

Decision Notice



Decision 082/2008 Springfield Properties PLC and Moray Council

Request for a copy of the Elgin Vissim Traffic Model

Reference No: 200700791

Decision Date: 15 July 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Springfield Properties requested a copy of the Elgin Vissim Microsimulation Traffic Model (the Model) from Moray Council (the Council). The Council responded by advising Springfield Properties that it considered the Model to be exempt from disclosure in terms of section 30(c) of FOISA. Following a review which upheld the original decision, Springfield Properties remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold the Model in terms of section 30(c) of FOISA on the grounds that its disclosure would be likely to prejudice substantially the effective conduct of public affairs, by causing significant delays to the planning process and incurring substantial additional costs to the taxpayer.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions) and 30(c) (Prejudice to effective conduct of public affairs)

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 2 February 2007, Springfield Properties wrote to the Council requesting the following information:
 - a. A copy of the Weekday and Saturday calibrated/validated Vissim Traffic Model for Elgin
 - b. Elgin STAG [Scottish Transport Appraisal Guidance] assessment
 - c. Future Year Base models covering AM peak period, PM peak period
2. The Council contacted Springfield Properties on 27 February 2007 seeking clarification of their request.



3. On 28 February 2007, Springfield Properties responded to the Council and clarified that they were seeking:
 - a. A copy of the Elgin STAG Part 2 Report; and
 - b. A copy of the Elgin Vissim Traffic Model (excluding the commercial software required to run the model).
4. On 15 March 2007, the Council wrote to Springfield Properties in response to their clarified request for information. In response to request a. the Council advised Springfield Properties that the Elgin STAG Part 2 Report was still to be finalised. The Council indicated that the completed Report would be presented to a committee of the Council and would be made available via the Council website. In response to request b. the Council advised Springfield Properties that it considered the Elgin Vissim Traffic Model (the Model) to be exempt in terms of section 30(c) of FOISA, in that release would be likely to prejudice substantially the effective conduct of public affairs. The Council provided reasons to Springfield Properties why section 30(c) applied, and provided an analysis of the public interest arguments in relation to the Model which concluded that disclosure would not be in the public interest.
5. Springfield Properties wrote to the Council on 10 April 2007, requesting a review of its decision.
6. On 10 May 2007, the Council wrote to notify Springfield Properties of the outcome of its review. The Council upheld its original decision and advised that the exemption in 30(c) had been correctly applied.
7. Springfield Properties contacted the Commissioner on 1 June 2007, stating that they were dissatisfied with the outcome of the Council's review and applying to him for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Springfield Properties 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.
9. On 27 June 2007, the Council was notified in writing that an application had been received from Springfield Properties and was asked to provide the Commissioner with specified items of information required for the purposes of the investigation. The case was then allocated to an investigating officer.

Investigation

10. The investigating officer wrote to the Council asking it to provide comments on the application and to respond to specific questions on the application. The Council was also asked to provide a copy of the Model.



11. In subsequent correspondence, the Council advised that it was unable to provide the Commissioner with a copy of the Model as it could only be viewed via licensed software (Vissim) at the cost of £1,000 per licence. However, the Council arranged for the investigating officer to view the software at its consultant's premises in Edinburgh.
12. The Council also provided the Commissioner with submissions supporting its application of the exemption contained within section 30(c).
13. Further submissions relating to the application of the exemption and the public interest arguments were sought (and received) from both the Council and Springfield Properties during the investigation.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all the information and submissions presented by both Springfield Properties and the Council and is satisfied that no matter of relevance has been overlooked.

