

Decision Notice

Decision 019/2015: Goodfellow Environmental Maintenance Ltd. and Perth and Kinross Council

Road maintenance contract

Reference No: 201402010

Decision Date: 11 February 2015



Scottish Information
Commissioner

Summary

On 19 March 2014, Goodfellow Environmental Maintenance Ltd. (Goodfellow Ltd.) asked Perth and Kinross Council (the Council) to respond to a 12-part request concerning a road maintenance contract. The Council responded to the request for review. It disclosed some information, withheld other information and stated that it did not hold the remaining information.

The Commissioner investigated the application and found that the Council had:

- (i) correctly disclosed the information that it held which was not exempt from disclosure.
- (ii) correctly withheld some information that was exempt from disclosure
- (iii) failed to let the applicant know when some information covered by the request was likely to be finalised, and
- (iv) failed to comply with the statutory timescale for response.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information”); 5(1) and (2) (Duty to make available environmental information on request); 7(1)(a) and (3) (Extension of time); 9(1) (Duty to provide advice and assistance); 10(1), (2), (4)(a) and (d) and 5(e) (Exceptions from duty to make environmental information available); 13(d) (Refusal to make information available); 16(3) and (4) (Review by Scottish public authority)

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

Background

1. On 19 March 2014, Goodfellow Ltd. made a 12-part request to the Council for a range of information regarding a road maintenance contract. The request is reproduced in Appendix 2 to this decision and is also referred to below in the *Commissioner’s analysis and findings*.
2. On 10 April 2014, the Council emailed Goodfellow Ltd. to say it would respond by 19 May 2014. In its response, the Council explained that the information requested was considerable in volume and substance, so it had extended the time period for responding to the request in line with regulation 7(1)(a) of the EIRs.
3. On 3 June 2014, Goodfellow Ltd. emailed the Council requesting a review of the Council’s failure to respond to the request.
4. The Council notified Goodfellow Ltd. of the outcome of its review on 7 July 2014, as follows:
 - (i) with respect to parts 4, 5 and 12 of the request, the Council stated that it did not hold any information (regulation 10(4)(a) of the EIRs).
 - (ii) with respect to parts 1, 2, 3, 6(i), 6(ii), 7, 8 and 9 of the request, the Council disclosed information or provided a response to the questions raised, but also withheld information under regulation 10(5)(e). Personal data was withheld under regulation 11(2) with respect to part 3 of the request.
 - (iii) with respect to part 10 of the request, the Council withheld information under regulation 10(4)(d) of the EIRs.

- (iv) in relation to part 6(iii) of the request, the Council commented that it was trying to locate the information.
 - (v) in relation to part 11 of the request, the Council commented that it was awaiting clarification (from its own officials).
5. On 1 August 2014, the Council emailed Goodfellow Ltd., disclosing information covered by part 6(iii) of the request and informing Goodfellow Ltd. that no information was held with respect to part 11, in line with regulation 10(4)(a) of the EIRs.
 6. On 12 August 2014, Goodfellow Ltd. 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. Goodfellow stated that it was dissatisfied with the outcome of the Council's review because it did not consider that full disclosure had been made.
 7. On 29 August 2014, the Council disclosed to Goodfellow Ltd. a redacted version of the report covered by part 10 of the request (referred to in this decision as "the Internal Audit report").

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Goodfellow Ltd. made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 17 September 2014, Goodfellow Ltd. confirmed the scope of its application. It submitted that:
 - (i) contrary to the Council's response, the Council did hold information with respect to parts 4, 5, 8, 9, 11 and 12 of the request.
 - (ii) the Council should disclose the cost (rates) information it had withheld under regulation 10(5)(e) (part 3 of the request).
 - (iii) the Council had not provided a timely response; if it had, Goodfellow Ltd. would have been in a position to submit a further application under the EIRs and would have been in receipt of the requested information. Goodfellow Ltd. was particularly dissatisfied with the delay in providing the finalised Internal Audit report (part 10 of the request).
10. Goodfellow Ltd. provided extensive correspondence to the investigating officer to substantiate its position that the Council held information that was not excepted from disclosure.
11. On 29 September 2014, the investigating officer notified the Council in writing that an application had been received from Goodfellow Ltd., giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was given a copy of the correspondence which Goodfellow Ltd. considered would substantiate its view that more information could be disclosed. The Council was asked to respond to the points raised by Goodfellow Ltd. and to substantiate its position that no further information could be disclosed. The Council was also asked to provide comments on the time it took to respond to the request

