

Decision Notice



Decision 014/2011 Mr Craig Mitchell and Fife Council

Draft Fife Core Path Plan

Reference No: 201000892

Decision Date: 20 January 2011

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Scottish Information Commissioner

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Summary

Mr Craig Mitchell (Mr Mitchell) requested from Fife Council (the Council) correspondence in relation to the Draft Fife Core Path Plan for the Burntisland and Aberdour area. The Council provided a weblink to the information available on its website and disclosed a summary of its observations of two crossings. Following a review, Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council should have dealt with the request under the Environmental Information (Scotland) Regulations 2004 (EIRs), and that, in failing to do so, it had failed to comply with the EIRs.

The Council also failed to disclose all of the information that fell within the scope of Mr Mitchell's request until after the investigation commenced. By failing to provide all relevant information, the Council failed to comply with regulation 5(1) of the EIRs. However, by the end of the investigation, the Commissioner was satisfied that the Council had identified all of the information it held within the scope of Mr Mitchell's request, and that reasonable searches had been undertaken by the Council to identify this. The Commissioner therefore does not require the Council to take any action in response to this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of "environmental information") and 5(1) (Duty to make environmental information available on request)

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



Background

1. On 15 February 2010, Mr Mitchell wrote to Fife Council (the Council) requesting all correspondence between Council Transportation Services and other Council employees regarding the Draft Fife Core Path Plan (the Draft Plan) in the Burntisland and Aberdour area. Mr Mitchell said this should include, but not be limited to:
 - details of any risk assessments, reports or otherwise carried out by or on behalf of Transportation Services
 - copies of any correspondence between Transportation Services and elected representatives.
 - all external correspondence between Transportation Services and all non-Council employees and organisations and members of the public
2. The Council responded on 12 March 2010, indicating that the request had been handled in terms of the EIRs. It provided Mr Mitchell with a weblink to the Draft Plan on its website and a written account of a Council employee's observations on two proposed crossings as a result of an inspection in October 2009. The Council indicated that it held no correspondence between Transportation Services and elected representatives or other organisations or members of the public.
3. On 15 March 2010, Mr Mitchell emailed the Council requesting a review of its decision. He commented that he did not consider that the information provided was all correspondence held by the Council between the Council's Transportation Services and other Council employees regarding the Draft Plan in the Burntisland and Aberdour area. He asked the Council to confirm whether it held any other correspondence on this subject and disclose the information therein.
4. The Council notified Mr Mitchell of the outcome of its review on 15 April 2010. The Council upheld its previous decision without amendment in that it did not hold any further information than that disclosed previously. This letter was headed "Freedom of Information (Scotland) 2002", suggesting that the review had considered Mr Mitchell's request in terms of FOISA rather than the EIRs.
5. On 27 April 2010, Mr Mitchell emailed the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.



6. The application was validated by establishing that Mr Mitchell had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. On 27 May 2010, the investigating officer contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). In seeking comments from the Council, the investigating officer asked it to justify its assertion that it had provided Mr Mitchell with all the information that it held and which was relevant to his request. The Council was also asked to provide details of the searches it had undertaken to determine this (including which individuals' and departments' records had been searched) and to provide copies of its internal correspondence in dealing with Mr Mitchell's request.
8. The investigating officer also commented that, having considered the nature of the information requested in this case, it appeared likely that any information falling within the scope of the request would be environmental information and therefore subject to the EIRs. The Council was asked to comment on this point. The Council was also asked if it wished to rely on the exemption in section 39(2) of FOISA, which provides that information is exempt from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
9. In its response, the Council provided an overview of the searches it had undertaken to establish what information it held with respect to Mr Mitchell's request and the other information requested by the investigating officer. The Council also highlighted that its initial response had dealt with Mr Mitchell's request under the EIRs, whilst its review had erroneously been considered under FOISA. The Council apologised for this omission, agreed that the requested information was environmental information as defined in the EIRs, and indicated that it wished to apply the exemption in 39(2) of FOISA.
10. The investigating officer requested and received additional submissions from the Council regarding the work undertaken by Transportation Services in assessing the local paths and information generated as a result of this work. As a result of providing these additional submissions, the Council identified three additional pieces of information (one email chain, one email and a file note) that fell within scope of the request, but had not been provided to Mr Mitchell.
11. On 13 August 2010, the Council disclosed this additional information to Mr Mitchell and on the same day the investigating officer provided a summary of the investigation to date to Mr Mitchell and enquired whether he considered that the Council held further information.