Background to the case

15. In 2000, the Moray Local Plan (the Plan) was developed. The Plan was designed to be in place for five years and set out the Council's policies for taking decisions on planning applications, along with the development plan aims for each town and village. A review of the Moray Local Plan 2000 commenced in 2004 and the finalised plan was published in September 2006. More than 700 objections to this finalised plan were received and these were considered in February and April 2007. Consideration of these objections resulted in modifications to the Plan, and all outstanding objections were scheduled to be heard at a Public Local Inquiry between November and December 2007.
16. In response to the review of the Moray Local Plan, Springfield Properties identified land for residential development to the South of Elgin; however this land was not included in the Council's Finalised Plan. Consequently, the use of this land was scheduled to be discussed at the Public Local Inquiry, where Springfield Properties would put forward their case for developing the land.
17. As part of the Local Plan process, Moray Council instructed consultants to prepare a traffic model to test the traffic implications of proposed developments on sites within the Local Plan. It is a copy of this traffic model which Springfield Properties has requested from the Council.

The Model

18. Springfield Properties requested a copy of the Model from Moray Council. They later clarified that the version of the Model they wish to obtain is the latest available version, and not the version that existed at the time of their initial request.



19. It may be helpful to provide some background information about the Model itself. The Model is a transport modelling system which was created for Moray Council. It provides a virtual model of real-life traffic use in Elgin and runs on a commercial transport modelling software system (PTV Vissim). The Council does not have direct access to the Model nor the software on which it is run. The Model is hosted by the Council's consultants who are responsible for inputting all data into the Model and providing Model outputs. The Council pays its consultants to carry out all work on the Model, but retains a perpetual, non-exclusive license to use all materials produced or provided by the Consultant, and is also permitted to grant a sub-licence for use of the Model to any third party.
20. The Model can be used to forecast the impact of traffic use on specific roads, junctions or roundabouts and is recognised to be useful in predicting the impact of a new development (residential or commercial) on traffic patterns around Elgin. The Model can be amended to include details of a proposed development (including expected numbers of additional cars, etc.) and can demonstrate how this development will impact on the road infrastructure. The Model will highlight any potential traffic issues and will allow the Council to implement road developments that will alleviate traffic problems.
21. The base Model is derived from a snapshot taken in March 2006. This has been updated with new data to ensure that the virtual Model continues to reflect real-life traffic use in Elgin. The Model is complex and subject to "ongoing tweaks and improvements" by the Council's consultants. In the Model, three time periods are focused on: AM Peak, PM Peak and Saturday morning (on the grounds that these represent the busiest times on the roads where traffic is most pressured).
22. The Model requires a large amount of real-life data and uses a variety of inputs which include:
 - the outcomes of police-conducted interviews, where members of the public are pulled over by police officers who then collate details of the drivers' origin and destination details;
 - turning counts at junctions, where the numbers of cars which turn right / left at junctions at specific times of the day are recorded
 - onsite observation of traffic, where the number of vehicles and types of vehicles are recorded at specific times of the day.
23. Once the Model has been inputted with all the data it requires, it must be calibrated and validated before it can be used.
 - Calibration refers to the adjustment of the Model to reflect real-life and is a complex process which smoothes out the differences between the observed data and the model outcomes, in order that the Model reflects real-life traffic use.
 - Validation refers to the process of checking the Model outcomes against independently collected journey times survey data, to ensure that they correlate.

After it has been populated with data, calibrated and validated, the Model can then be used to forecast the likely traffic outcomes of any residential or commercial developments in Elgin.



