

Decision Notice

Decision 032/2016: Mr Stewart Dickson and Aberdeenshire Council

Correspondence regarding a planning application

Reference No: 201501517

Decision Date: 11 February 2016



Scottish Information
Commissioner

Summary

On 7 May 2015, Mr Dickson asked Aberdeenshire Council (the Council) for correspondence exchanged with a named developer regarding a planning application.

The Council withheld the requested information under section 30(b) of FOISA. After review, the Council determined that the information was environmental and should be withheld under regulation 10(5)(f) of the EIRS. Mr Dickson remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had wrongly withheld information under regulation 10(5)(f) of the EIRs. She required the Council to disclose all of the withheld information apart from some personal data.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(f) (Exceptions from duty to make environmental information available)

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

Background

1. On 7 May 2015, Mr Dickson made a request for information to the Council. He asked for copies of correspondence between the Council, Moray Offshore Renewables Limited (MORL) and the Press and Journal newspaper in relation to the planning application to bring forward the development of a substation at Mains of Asleid.
2. The Council responded on 4 June 2015. In its response, the Council submitted that it did not hold any information regarding discussions with the Press and Journal, but it did hold information regarding correspondence exchanged between itself and a MORL. The Council advised Mr Dickson it was withholding this information under section 30(b) of FOISA, taking the view that disclosure would inhibit free and frank discussion in future.
3. On 4 June 2015, Mr Dickson wrote to the Council requesting a review of its decision on the basis that the requested information was not financially or commercially sensitive and that all staff at the Council should be committed to openness and transparency in their decision making.
4. The Council notified Mr Dickson of the outcome of its review on 23 June 2015. In its review outcome, the Council determined that the requested information was environmental information and should therefore to be considered under the EIRs and not FOISA. The Council considered that the requested information was excepted from disclosure under

regulation 10(5)(f) of the EIRs and that the public interest favoured maintaining the exception.

5. On 19 August 2015, Mr Dickson 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. Mr Dickson stated he was dissatisfied with the outcome of the Council's review because he did not believe it had fully considered the public interest test. He believed it would be in the public interest for the information to be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Dickson 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.
7. On 24 August 2015, the Council was notified in writing that Mr Dickson had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council 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 Council was invited to comment on this application and answer specific questions including justifying its reliance on any the EIRs it considered applicable to the information requested.
9. The Council provided submissions and indicated that it would rely on regulation 11(2) of the EIRs to withhold personal data contained in some of the emails covered by the request.
10. During the investigation, Mr Dickson explained why he considered that it would be in the public interest for the withheld information to be disclosed. Mr Dickson confirmed that the personal information withheld under regulation 11(2) of the EIRs could be excluded from the scope of the investigation and decision; accordingly, this information is not considered further in this decision.

Commissioner's analysis and findings

11. 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 Mr Dickson and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

12. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition are reproduced in full in Appendix 1 to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various qualifications and exceptions contained in the EIRs.
13. Although the Council had initially responded to Mr Dickson's request in terms of FOISA, at review stage it determined that the information fell within the scope of the EIRs. The Council consequently advised Mr Dickson that it had applied the exemption in section 39(2) of FOISA and was withholding the requested information under regulation 10(5)(f) of the EIRs.

14. The Commissioner notes that the withheld information relates to a planning application for a substation and she 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.
15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing such information to be considered solely in terms of the EIRs. As the Commissioner accepts that the requested information is environmental and must be considered under the EIRs, she is satisfied that the Council was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
16. 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 Mr Dickson in this case, the Commissioner also finds that the public interest in maintaining this exemption and in responding to the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner will therefore consider this case in what follows solely in terms of the EIRs.

Withheld Information

17. The Council withheld information from 11 documents in total under regulation 10(5)(f) of the EIRs: documents 1-7 are email chains; document 8 is the attachment to an email contained in document 1; document 9 is the attachment to an email contained in document 2; and documents 10 and 11 are attachments to an email contained in document 6.

Regulation 10(5)(f) of the EIRs

18. In terms of regulation 10(5)(f) of the EIRs, 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 interests of the person who provided the information where that person:
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.
19. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).
20. There are a number of factors that should be addressed in considering whether this exception applies. These include:
 - (i) Was the information provided by a third party?
 - (ii) Was the provider, or could the provider be, required by law to provide it?
 - (iii) Is the information otherwise publicly available?
 - (iv) Has the provider consented to disclosure?
 - (v) Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

21. Although question (iv) makes reference to the consent (or otherwise) of the provider of information, it is the responsibility of the public authority to formulate and make submissions to the Commissioner to show why the information should be withheld.

Was the information provided by a third party?

22. When questioned on this point, the Council queried whether information has to be provided by a third party for the exception in regulation 10(5)(f) to apply.

23. The Council was advised that, while the EIRs do not explicitly state that the information has to be provided by a third party, the Commissioner's interpretation of regulation 10(5)(f) takes account of the fact that the EIRs implement EU Directive 2003/4/EC¹ which itself was derived from the 1998 United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as "the Aarhus Convention"). Regulation 10(5)(f) of the EIRs enacts paragraph 4(g) of Article 4 of the Aarhus Convention.

24. The United Nations Economic Commission for Europe has published a document entitled, "The Aarhus Convention: An Implementation Guide." Page 89 of the Guide makes it clear that, under paragraph 4(g):

- (i) public authorities may withhold information that would adversely affect the interests of a third party
- (ii) if a request relates to information supplied by another person or entity (for example, a company applying for a permit), that entity will be a third party for the purposes of the information request
- (iii) this exception is meant to encourage the voluntary flow of information from private persons to the state.

