

# Decision Notice

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**Decision 103/2019: Mr I and Renfrewshire Council**

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**Appointment of architects to work on a school construction project**

Reference No: 201802081

Decision Date: 8 July 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked about the appointment of a firm of architects to work on a school construction project in Linwood.

The Council disclosed some information and withheld the remaining information, arguing that disclosure would cause substantial harm to commercial confidentiality.

The Commissioner accepted that the information had been correctly withheld and also concluded that the Council held no further information other than that which was considered during this investigation.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information") (Interpretation); 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

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1. On 3 September 2018, Mr I made an information request to Renfrewshire Council (the Council). The information he requested was:

*All information regarding the appointment of [named firm of architects] to provide additional design support for the construction of the ANS Linwood project in 2015.*

*This should include any correspondence related to alternative companies who were asked to tender; assessments for their suitability for the job and process details for the decision that led to [named firm] being appointed and instructed into the project.*

*For the avoidance of doubt, this should include internal and external email traffic, correspondence by letter plus any committee activity related to the company's appointment, covering the years 2015 and 2016.*

2. The Council responded on 1 October 2018. It provided some information and withheld other information under regulations 10(5)(e) (commercial confidentiality) and 10(4)(e) (internal communications) of the EIRs.
3. On 19 October 2018, Mr I wrote to the Council requesting a review of its decision. He believed that it was in the public interest for the withheld information to be disclosed, to allow a clearer understanding of the additional expenditure involved in the appointment. He also expected that other information should be held, including a specific email.
4. The Council notified Mr I of the outcome of its review on 15 November 2018. It provided him with further information, which included a copy of the email he had mentioned. However it also upheld the exceptions cited previously in relation to other information.

5. On 22 November 2018, Mr I wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 I was dissatisfied with the outcome of the Council's review because he believed that the withheld information should be disclosed and that further information should also be held.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr I 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.
7. On 9 January 2019, the Council was notified in writing that Mr I had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr I. The Council provided the information and the case was allocated to an investigating officer. The Council provided a schedule along with the withheld information, which stated that it was still relying on regulation 10(5)(e) of the EIRs, but not regulation 10(4)(e).
8. 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 to answer specific questions. These related to whether any further information might be held and offered the opportunity to make submissions in respect of the exception claimed.
9. Mr I was also asked for any comments he wished to make in support of his application. Submissions were received from both Mr I and the Council.
10. After discussions with the Council and with Mr I, the investigating officer established that the outstanding points of Mr I's dissatisfaction were as follows:
  - (a) The withholding of the architects firm's Services Proposal
  - (b) The withholding of the Financial Appraisal document attached to the Services Proposal
  - (c) Whether any further information should be held by the Council. Mr I was of the view that the Council should hold further information on its involvement in the appointment of the architects.
11. The Commissioner's investigation with therefore focus on the above matters.

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

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12. 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 him by both Mr I and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

13. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) to (c) of the definition of "environmental information"). The information relates to the construction of a school.

14. Mr I has not disputed the Council's handling of the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### **Regulation 5(1) of the EIRs**

15. 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.
16. 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(s) outweighs the public interest in making the information available (regulation 10(1)). It must interpret any exceptions restrictively and apply a presumption in favour of disclosure (regulation 10(2)).

### **Regulation 10(5)(e): confidentiality of commercial or industrial information**

17. Regulation 10(5)(e) 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.
18. The application of regulation 10(5)(e) of the EIRs was fully considered in a previous decision *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>1</sup> and the Commissioner does not intend to repeat that consideration in detail here. The Commissioner concluded 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 prejudice to a legitimate economic interest?

*Is the information commercial or industrial in nature?*

19. The Council stated that the withheld information was considered to be commercial/industrial in nature on the basis that it related to the construction of a school and contained detailed information on the daily rates paid to different grades of staff and the proposed apportionment of the work between grades.
20. The Commissioner is satisfied that the withheld information in both the Services Proposal document and the Financial Appraisal document is commercial in nature.

*Does a legally binding duty of confidence exist in relation to the information and is the information publicly available?*

21. The Council submitted that whilst no written confidentiality agreement existed between the Council and the architects (due to the firm being a sub-sub-contractor) the Council was satisfied that the relationship created an implied obligation of confidentiality between the parties in relation to the content of pricing information. As such, the Council viewed disclosure of this commercial information as a breach of the implied obligation of

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.aspx>

confidentiality existing between the parties. The Council confirmed that information was not currently available within the public domain.

22. The Commissioner accepts, in the circumstances, the information was provided to the Council subject to an obligation of confidentiality and is not in the public domain. It would be reasonable to imply such an obligation in the circumstances, even in the absence of a direct contractual relationship between the firm of architects and the Council.

