Scottish Information Commissioner
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Decision Notice 136/2025

Quote for work on specified property

Authority: Scottish Borders Council
Case Ref: 202500401

Summary

The Applicant asked the Authority for a detailed quote in relation to work being carried out at a specified property. The Authority disclosed some information and withheld other information it considered commercially sensitive. The Commissioner investigated and found that the Authority complied with the EIRs in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a) and (c) of the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 30 January 2025, the Applicant made a request for information to the Authority. Among other things, he asked for a “detailed quote from Ray Sutherland Roofing” regarding repairs to a specified property.

2. The Authority responded on 11 February 2025. It disclosed some information in a priced works schedule from Ray Sutherland Roofing (including the total quoted cost) but withheld other information under the exception in regulation 10(5)(e) of the EIRs.

3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because the individual prices in the quote had been redacted. He did not consider the withheld information sensitive and argued that he was entitled to a copy of the quote, being the “client/customer”. Without the individual prices, he said he could not work out his share of the work.

4. The Authority notified the Applicant of the outcome of its review on 11 March 2025, which fully upheld its original decision.

5. On 14 March 2025, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he disagreed the exception in regulation 10(5)(e) of the EIRs applied and explained why.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 2 April 2025, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions, regarding its reasons for withholding information under the exception in regulation 10(5)(e) of the EIRs and its consideration of the public interest test.

Commissioner’s analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Application of the EIRs

10. 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) and (c) of the definition of "environmental information").

11. The Applicant has not disputed the Authority’s handling of the request under the EIRs, and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Regulation 5(1) of the EIRs – Duty to make available environmental information on request

12. 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.

13. 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) of the EIRs – Confidentiality of commercial or industrial information

14. 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.

15. The Aarhus Convention: An Implementation Guide[1], which offers guidance on the interpretation of the Convention from which the EIRs 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 further considered below (at paragraph 37).

16. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) of the EIRs can be engaged, authorities must consider the following matters:

    (i) Is the information publicly available?

    (ii) Is the information industrial or commercial in nature?

    (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?

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

Submissions from the Applicant on regulation 10(5)(e)

17. The Applicant did not agree that the exception in regulation 10(5)(e) of the EIRs applied to the withheld information.

18. The Applicant referred to the Authority's position in the review outcome, where it stated that disclosure would be likely to give rise to competitors having an advantage in future similar tendering exercises, which would substantially prejudice Ray Sutherland Roofing's ability to submit competitive tenders, resulting in significant harm to their commercial business.

19. The Applicant stated that "at no point" would he be interested in tendering for work for the Authority. He explained that the quote related to the repair of the roof of his commercial property, a tenement building with a shared roof and a shared repair bill. He therefore

[1] https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

required the individual prices that had been withheld to determine which works were common and which were down to the individual property owner.

Submissions from the Authority on regulation 10(5)(e)

20. By way of background, the Authority explained that it had contracted with Ray Sutherland Roofing to repair a dangerous/defective building. The works subsequently commenced following discussion and agreement of quotes provided for the works.

21. The Authority submitted the withheld information was commercially sensitive as the tender document contained current pricing information particular to Ray Sutherland Roofing. It explained that it considered information commercial if any data (including pricing or financial data) related to business activities, particularly those involving the sale or purchase or goods and services.

22. The Authority stated that the withheld information was not publicly available, was provided by Ray Sutherland Roofing in confidence and shared on the basis that it would not be released into the public domain.

23. The Authority said it applied the exception in regulation 10(5)(e) of the EIRs to protect its own legitimate economic interests in order to protect its ability to obtain best value for money.

24. The Authority also said it applied the exception in regulation 10(5)(e) of the EIRs to protect Ray Sutherland Roofing's business and their ability to produce competitive tenders, ensuring competing companies do not have an unfair advantage in the market. The Authority confirmed that it did not consult Ray Sutherland Roofing in response to the request "given the contractual nature of the agreement in place".

25. In terms of the substantial harm that disclosure would cause, or be likely to cause, to its own legitimate economic interests, the Authority submitted that it would make it less able to fulfil its duty to obtain value for money through the management of contracts and other projects in the future. It also considered that disclosure would be detrimental to the general public interest in confidences being maintained.

26. In terms of the substantial harm that disclosure would cause, or be likely to cause, to Ray Sutherland Roofing's legitimate economic interests, the Authority considered that it would be likely to cause significant commercial damage to Ray Sutherland Roofing through disclosure of sensitive information that would likely result in competitors gaining an advantage in similar tendering exercises, which would substantially prejudice Ray Sutherland Roofing's ability to submit competitive tenders in the future.

The Commissioner's view about regulation 10(5)(e)

27. In the following, the Commissioner will consider if the Authority was justified in withholding information under regulation 10(5)(e) of the EIRs.

28. As stated in many previous decisions, the disclosure or withholding of information in one case should not be taken to mean that information in a similar case would necessarily require to be disclosed or withheld. As the Commissioner has made clear in many other decision notices, each case must be considered separately and, on a case-by-case basis.

