

Decision Notice



Decision 035/2012 Ross Estates Company and the Scottish Ministers

Decision not to call in a Planning Appeal

Reference No: 201101475

Decision Date: 20 February 2012

www.itspublicknowledge.info

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Summary

Ross Estates Company asked the Scottish Ministers (the Ministers) to provide information about the decision not to call in a certain Planning Appeal for re-determination. The Ministers provided some information but withheld information considered to be exempt from disclosure under the Environmental Information (Scotland) Regulations 2004 (the EIRs). Ross Estates Company was not satisfied with the way in which the Ministers had reached this decision, believing that the request should have been dealt with under the Freedom of Information (Scotland) Act 2002 (FOISA) as well as the EIRs. Following a review, the Ministers upheld their decision. Ross Estates Company remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which some of the withheld information was released, the Commissioner found that the information had been properly withheld under section 39(2) of FOISA and regulation 10(5)(d) of the EIRs, and that the Ministers had complied with the EIRs in dealing with the request.

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); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) to (c) of “environmental information”); 10(1), (2), (5)(d) and (6) (Exceptions from duty to make environmental information available)

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 25 March 2011, an information request was made to the Ministers on behalf of Ross Estates Company, under FOISA and the EIRs, as appropriate, for the following:



“...a complete and accurate copy of all information contained in email exchanges, letters, memoranda and any other recorded communication between:

- (a) members of staff of the Scottish Administration (including special advisers);
- (b) members of staff of the Scottish Administration and:
 - (i) the First Minister appointed under section 45 of the Scotland Act 1998
 - (ii) any Scottish Minister appointed under section 47 of the Scotland Act 1998
 - (iii) any junior Minister appointed under section 49 of the Scotland Act 1998
 - (iv) any Scottish Law Officers appointed under section 48 of the Scotland Act 1998

in relation to the decision not to call-in Planning Appeal Reference PPA-270-2017-1 for re-determination.”

2. The Ministers responded on 24 May 2011. They advised they considered the information covered by the request to be environmental information for the purposes of the EIRs, and applied the exemption in section 39(2) of FOISA, so that they did not have to deal with the request under FOISA. The Ministers provided some information but withheld other information under regulations 10(4)(e) and 10(5)(d) of the EIRs.
3. On 7 July 2011, a review of the Ministers’ response was requested on behalf of Ross Estates Company. Several points of dissatisfaction were raised, which are discussed later in this decision notice. In summary, these were that the Ministers had not :
 - a) adequately explained why the requested information was environmental information, or whether any of the information related to emissions;
 - b) properly considered the public interest arguments in favour of dealing with the request under FOISA as well as the EIRs;
 - c) adequately explained why the exceptions in regulations 10(4)(e) and 10(5)(d) could be applied to the withheld information;
 - d) shown that they had considered the public interest factors in favour of disclosure before concluding that the public interest lay in maintaining the exceptions.
4. On 5 August 2011, the Ministers issued their response to the request for review from Ross Estates Company. The Ministers upheld their decision to withhold certain information and found that the request had been correctly handled in accordance with their procedures and legislative requirements. The Ministers addressed, briefly, each of the points raised in the request for review.



5. On 10 August 2011, the legal representatives of Ross Estates Company wrote on their client's behalf to request a decision from the Commissioner, in terms of section 47(1) of FOISA and regulation 17 of the EIRs. 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. The Commissioner was asked to consider each of the points of dissatisfaction raised in the review request and to assess whether the Ministers were entitled to withhold the information they had refused to disclose.
6. The application was validated by establishing that, on behalf of Ross Estates Company, a request for information had been made to a Scottish public authority and an application made to the Commissioner for a decision only after the authority had been asked to review its response to that request. The case was allocated to an investigating officer.
7. Subsequent references in this decision to communications with Ross Estates Company should be read as including communications with the company's legal representatives on its behalf.

Investigation

8. On 24 August 2011, the Ministers were notified in writing that an application had been received from Ross Estates Company and were asked to provide the Commissioner with any information withheld from the company. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. On 15 September 2011, the investigating officer contacted the Ministers and invited them to provide any comments they wished to make on the application, as required by section 49(3)(a) of FOISA. The Ministers were asked to:
 - explain why two paragraphs had been redacted from a document, and to clarify whether a minute attached to one of the disclosed emails had already been provided to Ross Estates Company;
 - comment further on their view that the information should be regarded as environmental information;
 - comment further on the way the public interest test had been assessed in relation to the exemption in section 39(2) of FOISA;
 - provide a short explanation of how decisions were made about calling-in planning appeals for re-determination by Ministers, including details of the usual steps, the key officials, and whether any published guidance or criteria would be taken into account and
 - provide any additional arguments or information which would support the decision to withhold certain information under regulations 10(4)(e) and 10(5)(d) of the EIRs.
10. On 12 October 2011, the Ministers provided their response. Further information and comments were provided by both parties during the investigation.



