

Decision Notice



Decision 103/2013 Ms Carol Christie and Highland Council

Planning information

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Summary

Ms Christie asked Highland Council (the Council) for internal communications it held about a specific planning application. On review, the Council provided Ms Christie with some information. Ms Christie was not satisfied that she had been provided with all of the information she was looking for and applied to the Commissioner for a decision.

The Commissioner found that, while the Council had been entitled to withhold the remaining information from Ms Christie, it had failed to comply with the technical requirements of the EIRs in responding to her request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(e) and (5)(d) (Exceptions from duty to make environmental information available); 13 (Refusal to make information available) and 16 (Review by Scottish public authority)

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 4 May 2012, Ms Christie wrote to the Council and requested all internal communications generated by the Council in relation to Barratt Planning Application 09/00231/FULIN. Ms Christie gave, as an example, the names of six staff members whose communications she wanted.
2. The Council acknowledged Ms Christie's request on 9 May 2012, but otherwise failed to respond. This led to Ms Christie writing to the Council on 19 June 2012, requesting a review on the basis that it had failed to respond to her request.



3. The Council responded to Ms Christie on both 4 and 16 July 2012. It provided Ms Christie with information (described later by the Council as “two boxes of information”), but explained that it was not providing her with the information which was part of the planning file and which could be viewed at the Council’s offices. (The information provided to Ms Christie appears to have included information which fell outwith the scope of her request, e.g. external communications.)
4. Both of these responses advised Ms Christie that she had a right to request a review under section 20 of FOISA; given that Ms Christie had already requested a review on 19 June 2012, this advice was inaccurate in that the responses of 4 and 16 July 2012 have to be considered as responses to that requirement for review.
5. Ms Christie subsequently wrote to the Council, seeking a review in line with the advice given by to her. However, the Council did not respond.
6. On 12 September 2012, Ms Christie wrote to the Commissioner, applying 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.
7. The application was validated by establishing that Ms Christie made a request for information to a Scottish public authority and 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

8. On 18 September 2012, the investigating officer notified the Council in writing that an application had been received from Ms Christie, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested and it was asked to describe the steps it had taken to identify and locate the requested information.
9. The Council responded on 18 October 2012, informing the Commissioner that it considered the request to be for environmental information and therefore should have been dealt with in terms of the EIRs: as a result, it applied the exemption in section 39(2) of FOISA (see below).
10. The Council also informed the Commissioner that some information had been withheld in terms of regulations 10(4)(e) and 10(5)(d) of the EIRs, in that much of the information represents internal communications and disclosure would, or would likely to, prejudice substantially the confidentiality of the proceedings where such confidentiality is provided for by law. It was only at this stage of the investigation that the Commissioner became aware that information had been withheld from Ms Christie.



11. The Council explained that Ms Christie's letter of 19 June 2012 had not been recognised as a requirement for review, but interpreted as a reminder. It explained that it had recognised her letter of 8 August 2012 as a requirement for review, but had not responded by the time she had made an application to the Commissioner. The Council accepted that this was technically incorrect.
12. The Council stated that, following Ms Christie's application to the Commissioner, it had, on 17 October 2012, provided Ms Christie with a response to her letter of 8 August 2012. In this response, the Council provided Ms Christie with further information and explained that other information was being withheld for the reasons set out in paragraph 10 above.
13. There followed further communication with the Council in which it was asked to explain why the information fell to be withheld in terms of the EIRs, taking cognisance of regulation 10(2) which states that exceptions shall be interpreted in a restrictive way and that there should be a presumption in favour of release.
14. During the investigation, the Council provided submissions in response to the questions put by the investigating officer on this matter. The Council described the searches carried out to establish what relevant information it held. It explained that the information held falling within the scope of the request was all held within a specific paper file. The Council explained that the planning consent in question had been the subject of an appeal which had been heard in the Outer House of the Court of Session, finding in the Council's favour. The Council further explained that an appeal against that decision had been lodged in the Inner House and was due to be heard in the Court of Session (between 30 October 2012 and 2 November 2012). It explained the information had been gathered in preparation for the appeals process.
15. Ms Christie informed the Commissioner that she is a co-petitioner in a Court of Session Inner House civil action where Highland Council is the respondent, and Barratt Scotland are an interested party.
16. During the investigation, the Council provided further information to Ms Christie. Ms Christie confirmed receipt and provided submissions.
17. The relevant submissions received from both the Council and Ms Christie will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Ms Christie and the Council. She is satisfied that no matter of relevance has been overlooked.



FOISA or EIRs?

19. It is clear from the Council's correspondence with both Ms Christie and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns a specific planning application, and the Commissioner is satisfied that it 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) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).

Section 39(2) of FOISA – environmental information

20. The exemption in section 39(2) of FOISA provides, in effect, 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. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
21. As there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 5(1) of the EIRs

22. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
23. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(4)(e) of the EIRs (internal communications)

24. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. The Council contended that the exception in regulation 10(4)(e) applied to all of the information withheld from Ms Christie.
25. Ms Christie's request was, of course, for the "internal communications" held by the Council. Having examined the withheld information, the Commissioner is content that the documents to which the Council has applied regulation 10(4)(e) are all internal communications for the purposes of the EIRs and that the exception therefore applies. The application of the exception is, however, subject to the public interest test in regulation 10(1)(b).



Public interest test – regulation 10(4)(e)

26. Regulation 10(1) provides that a Scottish public authority may refuse a request to make environmental information available if there is an applicable exception to disclosure under regulation 10(4) or (5) and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception. Regulation 10(2) of the EIRs specifies that in considering the application of the exceptions contained in regulations 10(4) and (5), the public authority shall interpret those exceptions in a restrictive way and apply a presumption in favour of disclosure.

