expectation that it should be treated confidentially. It

includes commercial information and information about the progress of WETA Refresh, suggesting that it has the necessary quality of confidence. Similarly, it includes comments or views expressed in such a way or on such a subject that there would be an expectation of confidentiality. The Commissioner therefore accepts that the withheld information was received under circumstances from which it would reasonably have been inferred that it was confidential.

#### Obligation to maintain confidentiality

59. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
60. The Commissioner has found no evidence that the Council was under an explicit obligation to maintain confidentiality. Although a MoU was prepared for the Council and the other parties involved, containing clauses on confidentiality and freedom of information, the MoU was never signed. The Council nonetheless submits that all parties were acting in accordance with its terms.
61. The information within the minutes was circulated only to those involved in the meetings. The Commissioner has found nothing to show that the withheld information in the minutes has been disclosed or circulated further.
62. It must be acknowledged that there are no formal markings on the withheld information meetings to indicate confidentiality. However, there can be an obligation to maintain confidentiality in respect of information that has no such marking.
63. On balance, the Commissioner accepts that the information was received under an implied obligation to maintain confidentiality.

#### Unauthorised disclosure would cause detriment

64. The third requirement is that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it. Detriment need only be potential for the test to be met. The Council was therefore asked to explain the specific details of the harm that would ensue if the information was disclosed.
65. The Council explained that the withheld information is still not publicly available. Noting that the Edinburgh and South East Scotland City Region Deal was not concluded at the time when it had responded to West Craigs' request, the Council submitted that placing into the public domain discussions and information relating to the positions of the Council and its partners before the conclusion of the process would have caused harm.
66. The Council believed that disclosure of the requested information would be detrimental to the on-going negotiations. These negotiations included, but were not limited to, major infrastructure investments to enhance the economic potential and viability of the area. In the Council's opinion, disclosure of the withheld information would have harmed the economic interests of the Council, the local businesses and the organisations seeking to secure the investment through the Edinburgh and South East Scotland City Region Deal.
67. The Council submitted that, at the time of West Craigs' request, disclosure would have placed significant commercial information relating to WETA into the public domain. This would create a situation where "significant economic harm" would be inflicted on the stakeholders by disclosing potential developments and required development of infrastructure before agreement had been reached. At the time, this risked impacting on future development and procurement costs. Disclosure of draft technical approaches, the

details of the risk log, commercial interests of the stakeholders (the EIDP) while the discussions were ongoing and before the conclusion of the City Region Deal, would cause substantial harm to the negotiating positions of the stakeholders. Furthermore, the disclosure would impact on any subsequent tendering process arising from these discussions again causing substantial economic harm to the parties involved.

68. Specifically, the Council stated that, without WETA's identification of the infrastructure required for the vision set for the area by the Scottish Government, the realisation of the significant business investment potential could not be achieved. It was therefore critical that WETA was not undermined in any way. The Council said that undermining WETA "would be significant and registered at the highest levels of Scottish and UK Governments". It added that there was "a real risk that any reputational damage caused may harm the partners' ability to deliver the vision set for the area and therefore, none of the study about outputs, particularly the economic growth e.g. new jobs, would be realised".

#### The Commissioner's view

69. The Commissioner does not accept the Council's arguments in respect of all the withheld information. The Commissioner is not satisfied that the disclosure of some of the information at the time of the request or the review would have had the detrimental effect described by the Council.
70. The Commissioner is unable to explain fully his reasoning on this point, as to do so may reveal the content of the withheld information. (This factor has been acknowledged by the courts. In the case of *Scottish Ministers v Scottish Information Commissioner (William Alexander's Application)* [2007] CSIH 8<sup>6</sup>, the Court of Session commented that, in giving reasons, the Commissioner is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.) However, as far as he can without revealing the content of information that is withheld, the Commissioner will explain his reasons below
71. The Council's submission on detriment is often expressed in general terms and does not provide detail, example, evidence or other reason to accept its assertions. The Council has indicated that disclosure would be detrimental because it would put information into the public domain before certain positions or options were concluded. Whilst this is a potentially relevant argument for this exception, the Council has not developed, evidenced or explained this to any degree of sufficiency for the Commissioner to accept the argument in relation to some of the withheld information.
72. There are also some instances where the Commissioner disagrees that disclosure of the information – even before agreement was reached or there was a conclusion to the process – would have caused detriment on the level suggested by the Council. The Council was given a number of opportunities to explain its view, but has not done so to the Commissioner's satisfaction.
73. Additionally, there are instances of information being withheld which appears to be essentially uncontroversial, relating to actions which would reasonably be expected to form a routine part of such a project, and expressed in the most non-specific terms. The Commissioner cannot accept that disclosure of such information would have the detrimental effect the Council suggests.

