



Scottish Information
Commissioner
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Decision Notice 281/2024

Information about documents delivered by the Consultant for Angus Levelling Up Project - Monikie and Crombie

Authority: Angus Council
Case Ref: 202400299

Summary

The Applicant requested all documents delivered by the consultant for the Angus Levelling Up Project at Monikie and Crombie. The Authority refused to disclose information to the Applicant on the basis that it would be exempt under section 30(c) of FOISA. During the investigation the Authority identified that the information was "environmental" for the purposes of the Environmental Information (Scotland) Regulations 2004.

The Commissioner investigated and found that the Authority had not been entitled to rely on the exemption in section 30(c) of FOISA for withholding the information from the Applicant. He concluded that the request should have been processed and responded to in line with the EIRs and required the Authority to issue a revised review response.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs); 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", "the applicant", "the Commissioner" and (paragraphs (a), (b) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 2 November 2023, the Applicant requested all the documents that were delivered by the consultant under the contract titled 'Consultant for Angus Levelling Up Project - Monikie and Crombie'.
2. Having received no response to his request for information, the Applicant wrote to the Authority on 13 December 2023 to request a review.
3. The Authority responded to the Applicant's requirement for review on 15 December 2023. The Authority apologised for the delay in its response and informed the applicant that it was refusing to disclose the requested information as it was exempt under section 30(c) of the Freedom of Information (Scotland) Act 2002, citing substantial prejudice to the effective conduct of public affairs.
4. On 26 February 2024, the Applicant wrote to the Commissioner, applying for a Decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the Authority's decision to apply section 30(c) of FOISA and arguing that the Authority had not considered the public interest.

Investigation

5. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
6. On 27 February 2024, 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.
7. 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. These related to why the Authority considered disclosure of the requested information would prejudice substantially the effective conduct of public affairs, as well as where it considered the balance of the public interest to lie. The Authority was also asked to comment on whether it considered any of the withheld information to fall within scope of the Environmental Information (Scotland) Regulations (EIRs).
8. The Authority provided the Commissioner with its submissions.
9. Within these submissions the Authority confirmed that it was no longer seeking to argue that the exemption in section 30(c) of FOISA applied to the withheld information. It instead considered all of the information to be "environmental" for the purposes of the EIRs.
10. As the Authority has concluded that it should have processed and responded to the Applicant's request under the EIRs, the Commissioner must find that the Authority was not entitled to rely on the exemption in section 30(c) of FOISA for responding to this request, and so failed to comply with Part 1 of FOISA.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Authority. He is satisfied no matter of relevance has been overlooked.
12. In reaching a Decision on the Applicant's appeal in this case, the Commissioner must consider the circumstances prevailing at the time the Authority responded to the Applicant's requirement for review, in line with the findings of the Court of Session at paragraph 31 of the [Scottish Ministers v the Scottish Information Commissioner \(William Alexander's Application\) \[2006\] CSIH 8](#)¹

FOISA or EIRs?

13. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#).² Broadly, in the light of that Decision, the Commissioner 's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
14. During the investigation, the Authority was asked to inform the Commissioner as to whether it had considered if the information covered by the Applicant's request would be "environmental" for the purposes of the EIRs.
15. In response, the Authority explained that as the requested information relates to potential changes to the environment within park land, albeit on a small scale, it considered the withheld information to come within scope of parts (a), (b) and (c) of regulation 2(1) of the EIRs.
16. The Authority submitted that the Applicant's request should have been processed under the EIRs, instead of FOISA.

¹ [\[ARCHIVED CONTENT\] SCOTTISH MINISTERS \(WITH SUMMARY\) v. SCOTTISH INFORMATION COMMISSIONERS ETC](#)

² Decision 218/2007 Professor A D Hawkins and Transport Scotland

17. Having considered the subject matter of the withheld information, which relates to potential changes and developments to Monikie and Crombie Country Parks, the Commissioner is satisfied that this is "environmental" information in that it relates to a measure affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition in regulation 2(1) of the EIRs, and therefore to fall within paragraph (c) of that definition. Consequently, he considers the information to comprise, in its entirety environmental information.
18. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Regulation 39(2) of FOISA – environmental information

19. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
20. In this case, as stated above, when responding to the Applicant's requirement for review the Authority did not agree that the request fell to be considered under the EIRs and instead responded solely under FOISA, relying on the exemption in section 30(c).
21. The Commissioner finds that the Authority would have been entitled to apply the exemption in section 39(2) of FOISA to the request, given his conclusion that the information requested was properly classified as environmental information.
22. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs would outweigh any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

23. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
24. Although the Authority responded to the Applicant's requirement for review on 15 December 2023, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
25. It is apparent that the Authority failed to respond to the Applicant's request of 2 November 2023 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
24. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 13 December 2023, in terms of regulation 16 of the EIRs.
25. The Commissioner's decision below states a compliance date of 11 January 2025, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response: the deadline does not prevent the Authority from issuing one sooner.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information request made by the Applicant.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by 17 January 2025.

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.

Enforcement

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

Euan McCulloch
Head of Enforcement

3 December 2024