25. This guidance was shared with the Council. The Council was also advised that the Commissioner would not uphold the application of regulation 10(5)(f) to information that had not been provided to it by a third party. The Council was asked whether it wanted to reconsider its position.

26. In response, the Council submitted that if the information had not been environmental it would have relied on section 30(b) of FOISA, but as there is no direct equivalent of that exemption in the EIRs, it was obliged to rely on regulation 10(5)(f) to withhold this information.

27. The Council stated that all of the information requested in this case was obtained as part of the pre-application stage of a planning application. The Council explained that while the process of determining a formal planning application is entirely public, the pre-application stage is one where difficulties can often be ironed out with the applicant prior to submission of the formal planning application. The Council submitted that the pre-application stage is always considered to be confidential and it argued that applicants would be less inclined to engage in this process if it were to be made public.

28. The Council argued that the exception applied to each of the withheld documents as they all formed part of the pre-application stage of the planning application, and it was important to protect the flow of voluntary information between applicants and the Council at this stage.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

29. The Commissioner has considered each of the documents withheld from Mr Dickson (including each individual email contained in documents numbered 1-7) and has assessed whether they were provided by a third party. The Commissioner notes that many of the withheld documents contain information supplied to the Council in circumstances meeting the requirements set out at (i) and (ii) in paragraph 20 above: in other words, the information was provided by third parties who did so voluntarily and could not, in the circumstances, have been required to provide it.
30. The Commissioner is satisfied that the entirety of documents 2, 6, 8, 9, 10 and 11 and parts of documents 1, 3, 4, 5 and 7 comprise information provided to the Council by a third party.
31. However, the Commissioner has concluded that parts of documents 1, 3, 4, 5 and 7 were not provided by a third party.
32. The Commissioner notes that there is a distinction to be drawn between information and the medium in which it is conveyed. Information obtained from a third party may be reiterated in correspondence from the Council to that third party or in correspondence from the Council to another party. The information will still be information provided by a third party. In this instance, while she considers that some of the documents contain information provided by a third party, the remaining information is more accurately described as conveying information and comment from and between Council employees without reference to the third party information.
33. The Commissioner considers that only information which was provided by a third party can fall under the scope of regulation 10(5)(f) of the EIRs. She does not accept that information which originates from Council employees can be withheld under this exception. The Council has not chosen to rely on any other exception in relation to this information. Accordingly, the Commissioner finds that the information which could not be described as having been obtained from a third party was wrongly withheld under regulation 10(5)(f) of the EIRs.
34. The Commissioner will now go on to consider the other tests required for this exception to apply, in relation to the information she is satisfied was provided by a third party.

Was the provider, or could the provider be, required by law to provide it?

35. The Council argued that the third parties were not under any obligation to supply information.
36. The Commissioner notes that the requested information relates to the pre-application process which is a precursor to a formal planning application. The Commissioner is satisfied that while the Scottish Government encourages developers to engage in pre-application communications as a means to “speed up” the planning process, it is not a legal requirement for them to do so. Pre-application discussions are entirely voluntary and developers initiate such discussions at their discretion.
37. The Commissioner accepts that none of the third parties who provided information to the Council were required to do so by law.

Is the information otherwise publicly available, or has the provider consented to disclosure?

38. The Commissioner is satisfied that the information is not publicly available elsewhere. With regard to consent, the Council has indicated that MORL has not consented to disclosure of the information.

Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

39. If a Scottish public authority withholds information under regulation 10(5)(f), it must identify the harm that disclosure would cause to the interests of the person who provided the information. The harm must be real, actual and of substance.
40. The Council has argued that applicants would be less inclined to engage in the pre-application process for planning applications if they believed that the information provided to the Council would be made public. The Council has submitted that it is important to protect the flow of voluntary information between applicants and the Council at the pre-application stage. The Council has argued that disclosure of the requested information could inhibit the open and constructive discussions that take place between applicants and the Council during the pre-application process. If this happened, the Council argued that it would prejudice substantially the interests of the Council in being able to process planning applications timeously.
41. Having considered the submissions made by the Council, the Commissioner finds that the Council has failed to demonstrate why disclosure of the requested information would, or would be likely to prejudice substantially the interests of the third party or parties who provided the information which has been withheld in this case. The Council has submitted that disclosure would prejudice substantially its own interests, or might impact negatively on future planning applicants, but that is not the test which must be considered in relation to regulation 10(5)(f) of the EIRs. In order for the exception to be upheld, the Council must be able to demonstrate why disclosure would cause harm to the party or parties who provided the information, and it has failed to do so. While harm to the interests of the Council may be relevant when considering the public interest test, the public interest test only falls to be considered if the exception applies. In the absence of any persuasive arguments or evidence demonstrating that disclosure would substantially prejudice the interests of the third party or parties who provided the information to the Council, the Commissioner cannot uphold the application of this exception.
42. Accordingly, the Commissioner finds that the Council was wrong to apply the exception in regulation 10(5)(f) to the information obtained from a third party. As the Commissioner has found that the exception contained in regulation 10(5)(f) does not apply, she is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Decision

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Dickson. The Commissioner finds that the Council wrongly applied the exception contained in regulation 10(5)(f) of the EIRs to information withheld from Mr Dickson.

The Commissioner therefore requires the Council to disclose all of the withheld information (after redacting personal data) to Mr Dickson by 29 March 2016.

Appeal

Should either Mr Dickson or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Margaret Keyse
Head of Enforcement

11 February 2016

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 –

(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)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

(f) the interests of the person who provided the information where that person-

(i) was not under, and could not have been put under, any legal obligation to supply the information;

(ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and

(iii) has not consented to its disclosure; or

...

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