

Decision Notice



Decision 061/2011 Mr Euan Pearson and North Lanarkshire Council

Fee proposal

Reference No: 201001603
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr Pearson requested from North Lanarkshire Council (the Council) a copy of a fee proposal submitted by a consultancy firm. The Council withheld the information under regulation 10(5)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Mr Pearson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Pearson's request for information in accordance with the EIRs, by applying the exception in regulation 10(5)(e) (which relates to commercial and industrial confidentiality) of the EIRs to withhold the fee proposal.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definitions (a), (b) and (c) of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2) and (5)(e) (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. In 1955, the former Dunbartonshire County Council granted planning permission for the extraction of peat at Fannyside Muir, by Cumbernauld. Following successive local government reorganisations, this land is now within the boundaries of North Lanarkshire Council (the Council). The planning permission for peat extraction was updated by the Council to include a number of modern planning conditions in 1998.



2. In October 2008, the Scottish Government declared this area a Special Protection Area (SPA) under the EC Birds Directive (2009/147/EC), to protect Scotland's only population of bean geese. In November 2008, the Council approved the appointment of RPS Consultants to conduct an "appropriate assessment" of the peat extraction operation (as required by the Habitats Regulations 2004, which give effect to the EC Habitats Directive (92/43/EEC)) to consider the impact on the conservation of the SPA.
3. On 17 June 2010, Mr Pearson emailed North Lanarkshire Council (the Council) requesting a copy of a fee proposal submitted by RPS Consultants.
4. He noted that a previous fee proposal submitted by the same company in relation to the undertaking of the "appropriate assessment" had been provided to him. The information requested by Mr Pearson was another fee proposal which had been submitted in relation to further related work.
5. The Council responded on 15 July 2010. It refused to supply the fee proposal on the grounds that it was excepted from disclosure under regulation 10(5)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). This exception applies where disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
6. On the same day, Mr Pearson emailed the Council requesting a review of its decision. In particular, Mr Pearson indicated that the Council had not identified how the economic interests would be prejudiced by the disclosure of the information. He also noted that he had previously been supplied with the earlier fee proposal for assessment work undertaken by the same company on the same site.
7. The Council notified Mr Pearson of the outcome of its review on 6 August 2010. It upheld its previous decision without amendment.
8. On 9 August 2010, Mr Pearson 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.
9. The application was validated by establishing that Mr Pearson 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.



Investigation

10. On 15 September 2010, the Council was notified in writing that an application had been received from Mr Pearson and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). In particular, the Council was asked to provide background information about the fee proposal and the work to which it related, and to explain its reasoning when applying the exception in regulation 10(5)(e) of the EIRs to the information withheld from Mr Pearson.
12. The Council was also asked whether, since it had considered Mr Pearson's request as one made under the EIRs, it wished to apply the exemption in section 39(2) of FOISA. This 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.
13. In its response, the Council provided the background information and comments requested by and confirmed that it wished to apply the exemption in 39(2) of FOISA.
14. In further communications, the Council provided additional information in response to follow up questions from the investigating officer. The investigating officer also spoke with a Council specialist on the topic in question to gain fuller understanding of the matters to which Mr Pearson's request relates.
15. Mr Pearson's submissions were sought and received on his comments on the public interest test associated regulation 10(5)(e) of the EIRs.

Commissioner's analysis and findings

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

Handling under the EIRs

17. In this case, the Council has considered Mr Pearson's request as one seeking environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix 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 restrictions and exceptions contained in the EIRs.



18. Having had regard to the subject matter of Mr Pearson's request (costings for an assessment concerning the environmental impact of peat extraction in an SPA) and the withheld information, the Commissioner acknowledges that it concerns measures and activities affecting, or likely to affect, the elements of the environment (in particular land and landscape) and factors (such as noise), which in turn affect or are likely to affect the elements of the environment.
19. As such, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraph (c) of that definition. Therefore, the Commissioner considers that the Council correctly identified Mr Pearson's request as one covered by the EIRs.

Section 39(2) of FOISA – environmental information

20. During the investigation, the Council confirmed that it considered the information requested by Mr Pearson to be exempt from disclosure in terms of section 39(2) of FOISA.
21. 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
22. The Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given his conclusion that it is environmental information.
23. 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 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 is therefore satisfied that the information was properly withheld under section 39(2) of FOISA and has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(5)(e) of the EIRs

24. In this case, the Council has applied the exception in regulation 10(5)(e) to the fee proposal requested by Mr Pearson.
25. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.



26. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention) notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information. In practical terms, this means that national law must explicitly protect the type of information in question as commercial or industrial secrets.
27. The same guidance goes on to note that the Aarhus Convention does not define “legitimate economic interest” but that there are several steps that countries have taken to help define legitimate economic interest case by case. These are:
- Establish a process. Parties (to the Convention, i.e. relevant states) may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential;
 - Determine confidentiality. Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case;
 - Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.
28. The Commissioner has taken this guidance into consideration when considering this exception.
29. The Commissioner’s view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

30. Having considered the Council’s comments and the nature of the information under consideration, the Commissioner is satisfied that the withheld information is commercial or industrial in nature, being information about proposed consultancy work.

¹ <http://www.unece.org/env/pp/acig.pdf>



Does a legally binding duty of confidence exist?