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<sup>6</sup><http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

74. However, there are instances where the Commissioner accepts that disclosure of information at the time of West Craigs' request would have resulted in public awareness of information that could have had a detrimental effect on the commercial interests of the stakeholders associated with the project. The Commissioner also accepts the Council's view that disclosure of some information at the relevant time would have affected the Council own ability to attain best value. There is also some information containing views on commercial matters which may not have been expressed in the way they were if it was anticipated that the information would be disclosed, or even supplied to the Council were it anticipated that the information would be disclosed.
75. To the extent that the Commissioner finds no detriment, the information is not excepted from disclosure under regulation 10(5)(e) of the EIRs. The Commissioner will now consider the question of substantial prejudice to economic interests in relation to the remainder of the information.

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

76. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
77. The Commissioner does not accept that there is sufficient evidence to show that disclosure of all the withheld information would, or would be likely to, cause substantial harm to legitimate economic interests in the respect asserted by the Council. It is not obvious that the substantive content of some of the information or the manner of its presentation would be commercially sensitive, or that disclosure would, or be likely to, cause substantial harm to a legitimate economic interest. The Council has not provided adequate explanation of why some of the information was commercially sensitive or the type of harm or damage that might occur following its disclosure.
78. For the most part, the Council's submissions fail to explain its case, and are at a high level of generality with little or no specification or examples to explain the commercial sensitivity of the material or the anticipated harm. Similarly, many of the Council's arguments do no more than assert, without explanation, that the material is commercially sensitive and disclosure would or would have been likely to cause harm.
79. The Council has repeatedly asserted that disclosure would, or would be likely to, have an impact on the overall costs of the project.
80. Again, in respect of some information, the Council has not provided any evidence or detailed argument to support these views.
81. The Commissioner is not persuaded by the Council's view that disclosure would (or would have been likely to) harm the Council's position and ability to conduct future negotiations if disclosure of economically sensitive information into the public domain 'was forced' prior to the conclusion of the negotiation and investment process. The Council appears to imply that disclosure in this case would be seen to set a precedent for all future cases. Each case must be looked at in its own circumstances. There are adequate provisions within the EIRs and FOISA to protect such information.
82. Consequently, the Commissioner must conclude that the exception in regulation 10(5)(e) of the EIRs is not engaged for all of the withheld information and that the Council was not

entitled to withhold some information under this exception. As the Commissioner is not satisfied that the exception is engaged for some of the information he is not required to go on to consider the public interest test in regulation 10(1)(b) for that information.

83. The Commissioner accepts that the exception in regulation 10(5)(e) of the EIRs is engaged for some (a smaller part) of the withheld information and that the Council was entitled to withhold that information under this exception. As the Commissioner is satisfied that the exception is engaged, he is required to go on to consider the public interest test in regulation 10(1)(b) for that information.

## **Public interest**

84. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

### *The Council's submissions*

85. The Council acknowledged the importance of disclosing information that would demonstrate that it was “acting in the best interests of the citizens of Edinburgh”. The Council accepted that there was a public interest, in terms of transparency and accountability, in disclosing the requested information and also recognised that West Craigs had an interest in obtaining information regarding the development of the area.
86. Nonetheless, the Council decided that that public interest was outweighed in this case “by the need to avoid substantial harm to the legitimate economic interests of our partners, the local businesses and the organisations seeking to develop this part of West Edinburgh and the Council”. The Council believed that, as “the deal had not been agreed” it was in the public interest not to harm the potential investment, and the negotiations with the major landowners in the area on the opportunities and challenges to be progressed before the City Region Deal was concluded.
87. The Council also believed that there was a significant public interest in local authorities maintaining confidentiality and protecting the legitimate economic interests of commercial organisations in situations where it has been accepted that information would be held confidentially. The Council said that it “needed to avoid inflicting substantial harm to the legitimate economic interests of the EIDP through the disclosure of the information at the time of the applicant’s request”. Also, the Council was concerned that it would be less able to manage development projects for the citizens of Edinburgh if during a project it released information that (in its view) breached confidentiality agreements and disclosed commercially sensitive information. This would prejudice the Council’s ability to secure best value, as it would be likely to deter developers from engaging with the public sector site in favour of privately owned opportunities and “this would result in worse deals for the Council”.
88. Further, the Council argued that disclosure of the withheld information at the time of the request (and review) would have compromised the efficient and effective implementation of the transport developments in West of Edinburgh. Commercial contracts to carry out the work at the development had not been agreed and the release of the information would substantially harm their ability to achieve best value.