Section 30(c) – Prejudice to the effective conduct of public affairs

24. Section 30(c) of FOISA exempts from disclosure information which would “otherwise” (i.e. otherwise than provided for in section 30(a) and (b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
25. In this instance, the effective conduct of public affairs has been identified by the Council as the ability for the Council to be able to correctly forecast (and resolve) the traffic impact of developments in Elgin as well as its ability to recoup the capital outlay it has invested in developing the Model. The Council stated that it has invested in excess of £125,000 in the development of the Model, with the expectation of recouping some of that investment by charging applicants to have their development proposals inputted into the Model by the Council’s consultants. The Council submit that disclosure of the Model would prevent it from recouping this capital outlay, and would also require it to spend additional funds validating and calibrating any altered Models submitted by developers, thereby causing substantial prejudice through this expenditure falling to the public purse and to the Council taxpayers.
26. In addition, the Council submits that disclosure of the Model will lead to its distortion (by developers or other third parties) and will consequently affect its usefulness, and that this will have a negative impact on the ability of the Council to ensure an adequate transport infrastructure.
27. Authorities seeking to rely on the exemption in section 30(c) of FOISA need to show that disclosure would (or would be likely to) prejudice substantially the way in which they conduct their business. They should be able to demonstrate that the risk of damage caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance - not simply marginal - and must occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
28. In its submissions, the Council has asserted that if the Model were to be released to developers there is a very high risk that developers will make changes to the Model and will prepare a ‘Developer’s Model’ to submit along with their planning applications. If this happens, the Council has claimed that it would be required to audit all of the variables in the ‘Developer’s Model’, and that this would result in additional costs to the taxpayer. As the Council has no direct access to the Model or the software on which it is run, it has submitted that it would have to pay its consultants to make adjustments to the Model. The Council has submitted that a calibrated and validated model is required before any outputs can be accepted from a potential ‘Developer’s Model’. The Council has estimated that it would cost £1,120 to audit the static and dynamic parameters used in any ‘Developer’s Model’ and that it would cost between £17,000 and £32,000 to calibrate and validate a ‘Developer’s Model’.



29. Springfield Properties have acknowledged that the Council has invested significant taxpayers' money in the development of the Model, but they argue that restricting access to the Model may result in developers refusing to use the Model. Springfield Properties have submitted that, were this to happen, it is likely that future developers would either: a) prepare a different transport assessment which the Council would then have to review and which would create more work for the Council with resultant delays, or b) would simply refuse to consider embarking on developments in Elgin in the future.
30. The Council has submitted (from its previous experience with commercial applicants and developers) that such applicants are likely to input data into traffic models in such a way that will show the minimum impact of their development upon the traffic infrastructure. The Council maintains that if it accepted a 'Developer's Model' without checking it (and so saved itself from paying its consultants), it is likely to lead to the development of an inadequate transport infrastructure, causing the cost of future road improvements falling wholly to public funds, instead of being partly or fully met by developers. The Council contend that this would substantially prejudice the effective conduct of public affairs.
31. Springfield Properties have asserted that using the Council's Model may result in developers having to fund infrastructure improvements based on the assessment and conclusions of the Council's own transport consultants. They argue that while the Council may believe this is beneficial in terms of its finances, the longer term implications of discouraging developers from investing in Elgin have to be considered. Springfield Properties have expressed surprise at the Council's contention that developers who access the Model will seek to distort and manipulate it to suit their own development. They have argued that this supposition not only calls into question the integrity of developers' consultants but that this view is also clearly influencing the Council's decision on whether or not to release the Model.
32. Springfield Properties have submitted that developers generally want to ensure that their proposals are robustly presented and can be independently verified. They have argued that they plan to use the Model to calculate development traffic from a site and identify any associated infrastructure which may be required to deal with the traffic. They have contended that if there was doubt about the output of the Model, their own consultants would provide a Report on why the output was disputed.
33. Springfield Properties have also argued that it makes sense for all parties participating in the Local Plan to use the same traffic model so that the Scottish Government Reporter appointed to hear the objections at the Local Plan Inquiry can consider sites on "a level playing field". Springfield Properties have submitted that the Council will use the Model to oppose the inclusion of sites being put forward by objectors, arguing that the Model shows a detrimental traffic impact.

Conclusions on the application of 30(c)

34. The Commissioner has reviewed the submissions and evidence presented in this case. He acknowledges that the Council has invested taxpayer's money in developing the Model and that it plans to charge for access to the Model to recoup some of that investment.