12. Mr Mitchell responded on 31 August 2010; he considered that further information was held by the Council and provided copies of two sets of minutes of the Fife Access Steering Group in which the Draft Plan in the Aberdour and Burntisland area had been mentioned. This information was passed onto the Council which conducted further searches but found no additional information.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Mitchell and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

14. As in any case, the Commissioner has considered the Council's handling of Mr Mitchell's information request at the point where it notified him of the outcome of its review. As noted above, the review in this case was conducted in terms of FOISA, although the Council had initially dealt with the request in terms of the EIRs. The Council has confirmed during the investigation that it considers the information requested by Mr Mitchell to be environmental information as defined in regulation 2(1) of the EIRs.
15. The information requested by Mr Mitchell concerns the designation of certain paths in the Fife area as core paths as defined in the Land Reform (Scotland) Act 2003. The purpose of core paths is to provide a network of routes sufficient for the purposes of giving the public reasonable access throughout an area. The Commissioner considers that information on this topic would therefore concern measures such as plans or programmes likely to affect the elements of the environment including soil, land and landscape and natural sites or factors that affect these elements, such as substances, noise and waste. In the circumstances, therefore, the Commissioner considers that the information requested by Mr Mitchell falls within the definition of environmental information set out in regulation 2(1), in particular part (c) of that definition insofar as it relates to plans and programmes.
16. In any case where a person requests information that would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs. Therefore, the Commissioner considers that when conducting its review solely in terms of FOISA, the Council failed to comply with the EIRs.

Section 39(2) of FOISA – environmental information

17. The exemption in section 39(2) of FOISA provides 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.



18. The Council acknowledged early in the investigation that the information requested was environmental, and indicated that it wished to apply the exemption in section 39(2) in this case.
19. Having concluded that the information requested by Mr Mitchell was entirely environmental information, the Commissioner concludes that the Council was entitled to apply the exemption in section 39(2) of FOISA in this case.
20. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption, and in dealing with the request in line with the requirements of the EIRs, outweighs any public interest in disclosure of the information under FOISA. The Commissioner has therefore proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 5 of the EIRs

21. Regulation 5(1) of the EIRs requires authorities which hold environmental information to make it available when requested to do so by any applicant.
22. The Commissioner notes that Mr Mitchell's initial request specified that he was seeking correspondence between the Council's Transportation Service and other Council employees. However, it went on to indicate that this information should include (but not be limited to) three types of information, which included documents and correspondence which would not necessarily have been exchanged between staff in Transport Services and other Council employees.
23. When seeking a review of the Council's handling of this request, however, Mr Mitchell expressed dissatisfaction solely on the grounds that he did not consider that the information supplied included all correspondence between the Council's Transportation Services and other Fife Council employees regarding the Draft Plan. For this reason, the Commissioner has solely considered in this decision the Council's handling of Mr Mitchell's information request insofar as it sought any correspondence the Council's Transportation Services and other Council employees.
24. In its initial response to Mr Mitchell, the Council provided him with a link to an internet page on its website containing the Draft Plan and provided the content of an email containing Council employee's observations as a result of an inspection of two crossings. Following its review, the Council advised Mr Mitchell that it had provided him with all the information it held which fell within the scope of his request.
25. The Commissioner's investigation in this case has therefore focussed on establishing whether or not the Council holds (or held at the relevant time) any further information which falls within the scope of Mr Mitchell's request for correspondence between the Council's Transportation Services and other Council employees regarding the Draft Plan in the Burntisland and Aberdour area.