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

#### Submissions from the Council

23. The Council stated that substantial prejudice would be caused to the firm of architects and also to the Council itself, should the information be disclosed.
24. With regard to the detriment caused to the Council, it argued that if it disclosed this type of information into the public domain it might deter contractors from future work with the Council in this area. Making this type of information available to competing companies would also cause detriment by reducing effective competition in the market, for the reasons set out in the next paragraph, leading to higher costs to the public purse.
25. It was the view of the Council that substantial harm would be caused to the architects' commercial interests in making the commercial rates of works available, particularly as this would allow rival contractors to ascertain their margins and replicate their pricing structure. Rivals would therefore be able to undercut the firm in future tendering exercises. This would substantially prejudice the firm's ability to compete for future projects in a competitive marketplace and would, as a result, cause substantial harm to its legitimate economic interests.

#### Submissions from the architects

26. The firm stated that it had serious and genuine concerns about both the short- and long-term effect on its business should this commercially sensitive data be released into the public domain. The firm highlighted the importance of the education sector to its continuing success and stated that almost all bids were won through public tenders, judged on a scoring matrix in which fees were a decisive component. The firm stated that it had put a great deal of time and research over the years into refining the fee calculations and keeping them accurate.
27. It was the view of the firm that it would be highly commercially prejudicial to its business to have the key components of its feeing arrangements revealed by disclosure of the withheld information. Even partially redacted, competitor firms would easily be able to work out key underlying elements from information already available.

#### Submissions from Mr I

28. Mr I did not believe disclosure of the information would cause commercial detriment. He stated that for the exception to apply a "duty of confidence" has to be owed and in this case he believed that none was owed by the Council to the architects. He stated that the exception requirement was for the information to have been "communicated in circumstances importing an obligation of confidentiality". Mr I stated that if the Council had not appointed the architects firm then it was difficult to see where a duty of confidence could then be owed to it. He argued that for the exception to apply the information must have been

communicated in circumstances importing an obligation of confidentiality and yet the Council had not provided evidence of this.

29. Mr I also contended that the figures for the rates of commercial work were now “four or five years out of date” and that disclosure would be unlikely to have an impact on the firm’s current rates. Also, Mr I submitted that, to his knowledge, the Council had not consulted the architects’ firm involved for its views on detriment. However as noted in paragraphs 26 and 27, comments from the firm were obtained during the investigation.

#### *The Commissioner’s conclusions on substantial prejudice*

30. Taking account of those submissions received from both Mr I and the Council and, in particular, from the architects’ firm itself, the Commissioner is of the view that disclosure of the information would allow significant insight into the composition of the firm’s bid and its pricing structure. He notes Mr I’s claim that the date the documents were drawn up (November 2015) makes the information obsolete. However, given that the arguments presented relate more to methodology than to actual prices, and bearing in mind all the submissions received from the architects, he is satisfied that the information retains its relevance.
31. In the Commissioner’s view, disclosure could give competitors enough information to have a commercial advantage and undercut the architects for similar future projects, transactions and tenders. The Commissioner accepts that this would place the firm at a disadvantage in future tenders, thereby causing substantial prejudice to their commercial interests.
32. The Commissioner is therefore satisfied that the disclosure of this information, in response to Mr I’s request, would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of a legitimate economic interest. Consequently, he is satisfied that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld by it.

#### *The public interest test*

33. Having accepted that the exception in regulation 10(5)(e) applies to the 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.

#### Submissions on the public interest from the Council

34. While accepting that there was a public interest in disclosure of the information to ensure effective oversight of the expenditure of public funds, the Council submitted that this was outweighed by the need to maintain confidences and effective working relationships with contractors. It was the Council’s view that this was particularly important in circumstances where the Council did not appoint the contractor in question and had limited control over the associated costs of the appointment. The Council stated that the overriding public interest weighed in favour of withholding the information.

#### Submissions on the public interest from Mr I

35. Mr I submitted that a large amount of public funds had been spent on this construction project, amounting to around £18 million and that the appointment of the architects firm added a further £140K of public expenditure. He stated that financial prudence was important and questioned the financial oversight of the project. He stated that it was in the

public interest to get value for money for the public purse and that disclosure could shed light on a potential overspend.

#### *The Commissioner's conclusions on the public interest*

36. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves the construction of public amenities and the development of land sites. In relation to the information withheld in this case, he acknowledges that its disclosure might add (albeit not significantly – this was not an appointment made by the Council) to public understanding of whether or not the appointment of the architects might have demonstrated good value for money.
37. However, he must also take into account the harm he has identified above, and his acceptance that the information was provided in confidence. There is a clear public interest in confidences not being breached.
38. The Commissioner, having carefully considered the public interest arguments put forward by both Mr I and the Council, has concluded that the public interest in making the information available is outweighed by the public interest 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).
39. The Commissioner will now go on to consider the question of whether the Council holds any further information.