31. The Commissioner does not accept that a general implication of a duty of confidence will, in itself, mean that all information contained in a tender, or generally supplied by a third party, be automatically considered confidential. The Commissioner will therefore look behind any implied duty of confidence to the nature of the information concerned and consider whether the duty should stand.
32. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
 - i. the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already;
 - ii. the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
 - iii. disclosure or use of the information will be unauthorised and to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

Necessary quality of confidence

33. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here. Although published Council reports have referred to the Council seeking a fee proposal in relation to the additional assessment work, the content of that proposal is not known.
34. The Commissioner is therefore of the view that the information held at the relevant time, and has subsequently retained, the necessary quality of confidence.

Obligation to maintain confidentiality

35. The next test is that information must have been communicated in circumstances which imposed an obligation on the Council to maintain confidentiality. In this case, the Commissioner accepts that the relationship between the parties brought with it an implied obligation of confidentiality in relation to the relevant fee proposal, which remained in place at the relevant time.
36. Again, having reviewed all of the Council's submissions, the Commissioner accepts in all the circumstances that the information in question in this case was communicated in circumstances imposing an obligation on the Council to maintain confidentiality.



Unauthorised disclosure would cause detriment

37. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
38. The Council stated in its submissions that the fee proposal was submitted in the expectation that it would not be disclosed into the public domain. It also provided a copy of an email from RPS Consultants which made clear that it considered the information to be commercially sensitive, particularly since it the fee proposal had not been accepted, and could be subject to modification, at the relevant time.
39. The Commissioner accepts that disclosure of the fee proposal would cause some detriment to RPS Consultants, by revealing the fee it had proposed to the Council for work to be undertaken, prior to the acceptance of its proposal.
40. In reaching this conclusion, the Commissioner notes that the information contained in the fee proposal under consideration is of a different nature from that already provided to Mr Pearson. It provides breakdown of the total cost of the proposed work (which was removed from the proposal previously supplied), allowing the reader to establish the day rate charged for each piece of work. The work to be undertaken is also expressed in more specific terms than in the proposal previously released to Mr Pearson, as a consequence of this proposal being for particular pieces of work to be undertaken in addition to the general work previously contracted for in relation to the Appropriate Assessment.

Is the information publicly available?

41. As noted above, the information under consideration is not in the public domain.

Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

42. The term legitimate economic interest is not defined within the EIRs. The interest in question will however be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
43. The Council has argued that disclosure of the withheld information would harm its own legitimate economic interests, by revealing details of its position with respect to the issues raised with respect to the planning permission for peat extraction at Fannyside Muir.
44. The Commissioner cannot provide details of the Council’s submissions in this case, since it is not possible to do so without revealing the nature of the information that gives rise to the Council’s concerns. However, the Commissioner has considered these arguments carefully and is satisfied in all the circumstances that disclosure would be likely to substantially prejudice the Council’s legitimate economic interests by undermining its consideration of the matters concerning the planning consent for peat extraction at Fannyside Muir.



45. The Council has noted in published reports that should it find that the peat extraction operations at Fannyside Muir cannot proceed without undermining the conservation of the SPA, then it may have to revoke the planning consent, and compensate the owner. In these circumstances, the Commissioner accepts that, given the nature of the information under consideration, its disclosure at the time of Mr Pearson's request for review would or would have been likely to prejudice substantially the Council's legitimate economic interests which arise as a result of the matters under consideration. He is therefore satisfied that the exception in regulation 10(5)(e) is applicable in this case.
46. As noted above, the Commissioner has also recognised that disclosure of the information at the relevant time would have led to detriment to RPS Consultants. Since the Council's submissions have focussed on the harm to its own legitimate economic interests, the Commissioner has not considered whether such detriment would also amount to substantial prejudice to the legitimate economic interests of RPS Consultants. in this case.

Public interest test

47. Having upheld the use of the exception contained within regulation 10(5)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. This 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.
48. The Council has submitted that it is in the public interest that it is able to consider the matters relating to the planning permission for peat extraction at Fannyside Muir without revealing its position on this matter. The Commissioner is again limited in the extent to which he can reveal the content of the submissions received, as to do so would have the effect of revealing the content of the withheld information.
49. Mr Pearson was invited to comment on the public interest in favour of disclosure in this case. However, his response reiterated that he did not consider that the exception in regulation 10(5)(e) was applicable in this case.
50. The Commissioner recognises that there is a general public interest in authorities being accountable, and being transparent with respect to the use of public funds.
51. In this case, Mr Pearson has drawn the Commissioner's attention to the fact that the initial fee proposal submitted by RPS Consultants. for work to be undertaken to inform an "appropriate assessment" was released, subject to the redaction of personal data and daily rates. The Commissioner recognises that disclosure in this case would be in the public interest to the extent that it would reveal what additional work the Council had asked RPS Consultants to undertake, and the proposed cost of this work.



52. However, the Commissioner is also aware that the fee proposal under consideration has not been accepted, and so it does not reveal the actual costs incurred by the Council in relation to this matter. He also recognises that the information under consideration is of a different nature from that previously released, and would provide insights into the Council's thinking on the matters raised by the designation of Fannyside Muir as an SPA, at a stage where its position was not yet finalised or publicly known.
53. The Commissioner has balanced the public interest both for and against disclosure in this case, and has concluded that in all the circumstances, the public interest in maintaining the exception in regulation 10(5)(e) outweighs that in disclosure of the information withheld.

DECISION

The Commissioner finds that North Lanarkshire Council (the Council) complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Pearson. He finds that the Council correctly relied upon regulation 10(5)(e) of the EIRs to withhold the requested fee proposal and thereby complied with regulation 5(1).

Appeal

Should either Mr Euan Pearson or North Lanarkshire 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
22 March 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 –

- (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.

(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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...