12. The Council responded to the investigating officer's questions on 13 November 2014. On 5 December 2014, it confirmed that it had searched for information relating to meetings on the specific dates identified by Goodfellow Ltd.
13. The Council was also asked about the status of the Internal Audit report (part 10 of the request) at the date of the review response, and was asked to clarify the date on which it had issued the review response. The Council's response is considered below.

Commissioner's analysis and findings

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

Application of the EIRs

15. It is clear from the Council's correspondence with Goodfellow Ltd. that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to a road maintenance contract and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in the Appendix to this decision). Goodfellow Ltd. has not disputed the application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of that regime.

Regulation 5(1) of the EIRs

16. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
17. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Interpretation of parts 9 – 12 of the request

18. Parts 9 – 12 of the request asked for "...Reports on, and results of any investigations undertaken" into various aspects of road maintenance contracting procedures and practices. In its application for a decision from the Commissioner, Goodfellow Ltd. referred to an email relating to part 9 of its request, which it considered might indicate the existence of additional recorded information about the results of the investigations. Goodfellow Ltd. also commented that notes from meetings which were used in the production of the Internal Audit report would comprise information covered by part 10 of the request. This raises the question of how widely parts 9-12 of the request should be interpreted, in terms of the information covered.

19. The Council interpreted part 9 (and parts 10 – 12) as a request for the outcome of the investigation, i.e. the report or summary produced at the conclusion of the investigation. It argued that this follows the common meaning of the word “result” when used in connection with an investigation. The Council submitted that a request drafted by a solicitor (the request was made by a firm of solicitors acting on behalf of Goodfellow Ltd.) should be interpreted as closely as possible to the normal meaning of the words and phrases used, because lawyers are trained to express themselves in an exact manner. The Council considered it unwarranted to extend the understanding of the request to include documentation created during the investigation.
20. The Commissioner accepts the Council’s interpretation of parts 9 – 12 of the request, being satisfied that a report on an investigation is, in effect, the same as information about the result of the investigation. Consequently, the Commissioner has not considered whether the Council holds any information relating to the conduct or interim findings of the investigation.

Was all relevant information identified and located by the Council?

21. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

Details of the Council’s searches

22. The Council commented that the phrasing of the various parts of Goodfellow Ltd.’s request, whilst very specific, made dealing with the request quite difficult in practice. It was difficult to differentiate between information relevant to some of the parts of the request and information relevant to others. When Council officials were asked to provide the information they held, most officials provided all the information they thought might be relevant to some part of the request and, in effect, provided all of the information they held about Goodfellow Ltd. After considering all the information supplied by its officials, the Council concluded that slightly more fell outwith the scope of the request than within it.
23. The Council provided details of the searches that it had conducted. It explained how email boxes were searched (in their entirety) for “Goodfellow” and information found assessed for relevance. The same process was applied to specific network folders that were potentially relevant to the request.
24. The Council explained that, as the request related to a road maintenance contract, it had also extracted information relevant to the request from the Roads Contract Monitoring system.
25. Goodfellow Ltd. provided dates of its meetings with Council officials. Goodfellow Ltd. considered that Council officials would have taken notes of these meetings, which would be still held and should fall within scope of the request. The Council consulted the officials identified by Goodfellow Ltd. as attending the meetings, and provided a detailed account of the responses received from each individual, explaining why notes from the meetings were no longer available. In some cases, the official’s practice was to regularly destroy hand-written notes; another confirmed that he quickly converts any notes into entries in the summary document from the meeting, and destroys his own notes. One official was unable to locate the notebook covering the relevant period, but confirmed that no electronic notes were created afterwards.

