

Decision Notice



Decision 101/2009 Mr Hugh Johnston and the Scottish Ministers

Status of objections at a public local inquiry

Reference No: 200900222

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Scottish Information Commissioner

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Summary

Mr Hugh Johnston requested from the Scottish Ministers (the Ministers) details of how his objections lodged with the Aberdeen Western Peripheral Route (the AWPR) Public Local Inquiry (PLI) would be considered by the Reporters when making recommendations to the Ministers. The Ministers responded by stating that they could not provide a response in the level of detail required by Mr Johnston and that the requested information was not held by them. Following a review, in which the Ministers stated that they did not hold the requested information, Mr Johnston remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information and asked for the Ministers' comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Ministers agreed that any information held would be environmental and that they wished to rely on section 39(2) of FOISA and the exception contained in regulation 10(4)(a) of the EIRs. Following an investigation, the Commissioner found that Ministers had been correct to deal with Mr Johnston's information request by stating that they did not hold the information sought. However, the Commissioner also found that the Ministers failed to comply with certain technical aspects of the EIRs.

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of “environmental information”); 10(1) and (4)(a) (Exceptions from duty to make environmental information available) and 13(b) and (e) (Refusal to make information available)

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

Scottish Ministers Code of Practice on the Environmental Information (Scotland) Regulations 2004 for Scottish Public Authorities (the “Section 62 Code”)



Background

1. The Aberdeen West Peripheral Route (the AWPR) is a new road being developed jointly by Transport Scotland, Aberdeen City Council and Aberdeenshire Council. Draft Orders for the AWPR were published in September and October 2007 and a statutory consultation took place. The Scottish Government subsequently announced a public local inquiry (PLI) into the AWPR and appointed Reporters to conduct the PLI and report to the Scottish Ministers. The individual Reporters are not designated separately as a Scottish public authority under the Freedom of Information (Scotland) Act 2002 (FOISA), but are part of the Directorate for Planning and Environmental Appeals (DPEA) of the Scottish Government. Any reference to the Ministers in what follows includes reference to the individual Reporters.
2. On 4 October 2008, Mr Johnston wrote to the Ministers requesting the following information:
 - Those areas/aspects of his objections which the Reporters are empowered/enabled to consider and take into account when making recommendations to Scottish Ministers.
 - Those areas/aspects of his objections that fall outwith the scope of the Reporters' remit.
3. The Ministers initially responded on 13 October 2008. The Ministers stated that they were currently engaged in conducting the PLI and were not in position to respond to Mr Johnston's letter in the level of detail requested. The Ministers added that all objections lodged would be considered by the Reporters and the main points of those objections which fell within the remit of the PLI would be included in their report to the Ministers.
4. The Ministers also wrote to Mr Johnston on 29 October 2009. The Ministers informed Mr Johnston that, for the avoidance of doubt, his request for information had been treated as a request under FOISA. The Ministers also informed Mr Johnston that they did not hold the information requested by him.
5. On 31 October 2008, Mr Johnston wrote to the Ministers requesting a review of their decision. Mr Johnston argued that the Reporters had been provided with details of the scope of the remit of the PLI and therefore should be able to advise him which of his objections fell within the scope of that remit.
6. The Ministers notified Mr Johnston of the outcome of their review on 10 November 2008 upholding their previous decision that the information sought was not held by them.
7. On 4 February 2009, Mr Johnston wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' 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.



8. The application was validated by establishing that Mr Johnston 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. The case was then allocated to an investigating officer.

Investigation

9. On 24 March 2009 the investigating officer contacted the Ministers, inviting them to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking them to respond to specific questions. In particular, the Ministers were advised that, having considered the request, the Commissioner was of the opinion that Mr Johnston had requested environmental information as defined in regulation 2(1) of the EIRs. The Ministers were asked to comment on this point and provide submissions as to whether they considered the information fell within the scope of any of the exceptions contained in the EIRs. The Ministers were also asked if they wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information 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.
10. The Ministers responded on 15 April 2009. The Ministers initially apologised for not making clear reference to the appropriate legislation or fully informing Mr Johnston of his rights in previous correspondence with him. The Ministers also provided an explanation of the key steps undertaken by the Reporters when considering objections. The Ministers accepted that the information covered by the request fell under the definition of environmental information and that they wished to rely on the exemption contained in section 39(2) of FOISA. The Ministers stated that they wished to rely on the exception contained in regulation 10(4)(a) of the EIRs on the basis that they did not hold the information requested by Mr Johnston.
11. The Ministers subsequently provided a copy of the Reporters' Minute of Appointment to Mr Johnston on 16 April 2009. The Ministers advised Mr Johnston that, though not specific to his own objections, the document did refer to the PLI remit. The Ministers also advised the investigating officer that the document had been provided to Mr Johnston by way of providing as much assistance as possible to him rather than the information itself being within the scope of his request.
12. During the investigation, Mr Johnston provided the Commissioner with a copy of a Parliamentary Question (PQ) and answer which he believed supported his argument that the information requested must be held by the Ministers. Mr Johnston's submission is considered more fully in the Commissioner's Analysis and Findings section below.



Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr Johnston and the Ministers and he is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore **must** be dealt with under the EIRs
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
15. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full 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 the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
16. The Minute of Appointment of the Reporters notes that the Ministers wish to be advised on the technical and environmental aspects associated with the choice of route for the AWPR, including the Environmental Statement, and opinions expressed on those matters.



17. The Commissioner considers that a major road construction project such as this will inevitably have a significant intrinsic environmental impact because of its construction and use. As the remit of the Reporters to the PLI relates to a decision that would have significant environmental implications, the Commissioner considers that any information held would fall within the definition of environmental information contained in regulation 2(1)(a), (b) and (c) of the EIRs (see the text of regulation 2(1)(a) to (c) in the Appendix).