11. During the investigation, the Ministers provided Ross Estates Company with some of the withheld information, but continued to withhold information from certain internal email communications and from one paragraph of a submission to the Ministers. Ross Estates Company argued that the remaining withheld information should be disclosed, and continued to seek a decision from the Commissioner on this basis.
12. The relevant submissions received from both the Ministers and Ross Estates Company will be considered fully in the Commissioner's analysis and findings below.

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 on behalf of Ross Estates Company and by the Ministers and is satisfied that no matter of relevance has been overlooked.

EIRs or FOISA?

14. The Ministers dealt with the information request from Ross Estates Company under the EIRs; their initial response simply advised that the information was "environmental information" for the purposes of the EIRs. The Ministers applied the exemption in section 39(2) of FOISA "so that we do not also have to deal with your request under FOISA".
15. In its request for review (7 July 2011) Ross Estates Company expressed dissatisfaction with the Ministers' failure to explain why the information was "environmental information" under regulation 2 of the EIRs.

Is the information "environmental"?

16. In their review response, the Ministers referred to a previous decision from the Commissioner¹ in which he found that information relating to planning applications will commonly fall under the definition of environmental information in the EIRs, given that such information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area. They submitted that planning matters are therefore likely to fall principally within the definition of measures (including administrative measures) forming part (c) of the definition of environmental information in regulation 2(1) of the EIRs.
17. The Commissioner has considered carefully whether the withheld information in this case falls within the definition of environmental information in regulation 2(1). The request was for information relating to a decision not to call in a Planning Appeal for re-determination by Ministers. Having considered the request in context, the Commissioner takes the view that the decision on whether this Planning Appeal should be called in was a key part of the statutory planning process in respect of a significant development, which on any reasonable interpretation could be said to be likely to affect the elements of the environment, specifically land or landscape.

¹ Decision 045/2008 Dr Alex Morrow and the City of Edinburgh Council



18. The Commissioner will first consider whether the Ministers complied with the EIRs in dealing with the request from Ross Estates Company. After doing so, he will consider other points raised in the Company's application for decision, including whether the Ministers complied with Part 1 of FOISA in applying the exemption in section 39(2) of FOISA.

Regulation 10(6) of the EIRs

19. Ross Estates Company has asked the Commissioner for a specific decision as to whether the information requested from the Ministers, or any part of it, relates to emissions. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under certain exceptions (including that in regulation 10(5)(d), considered below) to the extent that it relates to emissions.

20. The Commissioner is satisfied that none of the withheld information relates to emissions, and therefore that regulation 10(6) of the EIRs is not applicable in this case.

Regulation 10(5)(d)

21. The exception in regulation 10(5)(d) has been applied to all the remaining withheld information in this case. Regulation 10(5)(d) 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 the proceedings of any public authority where such confidentiality is provided for by law.

22. In its publication "The Aarhus Convention: an implementation guide", the Economic Commission for Europe notes at page 59 that the convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.

23. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released 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)).

24. The first matter to be addressed by the Commissioner, therefore, is whether the information relates to proceedings, the confidentiality of which are protected by law. He must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.

25. In many cases where this exception applies, there exists a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.



26. The Ministers submitted that the withheld emails contained legal advice and a request for legal advice, which, if disclosed, would reveal the nature of the advice likely to be received. The Ministers argued that disclosure of legal advice had significant potential to prejudice the Government's ability to defend its legal interests.
27. The Commissioner is satisfied that the withheld information is a record of legal advice requested from, and provided by, a legal adviser, together with correspondence requesting that advice, all within the context of a professional relationship in circumstances in which legal professional privilege could apply.
28. The Commissioner takes the view that a claim for confidentiality of communications could be maintained in legal proceedings in respect of the withheld information. Although it could be argued that the direction of the legal advice might be surmised from the Ministers' decision not to call in the planning appeal, this is not known, and the substance of the legal advice has not been disclosed; consequently, the confidentiality of the advice has been maintained.
29. The Commissioner will therefore go on to consider whether disclosure of the privileged information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the proceedings of the Ministers in terms of regulation 10(5)(d) of the EIRs. In this connection, the Commissioner accepts, as he has in previous similar cases, that the process of obtaining legal advice in this case can be accepted as relevant proceedings for the purposes of regulation 10(5)(d).
30. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. However, given the content of the information and its privileged nature, the Commissioner accepts that disclosure would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Ministers' proceedings and that the exception in regulation 10(5)(d) therefore applied to that information at the time the Ministers dealt with the applicant's information request and request for review. The Ministers stated (and the Commissioner accepts, in the circumstances) that the case was still "live" at the time of the request.
31. Having concluded that the exception in regulation 10(5)(d) of the EIRs applied to the remaining withheld information, the Commissioner must consider, as required by regulation 10(1)(b), whether the public interest in making the information available was outweighed by the public interest in maintaining the exception.