26. The Council provided correspondence from the relevant Council officials as to the extent of the searches for the requested information. This showed which records had been searched.
27. Goodfellow Ltd. provided the Commissioner with a copy of a letter sent on 29 July 2013 from Tayside Procurement Consortium (TPC) (a collaborative procurement team created by Angus, Dundee City and Perth and Kinross Councils¹) which stated that the previous year's rates were being re-instated, in relation to TPC's Roads Maintenance Framework Agreement. Goodfellow Ltd. considered that such a letter would have engendered discussion within the Council and, therefore, the Council should hold information on this point.
28. The Council confirmed that it did not hold any information falling within the scope of part 5 of the request, apart from the covering email which accompanied the letter to the contractors.
29. On the basis of the evidence provided about the searches carried out by the Council, the Commissioner accepts (on the balance of probabilities) that all relevant information was identified by the Council when the request was originally dealt with.

Parts 4, 5, 11 and 12 of the request – is any information held?

30. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
31. The Commissioner agrees with the Council that parts 11 and 12 of Goodfellow Ltd.'s request should be interpreted as requests for information about the final outcome of the investigation, and not as requests for any information pre-dating the final report.
32. The Commissioner considers that the additional searches carried out by the Council for information about meetings held on the specific dates identified by Goodfellow Ltd. are sufficient to show that the Council does not hold any information falling within scope of parts 11 and 12 of the request.
33. In reaching her conclusion, the Commissioner has taken into account that when Goodfellow Ltd. submitted its initial request, Council officials provided the FOI Officer with all the information they held about "Goodfellow". The Commissioner considers that any information falling in scope of the request is highly likely to have been included within this first collation of information, given the amount of information retrieved by the search.
34. The Commissioner is satisfied that the Council's searches were reasonable and proportionate and she accepts (on the evidence of these searches) that the Council does not hold any information falling within scope of parts 4, 5, 11 and 12 of the request.
35. Before accepting that the exception in regulation 10(4)(a) of the EIRs was correctly cited in relation parts 4, 5, 11 and 12 of the request, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

The public interest test associated with parts 4, 5, 11 and 12 of the request

36. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.

¹ <http://www.taysideprocurement.gov.uk/>

37. The Commissioner is satisfied that the Council does not hold the information sought by Goodfellow Ltd. in parts 4, 5, 11 and 12 of its request. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
38. The Commissioner is satisfied, therefore, that the Council was entitled to refuse parts 4, 5, 11 and 12 of Goodfellow Ltd.'s request under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the requested information.

Parts 8 and 9 of the request – is further information held?

39. The Council commented that part 8 of Goodfellow Ltd.'s request refers specifically to "reports, memoranda, and other written communications" about a specified subject. The Council considered that it was unclear how notes taken at a meeting could be covered by this request unless they were part of any "reports, memoranda, and other written communications" about the specified subject. The Council considered that any note created by an officer which informed "reports, memoranda, and other written communications" would be information falling outwith the scope of this part of the request (regardless of whether such notes existed).
40. The Council considered the request to be phrased very carefully by Goodfellow Ltd.'s lawyers, and commented that it had taken great care in the interpretation of the various points. The Council understood part 8 to be a request for all internal documents and any communications between the Council and TPC or Tayside Contracts about the tenders submitted by Goodfellow Ltd. in 2012 or 2013. The Council commented that any information dated after the period of consideration of the tenders about rates, allocation of work, etc. to be generally outwith the scope of the request. Consequently, the Council considered that there was limited scope for it to hold further information. In view of the searches already conducted, it was confident that it did not hold any further information.
41. The Commissioner is satisfied with the Council's interpretation of parts 8 and 9 of the request. She agrees that these are requests for information about the final outcome of the investigation, and do not cover information about the earlier stages of the investigation.
42. Having considered the submissions provided by the Council, the Commissioner is satisfied that its searches for information falling within the scope of parts 8 and 9 of the request were reasonable and proportionate, and would have been likely to identify any additional relevant recorded information. She is satisfied that the Council does not hold any relevant information than that already disclosed to Goodfellow Ltd. and that the Council complied with regulation 5(1) in responding to parts 8 and 9 of the request.