Section 39(2) of FOISA – exemption for environmental information

18. As noted above, the Ministers accepted, during the investigation, the preliminary view expressed by the Commissioner that any information held would fall under the definition of environmental information and so indicated that they wished to apply the exemption in section 39(2) of FOISA.
19. As the Commissioner considers that the information requested by Mr Johnston, if held by the Ministers, would be environmental information, he considers that the Ministers were correct in their application of section 39(2) of FOISA.
20. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate legislative right of access to environmental information (via the EIRs), the Commissioner also accepts that in this case the public interest in maintaining this exemption and dealing with the requests under the EIRs outweighs any public interest there may be in considering the disclosure of any information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Consideration of regulation 10(4)(a)

21. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
22. In determining whether the Ministers were correct to rely on this exception in relation to their response to Mr Johnston's request, the Commissioner must be satisfied that the Ministers did not, at the time of Mr Johnston's request, hold information in question.
23. In their submissions to the Commissioner, the Ministers explained that the Reporters will consider all evidence within the terms of their remit, submitted to them at the PLI or in writing by all case parties. The Ministers went on further to explain that when the case was passed to the DPEA by Transport Scotland, the Reporters made an initial assessment of the case and put together a provisional timetable for the PLI process. The Ministers noted that, in this case, there were approximately 10,000 objectors, many of whom had submitted multiple objections. The Ministers stated that the Reporters will not respond to each and every objection lodged but will address the issues raised which are pertinent to the case and within the remit of the inquiry, whilst the report itself will not list which objections have been considered and which have not.



24. As noted above, Mr Johnston provided further submissions in the form of a reference to a PQ answer to support his argument that the information requested must be held. The PQ answer stated that with regard to the AWPR, each objection was analysed individually and responded to.
25. The Ministers were invited to comment on this matter. The Ministers responded by stating that the PQ answer did not refer to analysis and response by the Reporters, but was in relation to the initial analysis undertaken by Transport Scotland i.e. prior to the case being handed over to the DPEA. The Ministers went on to explain that this process is entirely separate from that undertaken by the appointed Reporters.
26. Having considered the Ministers' submissions and their explanation of the steps taken in order to ascertain that the information in question is not held, the Commissioner is satisfied that no information falling within the scope of Mr Johnston's request was held by the Ministers at the time the request was received. The Commissioner is satisfied that the Ministers have taken all reasonable steps to establish whether any relevant information is available. The Commissioner has therefore concluded that the Ministers were correct in informing Mr Johnston that they did not hold the information in question.
27. As such, the Commissioner is satisfied that the Ministers acted correctly in applying the exception in regulation 10(4)(a) of the EIRs to the information requested by Mr Johnston.
28. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, 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. In this case, the Commissioner is satisfied that the information in question is not (and was not at the time of Mr Johnston's request) held by the Ministers. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
29. The Commissioner therefore concludes that the Ministers were entitled to rely upon regulation 10(4)(a) of the EIRs as a basis for refusing Mr Johnston's request.

Technical breach of the EIRs

Content of certain notices

30. Regulation 13 of the EIRs provides that, where a request to make environmental information available is refused by a Scottish public authority, the refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4), 10(5) or provision of regulation 11, with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b).
31. In addition paragraph 65 of the Scottish Ministers' Ministers Code of Practice on the Environmental Information (Scotland) Regulations 2004 (commonly known as the "Section 62 Code") for Scottish Public Authorities states:



“Where a request for information is refused or partially refused in accordance with an exception, the EISRs require that the Scottish public authority notifies the applicant in writing which exception has been claimed, and the reason that exception applies. Scottish public authorities should not merely paraphrase the wording of the exception unless the statement would involve the disclosure of information which would itself be withheld in accordance with the EISRs. The Scottish public authority should state clearly in the decision letter why they have decided to apply that exception in the case in question. The EISRs also require Scottish public authorities, when withholding information, to state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure. Scottish public authorities should specify the public interest factors - for and against disclosure - that they have taken into account before reaching the decision, unless the statement would involve the disclosure of information which would itself be withheld in accordance with the EISRs. They should also include details of procedure for review of the decision and for appeal for a decision by the Scottish Information Commissioner.”

32. The Ministers initial response to Mr Johnston’s request (on 13 October 2008) and response to his request for review did not comply with the requirements detailed above. In particular the Ministers did not cite which exception in the EIRs they were relying upon to withhold the requested information, did not provide a consideration of the public interest and did not advise Mr Johnston of the right to make application to the Commissioner.
33. For this reason, the Commissioner has concluded that the Ministers failed to comply with the requirements of regulation 13(b) and (e) of the EIRs in responding to Mr Johnston’s request. However, the Commissioner does not require the Ministers to take any action with regard to these technical failures.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hugh Johnston.

The Commissioner finds that the Ministers were entitled to refuse Mr Johnston’s request in terms of section 39(2) of the Freedom of Information (Scotland) Act 2002 and regulation 10(4)(a) of the EIRs.

However, by failing to specify any exception under the EIRs and how they reached their decision with respect to the public interest and, by failing to advise Mr Johnston of his right to make application to the Commissioner, the Scottish Ministers failed to comply with regulation 13(b) and (e) of the EIRs.

The Commissioner does not require the Scottish Ministers to take any action in response to these technical failures.

Decision 101/2009
Mr Hugh Johnston
and the Scottish Ministers



Appeal

Should either Mr Johnston 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 notice.

Margaret Keyse
Head of Enforcement
26 August 2009



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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

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.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

....

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- ...
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.