The public interest test

32. The Ministers submitted that there was a strong public interest in maintaining the exception in relation to the withheld information, as this would robustly uphold the right to confidentiality of legal advice, whether sought or provided. In their responses to Ross Estates Company, the Ministers argued that the ability to obtain "quality legal advice" in confidence was an essential component of well-informed decision making; disclosure would therefore compromise the Scottish Government's capacity to properly fulfil its functions, which would not be in the public interest.



33. The Commissioner notes that the Ministers have not explained in specific terms which factors favouring disclosure in the public interest were weighed against the public interest they identified in maintaining the exception. However, the Ministers stated that they recognised “some public interest in release” (letter of 5 August 2011, conveying the outcome of their review). The Commissioner accepts this as evidence that the Ministers considered both the public interest in disclosing the information and the public interest in maintaining the exemption, as required by regulation 10(1)(b) of the EIRs.
34. Ross Estates Company considered that it was strongly in the public interest for legal privilege to be overridden in the circumstances of this case, as it would be clearly in the public interest to allow the public to challenge any failure of the Ministers to follow any legal advice provided, and therefore act unlawfully in their decision making process. Without the release of the information, the public would not have the ability to lodge such a challenge.
35. Ross Estates Company stated that the case concerned a matter of both local and national significance, with the potential to impact significantly upon the lives of those living in the vicinity of the proposed development. The company argued that those members of the public with an interest in the matter should be entitled to ask that a matter is called-in for determination by the Ministers, and should have the right to appeal a refusal to do so. While acknowledging the strong protection afforded by both common and statutory law to legal privilege, it was argued that the circumstances demanded this should be overridden in the current case.
36. Ross Estates Company submitted a sample of representations made by the public in relation to the Planning Appeal in question, to demonstrate the extent of the public interest in this matter. They advised that more than 640 letters of representation had been received by the Directorate for Planning and Environmental Appeals (the DPEA), the vast majority of which opposed the proposed development. They considered that the number and scope of these representations were of relevance to this case, demonstrating the extent of public concern about health, safety and the environment in respect of the planning decision in question, and showing that it was a matter of public interest.
37. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences. Consequently, while he will consider each case on an individual basis, he is likely to order the release of privileged communications (and confidential communications generally) in highly compelling cases only.



38. The Commissioner acknowledges that there is significant public concern about the Planning Appeal in question, as evidenced by the number of representations to the DPEA and the strong views contained in those representations. However, he is not persuaded that disclosure of the withheld information would empower the public in the way suggested by Ross Estates Company (paragraph 35). The Commissioner cannot give detailed reasons for this view, as to do so would be to disclose information which has been withheld, but bases his view on the content of the withheld information.
39. The Commissioner cannot comment on the assertion by Ross Estates Company that members of the public should be entitled to have a matter called-in for determination by the Ministers, and should have the right to appeal a refusal to do so. The rights and procedures relating to planning appeals are not within his remit.
40. Having examined the withheld information, the Commissioner does not accept that its disclosure would clearly have consequences which would be so strongly in the public interest as to make a highly compelling case for the disclosure of information from privileged communications. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure.
41. Given that the Commissioner has accepted that the information was properly withheld under regulation 10(5)(d) of the EIRs, he is not required to (and will not) go on to consider whether the Ministers were also correct in withholding the information under regulation 10(4)(e).