Regulation 10(4)(d) – information in the course of completion

43. In its review response, the Council withheld the Internal Audit report covered by part 10 of the request under regulation 10(4)(d) of the EIRs.
44. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

45. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
46. Regulation 13(d) provides that where a Scottish public authority refuses to make information available on the basis of the exception in regulation 10(4)(d), the authority shall state the time by which it considers that the information will be finished or completed.
47. The Council stated that the Internal Audit report was incomplete when Goodfellow Ltd. made its initial request on 19 March 2014. The Council provided the Commissioner with a copy of the minute of the Audit Committee meeting of 18 June 2014, at which the Committee resolved that Internal Audit's findings, as detailed in the report, should be noted. The Council provided a copy of the report included in the Audit Committee meeting papers. Its creation date was 11 June 2014.
48. The Council has not disputed that the Internal Audit report was finalised by 18 June 2014, when the Audit Committee considered it. The Commissioner concludes that the Internal Audit report was completed and finalised some time before the Council issued its review response on 7 July 2014.
49. The Council provided a copy of the Internal Audit report to Goodfellow Ltd. on 29 August 2014. Goodfellow Ltd. has expressed dissatisfaction with the delay in disclosure of the report.
50. The Commissioner's investigation and decision is limited to whether the Council complied with the EIRs in dealing with the request and the request for review submitted by Goodfellow Ltd. In its review response to part 10 of Goodfellow Ltd.'s request, the Council stated that the report was still in the course of completion and excepted from disclosure in line with regulation 10(4)(d) of the EIRs. The investigating officer explained, and Goodfellow Ltd. accepted, that the Commissioner's decision would consider whether the report was still in the course of completion at the date of the Council's review response (7 July 2014).
51. Regulation 16(3) of the EIRs states that, on receipt of "representations" (i.e. the request for review), the authority shall consider the representations and supporting evidence produced by the applicant; review the matter and decide whether it has complied with the EIRs.
52. In the Commissioner's view, there are three options available to the authority when conducting a review under the EIRs:
 - (i) review whether the initial response was correct at the date it was issued
 - (ii) review the initial decision on the basis of the current circumstances and conclude a new decision should be substituted
 - (iii) review the initial decision on the basis of the current circumstances and conclude a new decision should not be substituted and the original decision should be upheld.
53. The Commissioner takes the view that the obligation under the EIRs is to consider the information held at the time the request is received, in the circumstances applying to that information at that time. That should remain the material time when the review is carried out, although the review should be a comprehensive re-examination of the merits of the original decision.

54. The Commissioner does not consider that the authority is prevented from taking account of changed circumstances at the time of the review, should it wish to do so. Further, the Commissioner does not consider that regulation 16 of the EIRs can operate as a bar to addressing changed circumstances, should that be what the authority wishes to do. The aim is not to prevent the disclosure of information, where such disclosure would otherwise be appropriate. In any event, an authority dealing with an information request is always subject to regulation 9 of the EIRs, and the Commissioner considers that this duty extends to advising the requester of any material change in circumstances which made it likely that a new request would receive a different response; in other words, giving the requester the opportunity to make that new request.
55. In this instance, the Council decided to review whether the initial response was correct at the date of issue (option a). It did not take account of the change in circumstance, i.e. the fact that the Internal Audit report had been completed, at the time it carried out its review.
56. Having considered all the submissions with respect to the completion of the Internal Audit report, the Commissioner accepts that the report was in the process of completion at the date of the initial response. The Commissioner notes, however, that the Council's review response did not indicate that the Internal Audit report had been completed in the intervening period.
57. Regulation 13(d) of the EIRs requires a Scottish public authority relying on the exception in regulation 10(4)(d) to state the time by which the authority considers that the information will be finished or completed. The Council did not comply with this requirement in its initial response (7 July 2014). The Council should have identified this failure when reviewing its response, and should have rectified it by informing Goodfellow Ltd. that the information was no longer incomplete, but had been finalised. The Commissioner finds the Council's failure to do so to be a breach of regulation 9(1) of the EIRs, which require a Scottish public authority to provide reasonable advice and assistance to applicants.
58. As the Council disclosed a copy of the report some time after issuing its review response, the Commissioner does not require the Council to take any action with respect to this failure.
59. Before accepting that the exception in regulation 10(4)(d) of the EIRs was correctly cited in relation to part 10 of the request, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