26. Along with its submissions to the Commissioner, the Council provided copies of internal correspondence generated in the course of its handling Mr Mitchell's request for information. The Council commented that, as the request was for correspondence between Transportation Services and other Council employees, Transportation Services took the lead in dealing with the request.
27. The Council also explained that when reviewing its handling of Mr Mitchell's request, the employees from Transportation Services and Housing and Communities who were involved in the Draft Plan were asked to check and confirm if any additional information was held by them relating to the request. It indicated that these departments identified no additional information at that stage.
28. In correspondence following the Council's review, Mr Mitchell provided the Council with a copy of a summary list of objections and representations (which included comments from Transportation Services on some paths), together with a copy of an email to him from a Council employee which referred to discussions with another employee regarding the Draft Plan in the Burntisland and Aberdour area.
29. The investigating officer questioned the Council further regarding the Draft Plan in the Aberdour and Burntisland area, asking in particular for an overview of the process of undertaking risk assessments of the type detailed in the information supplied to Mr Mitchell, and whether any recorded information was held with respect to:
 - the reasons for and instigation of the inspection of the crossings mentioned in the information supplied to Mr Mitchell
 - comments by Transportation Services on relevant paths
 - discussions of the paths as mentioned in the email provided by Mr Mitchell
30. The Council responded to each of the questions raised by the investigating officer and, in doing so, identified an email chain and a record of a discussion that fell within scope of Mr Mitchell's request. The provision of this information led to further discussion between the investigating officer and the Council and the identification by the Council of an additional email which also fell within the scope of Mr Mitchell's request.
31. This information was disclosed to Mr Mitchell by the Council. In ongoing correspondence, Mr Mitchell advised the investigating officer that he considered that additional information was being withheld by the Council and provided copies of two sets of minutes of the Fife Access Steering Group dated September 2004 and February 2007 in which action by the Council with regards to Draft Plan in the Aberdour and Burntisland area had been mentioned.
32. This information was passed to the Council for further comment, who undertook an additional search for the requested information, but did not find any additional information.
33. The Commissioner has considered all of the submissions received from both Mr Mitchell and the Council, and the searches undertaken to identify any further relevant information that would fall within the scope of his request.



34. He has also had regard the content of the Draft Plan, which includes a table which specifies 18 factors in relation to each path being considered in the Draft Plan, with each factor being rated high, medium or low. In total, 848 paths were under consideration by the Council within the Draft Plan.
35. Within an email to Mr Mitchell (a copy of which he supplied during the investigation), he was advised by the Council that, due to budget restrictions, the low priority rating for the paths that were being considered for the Aberdour and Burntisland area, and the fact that current path serves the purpose, it would be unlikely for the Council to progress much further with the consideration of the paths in the Aberdour and Burntisland area.
36. The number of paths under consideration in the Draft Plan, together with the low priority of those in the area of interest to Mr Mitchell, and the Council's practice of conducting much of its business verbally, suggests to the Commissioner that there would be only limited relevant correspondence held by the Council.
37. Having considered all of the above, the Commissioner is satisfied that, by the end of the investigation, the Council had taken reasonable steps to locate and provide all relevant information that fell within the scope of Mr Mitchell's request. On balance of probabilities, he is satisfied that the Council does not hold (and did not hold at the time when Mr Mitchell's request was received) any additional information that would fall within the scope of Mr Mitchell's information request.
38. However, the Commissioner has concluded that the Council failed to identify and disclose all information that fell within scope of Mr Mitchell's request at the time when it issued its response to Mr Mitchell's request for review. By failing (at the time of its review) to provide the additional information that was identified and supplied to Mr Mitchell during the Commissioner's investigation, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.
39. However, the Commissioner is satisfied that this breach was rectified during the investigation and so he does not require any further action to be taken in response to this decision.

Content of notices

40. Mr Mitchell expressed dissatisfaction in his application to the Commissioner that the Council did not cite the appropriate exception under the EIRs in its response to his request for review.
41. In this case, the Council has not at any stage sought to apply any of the exceptions set out in regulations 10(4) or (5) of FOISA to the information requested by Mr Mitchell and under consideration in this decision. The Council's response was made on the (erroneous) basis that all relevant information that was held was supplied to Mr Mitchell. Where further relevant information was identified during the investigation, the Council has supplied this to Mr Mitchell and no exception from disclosure was ever claimed to apply to it.
42. Having considered the matter, the Commissioner is satisfied also that no exception was applicable as no information was withheld (or implied to have been withheld) by the Council.



43. For this reason, the Commissioner has found that there was no requirement for the Council to specify any exception in response to Mr Mitchell's information request, and there was no breach of the EIRs in terms of the content of its responses to Mr Mitchell.

DECISION

The Commissioner finds that Fife Council (the Council) failed to comply in full with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Mitchell.

The Commissioner has found that the Council failed to comply with the EIRs by responding to Mr Mitchell's request for review solely in terms of FOISA. He has also concluded that by failing to identify and disclose all of the information that fell within the scope of Mr Mitchell's request in response to his request for review, the Council failed to comply with the regulation 5(1) of the EIRs.

However, by the end of the investigation, the Commissioner was satisfied that the Council had identified all of the information it held within the scope of Mr Mitchell's request, and had provided the outstanding information to him. The Commissioner therefore does not require the Council to take any action in response to this decision.

Appeal

Should either Mr Mitchell or Fife Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
20 January 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

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

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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.

...