### *West Craigs' submissions*

89. West Craigs submitted on 3 May 2018 that Scottish Government Reporters confirmed their intention to uphold West Craigs' planning appeal subject to conclusion of a legal agreement securing certain planning obligations. The information being withheld was of relevance to the development of West Craigs' land. The Scottish Government Reporters' decision to grant planning permission (subject to a legal agreement) was therefore relevant to the public interest test in this application. Specifically, West Craigs explained that the planning application was submitted to the Council before the information request was made. The information being withheld by the Council was relevant to that application and its determination, and disclosure was therefore in the public interest at the time the information was requested.
90. Following publication of papers in relation to a meeting of the Council's Education, Children and Families Committee on 29 March 2018, West Craigs had become aware that the Council is proposing the construction of a new road through land that it owns, and a new secondary school either on its land or accessed by the new road. It was West Craigs' position that the withheld information may have comprised one of the considerations taken into account in formulating the Council's proposals. Given that the withheld information was of relevance to the formulation of public infrastructure proposals, it believed there was a clear public interest in its disclosure.
91. West Craigs also supplied a letter from Kevin Stewart MSP to the Council's Chief Executive, dated 9 November 2016, in which reference is made to the preparation of an updated masterplan for the IBG. West Craigs submitted that the IBG is a nationally significant development (being referred to in the National Planning Framework 3 as a significant location for investment in Edinburgh), and therefore the public interest in the withheld information is significant.
92. West Craigs commented that the IBG is in multiple ownership and, despite the emphasis in Planning Advice Note 83 on "effective joint-working arrangement" for the creation of masterplans in such cases, the Council had put forward public infrastructure proposals for the IBG without consultation with West Craigs. West Craigs argued that disclosure of the withheld information is in the public interest, as it would provide essential context to the Council's proposals and the implications for development of the IBG. Also, given that the withheld information is of relevance to the formulation of public infrastructure proposals, it believed there was a clear public interest in the information being disclosed.
93. West Craigs provided the Commissioner with the agenda for meeting of the Council's Housing and Economy Committee on 30 August 2018. It highlighted that Councillor Rose's motion at item 9.1 of the agenda was passed at the meeting. West Craigs considered that this was of relevance to its application as it demonstrated the Council's acceptance that the proposed Gogar link road provided for in the WETA, which runs over land owned by West Craigs, was supported by the Council's Local Development Plan. On that basis, West Craigs saw no grounds for the Council to withhold the requested information from them.
94. West Craigs explained that the Council was still failing to supply the unredacted information on the proposed Gogar Link Road – "the key spine road for IBG which goes through our land and which is a pivotal element of the master planning of IBG." In West Craigs' view "This is completely unacceptable and totally contrary to PAN 83." In that sense, West Craigs believed there was a public interest in scrutiny of the Council's actions and decision with respect WETA.