The public interest test associated with part 10 of the request

60. The exception in regulation 10(4)(d) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
61. As noted above, the Council's review response considered only whether it had been correct to withhold the Internal Audit report when responding to the request from Goodfellow. The reviewers did not consider whether that decision should be substituted with a decision to disclose the information, following completion of the report. The Commissioner must therefore decide whether the Council was correct in finding that, at the time of the request, the public interest lay in withholding the draft report.
62. The Council submitted that, when the request was made, neither the Internal Audit report nor the auditors' investigation was complete. As such, the report (in the form it existed then) reflected only the evidence obtained to that point and was completely open to misinterpretation.

63. The Council considered that disclosure of the incomplete report might contribute to the oversight of public expenditure, but might also provide a false picture of the situation. Similarly, disclosure might reveal malpractice, etc., or an absence of it, but later evidence might reverse that conclusion.
64. The Council concluded that it is vital that a public authority's internal auditors are permitted to undertake their duties unhindered, unbiased, and free from undue influence either internally or externally. To disclose an incomplete report from one of their investigations would hamper that investigation and subject them to a level of public scrutiny that would considerably hinder their objective approach and place them, and the Council, under pressure to make recommendations or take action on incomplete findings.
65. Goodfellow Ltd. did not provide any additional submissions regarding the Council's application of this exception or the public interest test.
66. The Commissioner has considered carefully the balancing exercise required by the public interest test. She has also had regard to the particular content of the information under consideration, and the nature of that information (an un-finalised draft of an audit investigation).
67. The Commissioner recognises that there is a general public interest in transparency and allowing public scrutiny of decision making and matters that have attracted considerable publicity. In the circumstances of this case, she accepts that there is a real and substantial public interest in the findings of an audit investigation into the Council's road maintenance contracting procedures.
68. The Commissioner recognises that this must be balanced against any detriment to the public interest as a consequence of disclosure. In the context of this case, the Commissioner considers that there was a strong public interest in allowing the Internal Audit report to be finalised before it was subject to public scrutiny. It is the Commissioner's view that the disclosure of this particular information, before it was finalised, could have harmed progress towards a final agreed and signed audit report, and its disclosure would therefore be detrimental to the public interest. The Commissioner considers, on balance, that the public interest favours maintaining the exception in this instance.
69. The Commissioner therefore concludes that the Council complied with the EIRs in withholding the information contained in the incomplete Internal Audit report under regulation 10(4)(d), when it responded to Goodfellow Ltd.'s request.

Regulation 10(5)(e) of the EIRs

70. The Council submitted that the information about chargeable rates within a third party's contract with the Council, which fell within scope of part 3 of Goodfellow Ltd.'s request, was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
71. 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.

72. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). 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)).
73. The Aarhus Convention: an Implementation Guide² (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (at page 60) that the first test for considering this exception is that national law must expressly protect the confidentiality of the withheld information: it must, the guidance states, explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
74. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*³ and the Commissioner does not intend to repeat that consideration in detail here. The Commissioner has 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 harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

75. The information comprises detailed rates for specified standard elements of roads maintenance, and relates to a framework agreement to carry out road maintenance works. As such, the Commissioner is satisfied that the withheld information is commercial in nature.

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

76. The Council explained that the tender process is administered by TPC rather than itself. The Council considered that there is a general understanding that contractor's rates are kept confidential. It noted that, during the processing of the request, Goodfellow Ltd. was contacted to establish whether it was willing to have its rates disclosed into the public domain. The response from Goodfellow Ltd.'s solicitors indicated that they were not willing for this to happen. On that basis, the Council felt it was reasonable to assume that none of the other contractors would take a different view.
77. The Council acknowledged that the information in question is historical in nature, but it considered that there was significant potential to "extrapolate forwards" to obtain reasonable estimates of the contractor's current rates.