Section 39(2) of FOISA

42. As noted previously, after determining that the withheld information was environmental information, the Ministers decided to claim the exemption in section 39(2) of FOISA and thereafter deal with the request solely under the EIRs.
43. As set out in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*², the Commissioner's view is that when a written request for information is received by a public authority, it comes under the scope of section 1 of FOISA whether or not the request is for environmental information, given the wide definition of "information" contained in section 73 of FOISA, i.e. "information recorded in any form". The definition does not exclude environmental information. However, if the information falls within the definition of environmental information, authorities have both an obligation and an option. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption at section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA.
44. Section 39(2) of FOISA exempts information from disclosure under FOISA if a Scottish public authority is obliged to make it available to the public under the regulations in the EIRs, or would be obliged to do so but for any exception in the EIRs. The exemption is subject to the public interest test in section 2(1) of FOISA, so can only apply where the public interest in maintaining the exemption outweighs disclosure of the information.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



45. The Ministers' initial response advised Ross Estates Company that, on balance, the public interest lay in favour of upholding the exemption in section 39(2), because there was no public interest in dealing with the request under both FOISA and the EIRs. In their review response, the Ministers explained that they had followed the Commissioner's guidance³ in applying the exemption in section 39(2) and in applying the public interest test.
46. The Commissioner's published guidance states:
- "If a Scottish public authority claims the exemption under section 39(2), it also needs to consider the public interest test under section 2. As there is a separate statutory right of access to environmental information, the Commissioner considers that the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs will generally outweigh the public interest in the disclosure of information under FOISA...
- ...The Commissioner acknowledges that it would be difficult to envisage circumstances in which there would be a prevailing public interest in disclosing the information under FOISA where the request could be dealt with under the EIRs."
47. Ross Estates Company submitted that to conclude that it was generally in the public interest for an authority to respond to a request for environmental information under the EIRs would be to misinterpret section 2(1)(b) of FOISA, which requires public authorities to consider the public interest "in all the circumstances of the case". They argued that there would be circumstances, such as those under consideration in this case, where the public interest favoured considering the request under both FOISA and the EIRs.
48. Ross Estates Company argued that the material effect of applying the exemption in section 39(2) of FOISA was that the Ministers were able to apply a "class" exception to the information covered by their request (specifically that in regulation 10(4)(e), covering information in "internal communications"). As regulation 10(4)(e) did not require a Scottish public authority to carry out a "separate and prior" harm test in order to establish whether the exception applied (i.e. before considering the public interest), Ross Estates Company believed it was less "disclosive" than the equivalent exemptions under section 30 of FOISA, which required a Scottish public authority to be satisfied that disclosure would cause harm at a high level: substantial prejudice or substantial inhibition.
49. In these circumstances, Ross Estates Company considered that there was a public interest in dealing with their request under both the EIRs and FOISA.

³ <http://www.itspublicknowledge.info/Law/EIRs/EIRsDifferencesEIRSandFOISA.asp>



50. The Commissioner's guidance acknowledges that there are certain key differences between FOISA and the EIRs, which could lead to different outcomes under each regime. However, this is most obviously the case in relation to matters such as charging or the definition of a Scottish public authority. In the current case, the question raised by Ross Estates Company is whether the withheld information would be more likely to be disclosed under FOISA than under the EIRs, and if so, whether this would have any bearing on the public interest test relating to section 39(2) of FOISA.
51. The Commissioner does not accept that disclosure of the withheld information under consideration in this case would be any more likely under FOISA than under the EIRs. The exception in regulation 10(5)(b) of the EIRs (which, as indicated above, contains a test of substantial prejudice) was also applied to the withheld information. In their submission, the Ministers stated that they would consider the information withheld under regulation 10(5)(d) to be protected also under section 36(1) of FOISA. The Commissioner's previous decisions on cases involving section 36(1) make it clear that while he will always consider each case on an individual basis, he is likely to order the release of privileged communications (and confidential communications generally) in highly compelling cases only. In other words, the Commissioner would apply the same considerations in relation to section 36(1) of FOISA as he has done in relation to privileged material under regulation 10(5)(d) of the EIRs.
52. Even assuming he were to accept this consideration as relevant, therefore, the Commissioner cannot accept that FOISA would necessarily offer the "more disclosive regime" in this case, as the applicant has argued. The applicant has provided no other reason why, in this particular case, the Ministers should have dealt with the request under FOISA rather than applying the exemption in section 39(2) of that Act.
53. In all the circumstances of this case, therefore, the Commissioner finds (for the reasons set out in *Decision 218/2007* and the guidance referred to in paragraph 46 above) that the public interest in maintaining the exemption in section 39(2) of FOISA (and thereby dealing with the information request under the EIRs alone) outweighs any public interest in dealing with the request under FOISA.

DECISION

The Commissioner finds that the Scottish Ministers complied with the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 in responding to Ross Estates Company's request for information.



Appeal

Should either Ross Estates Company or the Scottish Ministers 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.

Margaret Keyse
Head of Enforcement
20 February 2012



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

-

- (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;

...

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 –

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).