

Decision Notice

Decision 058/2016: Mr Gerard McGill and Aberdeenshire Council

Information relating to planning enforcement

Reference No: 201501711

Decision Date: 08 March 2016



Scottish Information
Commissioner

Summary

On 26 March 2015, Mr McGill asked Aberdeenshire Council (the Council) for information relating to a planning application for a specific site. The Council withheld the information. Following a review, Mr McGill remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council was correct to withhold information which was excepted from disclosure under regulation 10(5)(b) of the EIRs.

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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(b) (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 26 March 2015, Mr McGill made a request for information to the Council. The information he requested was:
 - communications between the Council and the site operator or their agent, relating to planning application APP/2012/3658; and
 - any reports from site visits by the planning department to the site 'Bruntland' relating to APP/2012/3658 and the previous application APP/2008/4268.
2. The Council responded on 9 April 2015 and withheld information under section 34(1)(a) and (b) of FOISA, which exempts information which has been held for the purposes of certain investigations. The Council told Mr McGill that other information covered by his request was held in the Council's planning register, and was therefore available through the Council's publication scheme.
3. On 14 April 2015, Mr McGill wrote to the Council requesting a review of its decision. He had previously received a reply from the Council which suggested that the Council was looking at complaints in respect of three areas not covered by the applications, and he wished to obtain adequate oversight of what was being done by the Council to address the concerns. Mr McGill said that the information he required was not in the planning register.
4. On 21 and 30 April 2015, and 11 May 2015, Mr McGill wrote to the Council expanding on his dissatisfaction with its response to his information request. He explained his concerns about the planning application and development site and made it clear that he wished to see what action had been taken by the Council to address the complaints that local residents had made. Mr McGill also said he would like to see any site visit reports to allow him to compare

what the Council officials had observed, or been told, with the observations of local residents. Mr McGill suggested that there was a public interest in the disclosure of the information he had requested, as this would be the only evidence of planning oversight.

5. The Council notified Mr McGill of the outcome of its review on 15 May 2015. The Council decided that Mr McGill's request was for environmental information and should have been dealt with under the EIRs. In respect of the communications between the Council and site operator or agent, the Council withheld information under regulation 10(5)(b) of the EIRs on the grounds that disclosure would, or would be likely to, prejudice substantially the ability of the authority to conduct an inquiry of a criminal or disciplinary nature. It determined that the information related to a live enforcement case.
6. In relation to site visit reports, the Council concluded that it did not hold any such reports. It stated that any documentation relating to the site could be viewed on the public website under reference numbers APP/2008/4268 and APP/2012/3658. The Council provided a link to each application.^{1,2}
7. On 17 September 2015, Mr McGill 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 McGill stated he was dissatisfied with the Council's decision to withhold documents from him.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr McGill 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 26 October 2015, the Council was notified in writing that Mr McGill 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.
10. 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 provisions of FOISA or the EIRs it considered applicable to the information requested.

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 McGill and the Council. She is satisfied that no matter of relevance has been overlooked.

¹ <https://upa.aberdeenshire.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=ZZZWUDCAXE094>

² <https://upa.aberdeenshire.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=ZZZWUDCAXE1654>

Information falling within Mr McGill's request

12. The Council explained how it had identified the information falling within the request (besides the information available on its website). The Council's Planning Service manager, the two Team Managers involved with the planning applications and the Enforcement Officer were asked to provide anything which fitted the description of "communications between the Council and the site operator or their agent relating to planning application APP/2012/3658".
13. The Council explained that the documents withheld from Mr McGill were those available at the time of the request and were limited in extent due to a number of factors. The Council's planning enforcement function was reorganised in 2014, resulting in a completely new team of enforcement officers and new staffing structure being put in place. This, combined with a changeover from a paper system to electronic information system in 2015, meant that records relating to the site were not complete and officers involved in previous investigations (pre-2015) were no longer with the Council. Knowledge and information relating to previous investigations prior to 2015 was therefore limited. The Council explained that the withheld information relates to investigations and correspondence from the end of 2014 to the date of the internal review (15 May 2015).
14. The Council commented that the documents being withheld related to planning enforcement investigations and, as such, were not directly related to planning application APP/2012/3658. A distinction was made between the planning application and planning enforcement: planning enforcement investigations relate to complaints alleging breaches of planning control, and the withheld documents are copies of correspondence relating to these investigations.
15. The Commissioner does not accept that such a distinction is relevant in relation to Mr McGill's request. In his requirement for review, Mr McGill emphasised that he was seeking information which would show what action the Council was taking in relation to complaints about the site development.
16. Mr McGill made his information request on 26 March 2015. Some of the withheld information supplied to the Commissioner (documents 23 - 25) post-date Mr McGill's request, but were considered by the Council during the review of its response.
17. The Commissioner accepts that the Council has conducted proportionate searches and has identified the information it holds which falls within Mr McGill's request.