35. The Council has made it clear that it wants developers to use the Model, but that it does require its costs to be met and its outlay recouped. Additionally, the Council has advised the Commissioner that any developer who worked with it to use the Model would be able to pay for its traffic consultant's time at 'framework' rates (the rates available to public authorities) which is significantly cheaper than the commercial rates they would normally be obliged to pay. It is important to note that it is the Council's consultants, and not the Council, that will be required to make any changes / alterations to the Model. The Council therefore has to pay for the consultant's time whenever it seeks to develop a new scenario or input new data. The Commissioner accepts that it would take a significant amount of time for the Council's consultants to identify any adjustments in the model. He also accepts that this delay would slow down the planning process and would substantially prejudice the effective conduct of public affairs.
36. The Council has suggested that if developers had access to the Model, they would have the ability to alter the variables within the Model in order to present a case that favoured the cheapest traffic options. The Council has contended that if this happened, it could lead to the development of an inadequate transport infrastructure in Elgin. Springfield Properties has denied this and has argued that it wishes access to the Model in order to present robust traffic proposals. Whilst the Commissioner does not accept that every developer would seek to alter the Model in order to save money on their development, he does acknowledge that the Council's previous experience in this field is important and he must give weight to its views on this matter.
37. The Commissioner has considered the arguments put forward by the Council in relation to the costs it would incur, and he agrees that the Council would be required to validate and calibrate any submitted Model (to ensure that no variables had been altered) and that those costs would be extensive.
38. It is the Commissioner's opinion that once the Model is released into the public domain, the Council could no longer be sure that its base data had not been altered and it would be obliged to spend taxpayers money in ensuring that any Model submitted to it by developers as part of a planning application was using the same tested base data it had developed. It is clear to the Commissioner that the Council has a duty to ensure that the traffic infrastructure in Elgin is suitable for its purpose, and that it would be unable to accept any submitted Model, without auditing it to ensure that it is based on valid and reliable data, and that it would not jeopardise the safety or suitability of the traffic infrastructure in Elgin.
39. The Commissioner has noted the concerns of Springfield Properties, particularly their contention that future developers will refuse to engage with the Model and that this will cost the Council more money. However, he is not persuaded by the arguments they have submitted. Springfield Properties have provided the Commissioner with no evidence to support its view that developers would seek to evade use of the Model by submitting an alternative transport methodology.



40. In addition, the Commissioner finds it difficult to accept Springfield Properties' implication that future developers are likely to refuse to embark upon other developments in Elgin, unless they can gain free access to the Model. The Council has made it clear that any developer who chooses to use the Elgin Model will be able to access the expertise of its consultants at 'framework rates', i.e. lower costs usually reserved to public authorities. In light of this, the Commissioner does not accept that developers would be dissuaded from using the Model nor that they would refuse to become involved in other Elgin-based developments.
41. It is the Commissioner's view that if the Model were released, the Council would have to expend substantial sums of public money to validate and calibrate the base data contained in any amended Model that was submitted to it by planning applicants. This would lead to substantial delays to the processing of planning applications and would cost the Council (and thus the tax payer) significant sums of money which it would be unable to recoup from developers themselves. Consequently, the Commissioner has found that disclosure of the Model would, or would be likely to, prejudice substantially the effective conduct of public affairs.
42. Being satisfied that the exemption in section 30(c) applies, the Commissioner is now required to go on to consider the public interest test required by section 2(1)(b) of FOISA.

Consideration of the public interest

43. The effect of section 2(1)(b) of FOISA is that, although the Commissioner has found that the information is exempt under section 30(c) of FOISA, he must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless he finds that it does, he must order the information to be disclosed.
44. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as the Section 60 Code) suggests a number of factors which may inform a decision about the public interest. Such factors include the general public interest in information being accessible (such as whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation), whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money and whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions.
45. The Council does not accept that there is a general public interest in making public the data contained within the Model itself, but acknowledges that there is a public interest in the outcomes of the Model. The Council has indicated that information produced by the Model has already been used for the Elgin STAG study and that this is publicly available. In addition, the Council has published a range of Model outcomes on its website and on request to enquirers. The types of data already disclosed by the Council include Model surveys, Model forecasts, animation and video data, 3D simulation of virtual reality and calibration and validation reports.