Is the information publicly available?

29. The Commissioner has examined the withheld information and accepts that it was not in the public domain.

Is the information commercial or industrial in nature?

30. The withheld information relates to individual prices created in the context of a successful tender submission for a contract to repair a dangerous/defective building.

31. Having considered the withheld information, alongside the Authority's submissions, the Commissioner is satisfied that the withheld information is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs.

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

32. In terms of regulation 10(5)(e) of the EIRs, confidentiality "provided by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation, or by statute.

33. In this case, the Authority explained that it did not consider it necessary to seek Ray Sutherland Roofing's views on disclosure of the withheld information, given the contractual nature of the agreement in place.

34. The Commissioner does not accept that contractual terms or custom and practice, of themselves, mean that all information identified should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is confidential. The Commissioner is required to focus on the nature of any withheld information to determine whether a duty of confidence should stand.

35. Having reviewed the withheld information, the Commissioner is satisfied that there is no reasonable basis for treating it as other than confidential. It is not generally accessible to the public already, it was communicated in circumstances importing an obligation of confidentiality and unauthorised use or disclosure of the information would be to the detriment of the party communicating it.

36. In the circumstances, the Commissioner is therefore satisfied a legally binding duty of confidence exists in relation to the information.

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

37. 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.

38. The Commissioner accepts that disclosure of the withheld information in this case would be likely to prejudice its own legitimate economic interests as well as those of Ray Sutherland Roofing. He has reached this conclusion having carefully considered the withheld information and submissions from both the Authority and the Applicant.

39. The Commissioner notes the Applicant's disagreement with the Authority's position that disclosure of the withheld information would likely give rise to the harm claimed by the Authority, on the basis he would "at no point" be interested in tendering for work with the Authority.

40. The Commissioner accepts that the Applicant has no such intention. However, it is important to bear in mind that disclosure under FOI law is disclosure to the world at large and not just

to the person who asks for the information. The Commissioner must therefore have regard to what effect disclosure of the information would have to parties other than the Applicant.

41. Having done so, the Commissioner is satisfied, therefore, that the Authority was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information falling within the scope of the request. While generally it will be helpful to have the views of the contractor in such cases, he is satisfied here that he can reach a conclusion on the basis of the withheld information provided. He accepts that disclosure of this information would allow a competing company to gain significant insight into Ray Sutherland Roofing's pricing and would, to some extent, be likely to negatively affect the Authority's ability to obtain best value for money

42. The Commissioner is therefore satisfied disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of commercial information where such confidentiality is provided for by law to protect a legitimate economic interest.

The public interest test

43. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states 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 Authority's submissions about the public interest

44. The Authority submitted that there was a risk in disclosing the information requested might result in contractors being unwilling to work with it, resulting in dangerous or defective buildings continuing to deteriorate, posing a risk to public safety as work could not be completed.

45. If contractors were unwilling to work with the Authority, the resulting impact could see a decrease in the pool of contractors available and less competitive pricing. This could result in the Authority not being in a position to obtain best value for money.

The Applicant's submissions about the public interest

46. During the investigation, the Applicant was asked to explain why he considered disclosing the withheld information would be in the public interest, otherwise the Commissioner would rely on the information he had already provided as part of his application. The Applicant did not respond.

47. While the Applicant did not provide specific public interest arguments, his requirement for review questioned the transparency of the Authority's response to his information requested. He queried whether the Authority had "something to hide" by redacting individual prices, which he felt was "very underhanded" and "rang the alarm bells massively".

48. The Applicant also submitted that there was no "conflict of interest" as he was not a roofing contractor. He stated that he needed to know what was being charged.

49. The Commissioner has also fully considered the other submissions made by the Applicant, to the extent that they may be relevant to considering the balance of the public interest test.

The Commissioner's view on the public interest

50. The Commissioner has carefully considered the submissions made by both parties on the public interest test, together with the information (to which he accepts the exception in regulation 10(5)(e) of the EIRs applies).

51. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the expenditure of public funds. He also recognises the personal interest the Applicant has in the withheld information and that the information will likely also be of interest to other affected parties.

52. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial prejudice to the legitimate economic interests of both the Authority and Ray Sutherland Roofing. Such harm would be contrary to the public interest.

53. In the Commissioner's view, it is in the public interest for organisations operating in a commercial environment to be able to trade fairly and provide a viable service in a competitive market. He considers it is in the public interest that Ray Sutherland Roofing is not disadvantaged as a result of having entered into contractual arrangements with the Authority, with a consequential adverse impact on their ability to participate effectively in future competitive exercises.

54. The Commissioner also accepts that, to some extent, organisations may be discouraged from seeking to do business with the Authority for fear of commercially sensitive information being disclosed to the world at large (which, as stated above, is the effect of disclosure under FOI law). This would not be in the public interest.

55. Having carefully considered the public interest arguments put forward by both parties, the Commissioner 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.

56. The Commissioner is therefore satisfied that the Authority was entitled to withhold the information under the exception in regulation 10(5)(e) of the EIRs.

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

5 June 2025