#### **Does the Council hold any further information?**

40. As noted above, 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 held by the authority when it receives a request.
41. 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)).
42. The standard of proof to apply in determining whether a public authority holds the requested information (or, as in this case, whether it holds more information than has been made available) is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. He will also consider, where appropriate, any reasons offered by the public authority to explain why it does not hold information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority at the time it received the request.

#### *Submissions from Mr I*

43. Mr I considered there should be a considerable amount of email traffic held by the Council regarding the appointment of the architects firm. He pointed out that the construction project was a multi-million pound enterprise and, in a project of such high value, he would expect the Council to hold records of an appointment of this kind.

44. The information provided to Mr I by the Council included a copy of the Council Project Manager's instruction memo to the principal contractor and a copy of an email from the sub-contractor to the Council with the Council's response. The email to the Council contained the proposal sent from the architects firm to the sub-contractor. The Council's response to the sub-contractor indicated their approval of the sub-contractor's proposed appointment of the architects' firm. Mr I believed further information should be held by the Council on the appointment.

#### *Submissions from the Council*

45. The Council submitted that the nature of the construction project in question necessitated the following chain of operations: The Council appointed the principal contractor, who appointed the sub-contractor, who appointed the various sub-sub-contractors. The architects firm was one of the sub-sub-contractors.
46. The Council stated that, despite Mr I's expectations that it should hold a number of Board reports etc. regarding a procurement process to appoint the architects, this was not the case. There was no direct appointment by the Council and the architects' firm was appointed by the sub-contractor answerable to the Council's principal contractor.
47. The Council acknowledged that Mr I felt there should be a significant amount of email traffic between the Council and the architects' firm. However, the Council reiterated that it only consented to the appointment of the architects' firm as a sub-sub-contractor. It did not appoint the firm directly and so the terms of the appointment and any related email correspondence (including any tendering) would have been between the sub-contractor and the architects and not held by the Council. The Council stated that it had provided Mr I with all of the information it held falling within the scope of his request, other than the information being withheld under regulation 10(5)(e) of the EIRs.
48. The Council explained that, under its contract with the principal contractor, the principal contractor was obliged to submit the name (and proposed conditions of contract) of each proposed sub-contractor to the Council's Project Manager for acceptance, but this did not happen consistently. In the instance in question, the instruction of the architects' firm also varied the underlying Works Information, or scope, of the contract. The Council's "approval" of the appointment of the architects was by way of the Project Manger's instruction to record the principal contractor's entitlement to be paid an additional sum in respect of this variation (a copy of this instruction was provided to Mr I). However, the Council emphasised, the architects' firm was still appointed by one of the sub-contractors and not by the Council.

#### *Searches carried out*

49. The Council explained that all information in relation to this matter flowed via the Project Manager, who had been involved in the searches at every stage. He confirmed that no further information was held.
50. In carrying out its searches, the Council established what information was covered by the request and stated that it was clear from both the initial request and the requirement for review that the Mr I's focus was on information concerning the firm's appointment, any tendering process and any evaluation of the firm.
51. The Council did not consider extensive searches to be necessary, as all information relating to this project was stored in a central electronic storage location, with the exception of emails. For this reason, the searches consisted of searches of the relevant project folder for documents relating to the architects' firm and a search of email correspondence for items

relating to the firm. The searches did not reveal any further information, other than that already provided to Mr I.

52. However, in order to be thorough, the investigating officer also contacted the architects' firm directly, to establish whether they could recall any direct correspondence between the firm and the Council. The architects stated that the only contact made to the firm about this construction project came from the sub-contractor, which was the usual process in this type of contract.

#### *The Commissioner's conclusions*

53. The Commissioner has considered all the relevant submissions from Mr I, from the Council and from the architects' firm. This includes the explanations provided by the Council as to why it should not be expected to hold the type of information sought about the appointment of the architects' firm. He is satisfied that the Council took adequate and proportionate steps to establish the information it held which fell within the scope of Mr I's request, and to establish that it did not hold any other information covered by that request.
54. It is clear that Mr I believes further information should be held by the Council. However the Commissioner is satisfied, on the balance of probabilities, that the Council does not hold more information than has already been provided to Mr I.
55. Therefore, he finds that the Council complied with regulation 5(1) of the EIRs in responding to Mr I's request.

## **Decision**

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The Commissioner finds that Renfrewshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr I.

## **Appeal**

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Should either Mr I 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.

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

**8 July 2019**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

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"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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- (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;

...

#### 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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