46. The Council has submitted that it is willing to work with developers to use the Model and that it is also willing to provide specific outputs from the Model (i.e. relating to a specific junction or road) to any developer, as long as a fee is paid (which it can use to cover the charges of its consultants). The Council submits that there is a public interest in obtaining a quicker planning process, whereby the planning goals of the local authority are fulfilled in accordance with Scottish Government targets and minimum performance standards. The Council has argued that this can be best achieved by central control of the Model, where the Model is controlled by the Council and all amendments and forecasts are inputted by its own consultants (who have the greatest understanding of the Model) after negotiation with developers.
47. The Council also submits that there is a public interest in lower central planning costs and public accuracy and confidence in the Model. The Council has also asserted that the public interest lies in ensuring that taxpayers are not subsidising the profits of developers, but that developers pay for the necessary road alterations that their development may require.
48. The Council considers that Springfield Properties' primary interest lies in obtaining increased profits and speedier planning processes in their favour. The Council contends that while developer profit is not directly in the public interest, a speedier and reliable planning process is and the Council considers that this can be achieved best through central control of the Model. The Council has submitted that the Model's release into the public domain would almost certainly lead to distortion and devaluation of the Model, which would be to the benefit of developers and would be against the wider public interest, that of an effective roads infrastructure.
49. Springfield Properties have argued that the Council has not provided a detailed public interest argument as to the reasons why the information should not be released. They have submitted that in each case where the public interest applies the balance of convenience is in favour of disclosure. In addition, Springfield Properties have drawn attention to the fact that FOISA contains an overriding presumption in favour of disclosure, where at all possible, and that the Council has a duty to be helpful to applicants.
50. The Commissioner acknowledges that there is a genuine public interest in ensuring that the Council is adequately discharging its functions with regard to ensuring that the road infrastructure in Elgin is adequate and meets its purpose. Additionally, there are also valid public interest arguments in ensuring that the Council is obtaining value for money with regard to the expenditure of public funds and that its decision-making processes are transparent in order to increase openness and accountability.
51. However, in this case the Commissioner is not convinced that release of the Model would achieve any of the above three objectives.



52. The Council has invested substantial sums of public money in developing the Model, in order to create a high quality calibrated and validated base that will enable it to speed up the planning process and to be better able to identify any potential traffic issues arising from proposed developments. It is the Commissioner's view that release of the Model to developers would undermine this investment and would negate any of the benefits of having such a Model constructed. If the Model were released, its effect could mean that the Council would see no merit in being burdened with the costs of maintaining the Model (if these costs could not be recouped in part from developers using the Model), especially when it then had to bear the additional costs of validating and calibrating the version of the Model being submitted by developers. In the Commissioner's view this is clearly to the detriment of planning in Elgin and is therefore not in the public interest.
53. The Council is not refusing to let developers utilise the Model, but is simply requesting that they pay a fee to do so; fees which would be payable at reduced 'framework rates'. It is clear that the Council itself has to pay its consultants fees for updating the Model and that if amended versions of the Model were submitted by developers via applications, it would cost the taxpayer a considerable sum for the Council's consultants to verify these submitted models. The Commissioner is of the view that the current outputs of the Model, which the Council has made freely available, address the issues of openness and accountability, and give an indication of how the Council is discharging its functions with regard to road infrastructure in Elgin.
54. Springfield Properties have argued that there is a public interest in allowing developers to have unrestricted access to the Model as it relates to the submission of planning applications. Springfield Properties have argued that if they obtained access to the Model they would be able to check for themselves the basis on which traffic is modelled, and they would also be able to input their own developments into the Model, identifying any required infrastructure that may be required before formally submitting an application to the Council. The Commissioner acknowledges that there is merit in these arguments.
55. However, it is not clear to the Commissioner whether Springfield Properties, having received the Model would be in a position to use it. The Commissioner is of the view that use of the Model may well be subject to licence restrictions, in which case some of the advantages of release suggested by Springfield Properties may not occur.
56. In all the circumstances of the case, therefore, the Commissioner is persuaded that, on balance, the public interest in maintaining the exemption in section 30(c) outweighs the public interest in disclosure of the information. He therefore finds that the Council is entitled to withhold the Model.



DECISION

The Commissioner finds that Moray Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Springfield Properties PLC.

Appeal

Should either Springfield Properties PLC or Moray 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.

Kevin Dunion
Scottish Information Commissioner
15 July 2008



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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.