Application of the EIRs

18. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1). Where information falls within the scope of this definition, a person has a right to access it under regulation 5(1) of the EIRs, subject to various restrictions and exceptions contained in the EIRs.
19. At review, the Council took the view that the request related to the state of elements of the environment and factors likely to affect the state of the elements of the environment, and should therefore be considered under the EIRs, rather than FOISA. The Council applied the exemption under section 39(2) of FOISA as the information would fall within the scope of the EIRs. It took the view that, because a separate regime exists for the consideration of requests for environmental information, the public interest lay in upholding the exemption and considering the request under the EIRs.

20. In his application to the Commissioner, Mr McGill commented that he did not wish to see environmental reports, but only site visit reports and “non-public communications” between the Council’s planning department, site operator and its agent.
21. Having considered the terms of the request and the withheld information, the Commissioner is satisfied that the information covered by the request would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment, including land and landscape) or paragraph (c) of that definition (as information on measures, including plans, affecting or likely to affect those elements).
22. As there is a separate statutory right of access to environmental information available to Mr McGill in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and dealing with the request in line with the EIRs, outweighs the public interest in disclosure under FOISA. She accepts that in this case, in practice, there is little public interest in also considering the request under FOISA as this would not have made any difference in terms of the information disclosed to Mr McGill.
23. The Commissioner accepts that, at review, the Council correctly identified Mr McGill’s request as being for environmental information and therefore correctly dealt with it under the EIRs as a request for environmental information.

Regulation 10(5)(b) of the EIRs

24. Regulation 10(5)(b) of the EIRs 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 course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b).
25. The Commissioner is mindful that regulation 10(2) states that exceptions in regulation 10(4) and (5) must be interpreted in a restrictive way, with a presumption in favour of disclosure.
26. Although there is no definition within the EIRs of what would constitute substantial prejudice, the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
27. The Council explained its position should it have to take formal enforcement action in relation to the restoration of the borrow pit and the extraction of materials below the area approved. If the developer did not comply with the requirements of any potential Enforcement Notice(s), there were two options available to the Council:
 - (i) Pursue Direct Action, which would mean that the Council would arrange for the works to be carried out and thereafter attempt to recoup costs from the landowner.
 - (ii) Report the failure to comply with the requirements of the Enforcement Notice to the Crown Office and Procurator Fiscal for possible prosecution. Thereafter, were a prosecution pursued, then the proceedings and evidence involved in bringing the matter to the Court would be comparable with the Police bringing a criminal prosecution.

28. The Council said that if it had to bring the matter to the attention of the Procurator Fiscal, it would be required to produce the same quality of evidence as for other forms of criminal prosecution and to ensure that due process had been correctly followed. If the developer left the site in its present condition, then the only recourse available to the Council would be to pursue enforcement action and potentially report to the Procurator Fiscal. Essentially, this was therefore a “live” enforcement case, and the Council argued that providing any information at this time could prejudice its option to report the matter to the Procurator Fiscal.
29. Mr McGill stated in his application to the Commissioner that “the Council has not prosecuted anybody for planning offences in the years 2012-2014” and that the Council’s policy was to mediate, not to prosecute. Mr McGill indicated that the prospect of legal action had been communicated to the operator in April 2014 and that there was therefore now no reason to withhold any documents. Mr McGill also said that no legal action had been taken on breaches of planning control in the last three years, which would strongly indicate that none would result from this breach.
30. The Council explained that all information relating to enforcement case investigations (such as details of complainants, source of complaint, and all related correspondence to and from the persons who are the subject of the complaint) are kept confidential. Disclosing such information could be prejudicial to both parties. Both parties have a right to equal and fair treatment, regardless whether it is the complainant or persons subject to the complaint, and therefore both are treated in the same way.
31. The Council said it would not wish to disclose information relating to any enforcement discussions and investigation findings that may be relied upon in court. The Council would not want to prejudice a case that could be reported to the Procurator Fiscal in the event of non-compliance, and it would not wish to prejudice a case that the Procurator Fiscal may take a decision upon to undertake criminal proceedings in the future. To disclose information would prejudice any enforcement action such as an enforcement notice or referral of a failure to comply with the Notice to the Procurator Fiscal for prosecution.
32. The Council also said that if it were known that information about enforcement investigations could be made public, it might discourage complainants from coming forward and providing full information. The Council made clear that it regarded the issues in respect of the planning enforcement as “live”.
33. It is worth noting here that when consideration is being given to whether a Scottish public authority has handled a request under FOISA or the EIRs correctly, the Commissioner must consider whether the Council was correct to apply this exception under the EIRs at the time that it responded to the requirement for review, and not at the time the application was made to the Commissioner, or her decision issued.
34. The exception in regulation 10(5)(b) is broad: the “course of justice” element of this exception is wide in coverage. Other elements, such as the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature, are, in practice, sub-sets of the “course of justice” element rather than distinct elements, and may therefore be considered under the general “course of justice” heading.
35. In *Decision 125/2007 Robert Hogg and City of Edinburgh Council*³, the Commissioner accepted that the exception in regulation 10(5)(b) applied in respect of information from a