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

³ <http://www.itspubliknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

78. Having considered the context within which the information was supplied to the Council, the Commissioner accepts that it was supplied subject to an implied obligation of confidence. Such an obligation may lapse with the passage of time but, given her conclusions below, the Commissioner accepts that it remained in force at the time the Council responded to the request from Goodfellow Ltd.

Is the information publicly available?

79. The Council submitted that the withheld information was not currently in the public domain, and the Commissioner accepts this.

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

80. As noted above, the term "legitimate economic interest" is not defined within the EIRs. The interest in question must, however, be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.

81. The Council considered that disclosure of information comprising detailed rates for specified standard elements of road maintenance would allow other organisations to compete more effectively or undercut the rates of the contractors whose information was disclosed.

82. The Council noted that the TPC framework agreements have been awarded annually, so it anticipated that harm would follow within a 12 month period.

83. In its application, Goodfellow commented that it appreciated the need for confidentiality on commercial matters, but considered that the information in this category had now lost commercial sensitivity by the passage of time, as the rates and prices have been superseded.

84. Goodfellow Ltd. also provided a copy of a letter from TPC dated 29 July 2013 confirming that work would be awarded on the 2012 rates. The Commissioner notes that, in effect, the rates for 2013 had been rolled back to the 2012 rates, and accepts that this increases the commercial sensitivity of the information about the rates charged by the contractor.

85. In reaching a conclusion, the Commissioner has to be satisfied that the harm to the economic interest in question (and thus to the confidentiality to be protected) would be real, actual and of significant substance. The withheld information in this case comprises a contractor's rates in a framework agreement. The Commissioner has taken into consideration the fact that Goodfellow Ltd. did not want its own costs to be disclosed, and concurs with the Council that other contractors are likely to have the same view. Having considered the commercially sensitive nature of the withheld information and the submissions made by the Council and Goodfellow Ltd., the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause, substantial harm to the ongoing legitimate economic interests of the contractor, and that the exception in regulation 10(5)(e) is engaged.

Consideration of the public interest associated with part 3 of the request

86. Having upheld the use of the exception in regulation 10(5)(e) in relation to the withheld rates information, the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
87. Goodfellow Ltd. submitted that, in applying the public interest test in this situation, it was important to consider the importance of disclosure in revealing malpractice, ensuring effective oversight of expenditure of public funds and achieving value for money for the public.
88. The Council has recognised a general public interest in authorities being accountable, and thus subject to scrutiny, with respect to the use of public funds. In this case, it accepted that disclosure of the information would be necessary in order to undertake a detailed analysis of public expenditure on roads maintenance, but suggested that, in itself, the information would provide a confusing picture due to the nature of the underlying framework agreement. The Council questioned whether disclosure of the information would provide enough information to allow conclusions to be reached.
89. The Council also considered there to be a public interest in local authorities maintaining confidentiality and protecting suppliers' commercial interests. It noted that there is a clear understanding of the continuing obligation of confidentiality associated with this information, and that this is also understood by the requester. The Council concluded that there is considerable public interest in ensuring that a public authority maintains appropriately the confidentiality of the information it holds. Such confidentiality forms part of the terms and conditions of employment of all the Council's employees.
90. The Council explained that it has multiple agreements on a "schedule of rates" basis. The Council considered that it is well understood that these rates are commercially sensitive and should not be disclosed whilst they maintain some degree of currency. The Council understood that amounts paid to contractors should be disclosed into the public domain but it differentiated between invoiced amounts and the detail, including rates, that make up those amounts.
91. The Council concluded that, on balance, the public interest in maintaining the current confidentiality of the information and protecting the commercial interests of its suppliers outweighed the public interest in disclosing the information.
92. The withheld information clearly relates to public expenditure and the Commissioner recognises the public interest in transparency in relation to the amounts paid to the contractor. Equally, given the strong public interest in the maintenance of confidentiality within a competitive environment, she is satisfied that there is a strong public interest in the withheld cost information not being made public (which would be the effect of making it available under the EIRs). On balance, and in all the circumstances of this case, she concludes that the public interest in making the pricing information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.