*The Commissioner's view on the public interest*

95. The Commissioner acknowledges that there is always a general public interest in transparency and accountability, particularly in relation to the expenditure of public funds. In this case, he accepts that disclosure of the information would allow insight into WETA, the process through which it was developed, and how that process was conducted.
96. The Commissioner accepts the Council's view that the site involved is an important current economic development in Scotland which has potential to affect many persons and businesses, and which involves significant expenditures. There is therefore a public interest in enabling scrutiny of such an important development.
97. On the other hand, the Commissioner accepts there is a public interest in ensuring that there is fairness in activities taking place in a commercial environment. It would not be in the public interest to unfairly disadvantage parties through their involvement in a project in which a Scottish public authority is a partner. There is a public interest in allowing such projects a degree of private space, acknowledging that confidentiality may sometimes be a necessary condition for the development of projects of this scale and nature.
98. West Craigs has provided public interest arguments which are closely associated with its own interests, but which also relate to the public interest in transparency and accountability around a major development for Edinburgh. Specifically, West Craigs has explained that the information being withheld by the Council was of relevance to that application, and its determination, and disclosure was therefore in the public interest at the time the information was requested.
99. The Commissioner has given weight to the arguments put forward by West Craigs (while noting that his decision must reflect the balance of public interest at the time the Council reviewed its response to West Craigs' request and review, and cannot take account of events post-dating that time). He accepts there is public interest in enabling scrutiny of the Council's decision-making process as regards WETA generally, but also as regards West Craigs' land and commercial interests. While there may be other methods of scrutiny (such as those provided by the planning process), the Commissioner recognises the public interest in disclosing information which would enable fuller understanding and scrutiny of WETA. Inasmuch as WETA encompasses an area that includes many properties and other projects and interests, there will be a public interest in understanding how WETA affects – or is affected by – other such projects.
100. The Commissioner has already concluded that disclosure of the withheld information would, or would be likely to, cause substantial harm to a legitimate economic interest. Some information shared for the purposes of the project may not have been shared if there had been an expectation of disclosure under the EIRs. The Commissioner has already accepted that harm would, or would be likely to, follow disclosure of that information. The Commissioner considers it would be contrary to the public interest to place the parties in a disadvantageous position with regard to their competitors.
101. Similarly, it is in the public interest that those involved in such a project should have the space to consider commercial information. There is a clear public interest in the prevention of harm caused by the disclosure of commercially sensitive information. There was a public interest in allowing the WETA Refresh to be fully informed and for those involved to be able to share information and to make comment on commercial matters. There is a significant public interest in Scottish public authorities maintaining confidentiality and protecting the

legitimate economic interests of commercial organisations in situations where there is an expectation that information would be held confidentially.

102. The Commissioner also acknowledges that disclosure of some of the information at the relevant time would substantially harm the Council's ability to achieve best value, which would not be in the public interest.
103. The Commissioner has therefore concluded that, in all the circumstances of this case, the public interest in making the information in question available is outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

## **Technical aspects**

### *Compliance with timescales*

104. The Council's emails of 20 December 2016 and 20 January 2017 sought to clarify what information West Craigs required, and stated that the Council was unable to proceed with its request without such clarification.
105. It is not clear why the Council needed this clarification. The Council chose to treat West Craigs' email of 9 December 2016 as a request for information. It appears quite clear what information West Craigs required: it stated that its previous request covered far more than the WETA Refresh Report and went on to list the information that was missing from the previous response. The Commissioner cannot see why clarification was necessary, in the circumstances.
106. The Council acknowledged and apologised for the delay in responding to West Craigs in its initial response (9 March 2017). It is clear that the delay was extensive and significant. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information.
107. It is a matter of fact that the Council did not provide a response to West Craigs' request for information for within 20 working days, so the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.

### *Whether some information should have been disclosed sooner*

108. West Craigs complained that the Council could have disclosed some information sooner: it had delayed disclosure while it discussed issues relating to other information. The fact that additional time was required to consider some information was, in West Craigs' view, not a proper reason to delay the release of information that was capable of being released. West Craigs said that if it had issued separate specific requests for each individual piece of information, it would have received some of the information sooner. Given the relevance of the information to a (then) on-going planning application, time was of the essence.
109. The Commissioner has some sympathy with this view. In the spirit of the legislation, it would seem to be good practice to disclose information as soon as a decision has been made to do so. However, there is nothing in the legislation or the associated Codes of Practice which would require this. An applicant may choose to make a series of separate focused requests for recorded information. Alternatively they may choose to make a single broader request. Either way, the Scottish public authority must respond to the request within the statutory timescale. In this case, as indicated above, the Council failed to respond within the statutory timescale.



### *Co-operation with the Commissioner's office*

110. The Commissioner is disappointed to note that the time required to issue a decision on West Craigs' application has been significantly extended by the Council's delayed or inadequate responses to requests for the withheld information or for submissions explaining its position. This has added to the delays experienced by West Craigs in receiving a response to its request.
111. The Commissioner has, separately, raised with the Council the issues relating to provision of withheld information, and the Council has committed to improving its practice.

## **Decision**

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The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by West Craigs Ltd (West Craigs).

The Commissioner finds that the Council was entitled to withhold some information under regulation 10(5)(e) of the EIRs, but wrongly withheld information under this exception.

The Commissioner also finds that Council did not provide a response to West Craigs' request for information or request for review within 20 working days and therefore failed to comply with regulation 5(2)(a) of the EIRs.

The Commissioner requires the Council to disclose information which was wrongly withheld (which he will specify to the Council) to West Craigs by 19 November 2018.

## **Appeal**

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Should either West Craigs 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**

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

**Margaret Keyse**  
**Head of Enforcement**

**4 October 2018**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“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.

...

(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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