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200601096.aspx>

planning enforcement process which remained ongoing at the time the authority dealt with the applicant's request and requirement for review. In those circumstances, the Commissioner concluded that the planning authority's investigations, findings and submissions on the matter would inform any subsequent decision on prosecution made by the Procurator Fiscal (so disclosure would be likely to prejudice substantially any future criminal investigation prompted by the planning enforcement process).

36. In the current case, the Commissioner has applied the same reasoning as in *Decision 125/2007*. She accepts the possibility that the Council's enforcement of planning conditions might lead to criminal prosecution; this remains a possibility until the process of enforcement is complete. She accepts that disclosure of the information withheld from Mr McGill would, or would be likely to, prejudice the ability of the developer to receive a fair trial. The evidence in the planning enforcement file would be likely to form the basis of any prosecution.
37. The Commissioner is satisfied that disclosure of the information requested by Mr McGill, while the matter remains ongoing, would undermine the ability of the site developer to prepare their case and receive an impartial hearing, should the Council's enforcement action ultimately lead to criminal proceedings.
38. In this case, therefore, the Commissioner is satisfied that disclosure of the withheld information would have prejudiced substantially, or would have been likely to prejudice substantially, the ability of a public authority to conduct an inquiry of a criminal nature.
39. Having considered carefully the submissions from both the Council and Mr McGill, together with the withheld information, the Commissioner accepts that this information was excepted from disclosure under regulation 10(5)(b) of the EIRs.

Public interest test

40. Having found that the Council correctly applied the exception contained within regulation 10(5)(b), the Commissioner is required to consider the public interest test required by 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.
41. The Council submitted that, after reviewing its response to Mr McGill's request, it was satisfied that disclosing the information would potentially undermine the ongoing enforcement action and cause substantial prejudice to the Council's ability to report the matter to the Procurator Fiscal. It considered the public interest in disclosing the information and determined that this was outweighed by "the Council's interest in preserving its ability to bring the matter to the Court". The Council took the view that adequate public scrutiny would exist if the matter goes to court and the balance of the public interest lies in preserving the integrity of the investigatory process.
42. Mr McGill made several points relevant to the public interest test which the Council considered at review. Firstly, Mr McGill pointed out that local residents sought clarity on what site visits had taken place and on ongoing communications with the operator so as to correlate reports of site visits to the complaints made and see what enforcement officers observed and were told by the operator, compared to their own observations. Mr McGill suggested that there was a public interest in the disclosure of the information he had requested, as it would be the only evidence of planning oversight.

43. The Commissioner has considered the submissions from both Mr McGill and the Council regarding the public interest arguments in relation to the information that has been withheld.
44. In considering the public interest test, she accepts that there is a general public interest in making information available to the public, and in transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure. She accepts that Mr McGill has shown that there would be some public interest in disclosure, in terms of permitting local residents to scrutinise actions taken by the Council which affect them (i.e. the actions taken by the Council in respect of a planning application and the associated complaints). She agrees that disclosure of the withheld information would assist people in understanding the Council's actions and those of the site operator and its agents.
45. The Commissioner accepts that where complaints arise about a planning application, there is a public interest in the Council being able to fully investigate those complaints and to use all enforcement powers at its disposal, if required. Where investigations involve potential breaches in planning, there is a significant public interest in ensuring that those whose actions are under scrutiny are treated with fairness. Similarly, there is also a public interest in those who are affected by potential breaches being able to see and assess how their concerns are being addressed, and, if their concerns are warranted, what action is being taken by the Council.
46. The Commissioner recognises that the Council was at the time of request, and review, (and is currently) in the process of investigating and addressing concerns that have been raised in relation to this planning application. She must weigh the public interest favouring disclosure against that favouring the maintenance of the exception in regulation 10(5)(b).
47. Having considered all the circumstances of the case, the Commissioner has decided that the balance of public interest lies in maintaining the exception in regulation 10(5)(b) and withholding the information. In reaching this decision, she has taken into account that the information relates to a live enforcement action, and there is a strong public interest in withholding information if its disclosure would affect the Council's ability to take all actions required in order to enforce its planning decisions.
48. She accordingly accepts that the Council was correct to withhold the information requested under regulation 10(5)(b) of the EIRs.

Decision

The Commissioner finds that Aberdeenshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr McGill.

Appeal

Should either Mr McGill 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.

Rosemary Agnew
Scottish Information Commissioner

08 March 2016

Appendix 1: 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 –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

"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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

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