Timescales

93. Goodfellow Ltd. expressed dissatisfaction with the time taken by the Council to respond to the initial request and its request for review.

94. 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, subject to exceptions which are not relevant in this case.
95. Regulation 7(1) of the EIRs allows a Scottish public authority to extend the time allowed by regulation 5(2)(a) by a further period of up to 20 working days, if the volume and complexity of the information requested makes it impracticable for the authority to provide an earlier response. In such cases, therefore, the time allowed for a response can be extended to a maximum of 40 working days. Regulations 7(3)(b) and (c) of the EIRs specify the notification that is required to be given to an applicant, if the time period is to be extended for a further period of 20 working days.
96. The Council commented that, due to the complex nature of the request and the volume of the information initially located, it quickly became apparent that the information provided by officials was voluminous. The Council issued its response under regulation 7 of the EIRs to Goodfellow on 10 April 2014, and stated that a response would be issued by 19 May 2014.
97. No response was received by 19 May 2014, and on 3 June 2014, Goodfellow asked the Council to conduct a review of its failure to respond to the request.
98. The Commissioner accepts that the notice issued by the Council to Goodfellow on 10 April 2014, to extend the time allowed for a response for a further 20 days (40 working days in total from the date of the request), complied with requirements of regulations 7(3)(b) and (c) of the EIRs.
99. As the Council did not issue a response to Goodfellow's request within the statutory timescale permitted under regulation 7 of the EIRs, the Commissioner has concluded that the Council failed to comply with regulation 5(2)(a) of the EIRs.
100. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
101. The Council issued its review response on 7 July 2014. It is a matter of fact that it failed to comply with Goodfellow's requirement for review within 20 working days, so the Commissioner must find that the Council failed to comply with regulation 16(4) of the EIRs.
102. As the Council responded to the request and the requirement for review, the Commissioner does not require the Council to take any further action with respect to these failures.

Decision

The Commissioner finds that Perth and Kinross Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Goodfellow Environmental Maintenance Ltd (Goodfellow).

The Commissioner finds that the Council:

- (i) did not hold any information with respect to parts 4, 5, 11 and 12 of the request and correctly applied the exception in regulation 10(4)(a) of the EIRs;
- (ii) provided Goodfellow with all the information covered by parts 8 and 9 of the request in line with regulation 5(1) of the EIRs;
- (iii) was correct to withhold the report covered by part 10 of the request under regulation 10(4)(d) of the EIRs;
- (iv) was correct to withhold the information covered by part 3 of the request under regulation 10(5)(e) of the EIRs;
- (v) complied with the EIRs in giving notice, under regulation 7 of the EIRs, that it required to extend the time period for response by a further period of up to 20 working days;
- (vi) failed to comply with regulation 13(d) of the EIRs, in failing to indicate when incomplete information would be finished or completed;
- (vii) failed to take into consideration that the report covered by part 10 of the request had been finished when reviewing its initial response and so failed to comply with regulation 9(1) of the EIRs;
- (viii) failed to comply with the timescales for response specified in regulations 5(2)(a) and 16(4) of the EIRs.

The Commissioner does not require the Council to take any action in respect of these failures in response to the application from Goodfellow Ltd.

Appeal

Should either Goodfellow Environmental Maintenance Ltd. or Perth and Kinross 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.

Rosemary Agnew
Scottish Information Commissioner

11 February 2015

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

...

7 Extension of time

(1) The period of 20 working days referred to in-

(a) regulation 5(2)(a);

...

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

...

(3) Notification under paragraph (2) shall-

(a) be in writing;

(b) give the authority's reasons for considering the information to be voluminous and complex; and

- (c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;...
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

- (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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and

...

16 Review by Scottish public authority

...

- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...

Appendix 2: Request

1. Copies of all Roads Maintenance Framework Agreements awarded by the Tayside Procurement Consortium (TPC) or Perth and Kinross Council (PKC) to Goodfellow Environmental Maintenance Ltd amongst other contractors, for each successive period commencing after 1 January 2010 to date; including all terms and conditions of contract under such Agreement.
2. Copies of the invitations to prospective contractors to tender for each of the Agreements referred to in paragraph 1 above; including all terms and conditions of tendering.
3. Copies of the tenders for each of the Agreements referred to in paragraph 1 above, submitted by:
 - i. Goodfellow Environmental Maintenance Ltd;
 - ii. McCormack Developments Ltd (MDL);including all specifications of costs, rates and prices.
4. Copies of all letters, correspondence, emails, attachments and other documents passing and records of meetings and telephone calls between:
 - i. TPC or PKC; and
 - ii. Goodfellow Environmental Maintenance Ltd or others on their behalf.relative to the invitation, submission and acceptance of each tender by Goodfellow Environmental Maintenance Ltd for each of the Agreements referred to in paragraph 1 above, including all entries therein showing or tending to show that the terms of each such tender would be kept confidential.
5. Copies of all letters, correspondence, notes, minutes, records of meetings, visits or telephone calls and other papers, emails, attachments, data and other documents showing or tending to show:
 - i. whether, when and by whom any tender, including specification of costs, rates or prices by Goodfellow Environmental Maintenance Ltd for any of the Agreements referred to in paragraph 1 above was passed or disclosed to individual Road Supervisors or other employee of PKC responsible for road maintenance.
 - ii. whether, when and by whom any tender, including specification of costs, rates and prices by Goodfellow Environmental Maintenance Ltd for any of the Agreements referred to in paragraph 1 above was passed or disclosed to:
 - a. MDL; or
 - b. any other contractor or others acting on any of their behalf.
 - iii. The nature and extent of the information about any such tender which so passed or disclosed.
6. Details of all individual contracts awarded to:
 - i. Goodfellow Environmental Maintenance Ltd;
 - ii. MDL; and

- iii. other contractors in each successive period of the Agreements referred to in paragraph 1 above.
7. Details of the total sums paid under the individual contracts referred to at paragraph 6 above to:
 - i. Goodfellow Environmental Maintenance Ltd;
 - ii. MDL; and
 - iii. other contractors in each successive period of the Agreements referred to in paragraph 1 above.
8. Copies of all Reports, Memoranda and other written communications made by [named individuals], other PKC officials, employees or agents or others on their behalf to:
 - i. PKC;
 - ii. TPC; or
 - iii. TC

or others on their behalf relative to the tenders submitted in 2012 and 2013 for the Agreements referred to in paragraph 1 above.
9. Copies of all Reports on and results of investigations undertaken in or after 2012 by:
 - i. PKC;
 - ii. Jim Valentine, Executive Director, The Environment Service, PKC;
 - iii. Barbara Renton, Depute Director, The Environment Service, PKC; or
 - iv. [named individual], Corporate Asset Management, PKC;

into road maintenance contracting procedures and practices at PKC, TPC, TC or related complaints made by or on behalf of Goodfellow Environmental Maintenance Ltd from on or about 11 September 2012 to date
10. Copies of all reports on and results of any investigations undertaken in or about 2013 or 2014 by internal and, or external auditors of PKC into road maintenance contracting procedures and practices at PKC, TPC or TC or related complaints made by or on behalf of Goodfellow Environmental Maintenance Ltd from on or about 11 September 2012 to date.
11. Copies of all reports on and results of any investigations undertaken in or about 2013 or 2014 by internal and, or external auditors of TPC into road maintenance contracting procedures and practices at PKC, TPC or TC or related complaints made by or on behalf of Goodfellow Environmental Maintenance Ltd from on or about 11 September 2012 to date.
12. Copies of all reports on and results of any investigations undertaken in or about 2013 or 2014 by Mr Douglas Cross formerly of Tayside Police by on behalf of PKC into the governance and arrangements for road maintenance contracting procedures and practices at PKC, TPC or TC or related complaints made by or on behalf of Goodfellow Environmental Maintenance Ltd from on or about 11 September 2012 to date.