Submissions from the Council

27. According to the Council, the internal communications withheld from Ms Christie generally took place as a result of a question from its QC and involve discussions around how to answer the questions or discussion around the circumstances at the time of the planning application and processes involved. The Council believes that disclosure would provide details of the Council's preparation for the Court case to the petitioners and would prejudice substantially its ability to prepare its case.
28. The Council commented that it was defending the planning appeal because the decision to grant the planning permission in question was in accordance with the local plan and was the democratic decision of its Planning Application Committee. The Council believes the decision to have been the correct one. It argued that the public interest in withholding the internal communications, and in allowing the Council to fully prepare its case in private, outweighs any public interest in the information being disclosed – to do otherwise would be contrary to the course of justice. It commented that the results from the communications will be presented at the Court to both parties and the Court would judge the merits of the case.

Submissions from Ms Christie

29. Ms Christie argued that the Council's refusal to disclose information prejudiced the ability of the public to fully understand the situation on site in terms of the works taking place, or the answers provided by the Council in response to complaints requesting planning enforcement. She also explained that the purpose of the request is to allow neighbours to understand the steps taken by the developer in their consideration of damage to the environment (and potentially to existing properties adjoining the development) during and following the insertion of piling as part of the works being undertaken.



30. Ms Christie made several references to information that had previously been provided to her and commented on the actions she believed had been taken by the Council, SEPA and others. She also made various submissions regarding the planning process and what had taken place during the planning appeal. These comments provided background as to the reason for her request. Whilst the Commissioner cannot comment on the points raised, she accepts, in summary, that Ms Christie's overall comments conclude that it is in the public interest that there is a full understanding of the processes followed and actions taken in relation to this specific planning application.

The view of the Commissioner

31. It is important to note that the Commissioner must consider whether the Council complied with Ms Christie's request at the time it carried out a review of her request – i.e. July 2012. At this time, dates had already been set for the hearing at the Court of Session, but the hearing had not yet taken place.
32. The Commissioner first of all considered the public interest in disclosure of the information. Having examined the actual content of the information under consideration, the Commissioner has found little that would significantly assist Ms Christie on any of the matters that she raised within her submissions to her. In all the circumstances, the Commissioner is not convinced that the publication of the internal communications withheld here would add substantially to the public's understanding of the planning processes that were followed or the decision made.
33. However, in considering the public interest in maintaining the exception, the Commissioner has concluded that there is some force in the counter arguments put forward by the Council in relation to allowing it to prepare for the court hearing and in relation to the course of justice.
34. The Commissioner accepts disclosure of some of the information under discussion would enable greater public understanding of the Council's involvement in the appeal before the Court of Session. However, the Commissioner does not consider that disclosure would increase public understanding of the course of the planning application which is the subject of that appeal and of the information request. The Commissioner finds that, on balance, the public interest in achieving this understanding is outweighed by the public interest in maintaining the confidentiality of communications between a legal adviser and their client and associated communications.
35. In all the circumstances of this case, having considered the withheld environmental information along with all relevant submissions, the Commissioner concludes, on balance, that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she considers the Council to have been justified in withholding the information under that exception.
36. Given that the Commissioner has concluded that the information was correctly withheld in terms of regulation 10(4)(e) of the EIRs, she is not required to consider the exception in terms of regulation 10(5)(d) of the EIRs. She will, however, comment on the Council's poor handling of Ms Christie's request for information.



Handling of the request

37. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain provisions which are not relevant in this case.
38. Regulation 13 of the EIRs provides that, 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:
 - be given in writing within 20 working days after the date of receipt of the request (regulation 13(a));
 - specify the reasons for the refusal including any exception under regulation 10(4) or (5); and how the public authority reached its decision with respect to the public interest under regulation 10(1)(b) (regulation 13(b)).
39. Given that the Council did not respond to Ms Christie's request of 4 May 2012 within the 20 working days, nor did it issue a refusal notice meeting the requirements of regulation 13 within that time, the Commissioner finds that the Council failed to comply with the requirements of regulations 5(2)(a) and 13 of the EIRs.
40. The Commissioner notes that Ms Christie's email of 19 June 2012 required the Council to review its decision on the basis that it had failed to respond.
41. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the regulations within 20 working days (regulations 16(3) and (4)). It also states that where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
42. Although the Council responded to Ms Christie on 4 and 16 July 2012, and apologised for the delay in responding, neither of these responses considered whether the Council had otherwise failed to comply with the EIRs. It is apparent that the Council had failed to issue a refusal notice in terms of regulation 13, and as such, it is also apparent that the Council therefore further failed to carry out a review meeting the full requirements of regulation 16.
43. The Council has acknowledged that the way it dealt with Ms Christie's request was not technically correct and has demonstrated in its submissions that it understands this. However, the Commissioner still has some concern about the overall handling of the request by the Council, in particular that it was not until the matter was being investigated by her, that the Council informed Ms Christie (and the Commissioner) that it was withholding information from Ms Christie.
44. The Commissioner does not require the Council to take any action regarding its failures in terms of regulations 5, 13 and 16 of the EIRs as outlined above. However, the Council should be aware that if similar breaches occur in future the Commissioner will consider taking further action against the Council in line with her enforcement strategy.



DECISION

The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and, in part, with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Christie.

The Commissioner finds that the Council dealt with Ms Christie's request for information in accordance with Part 1 of FOISA by applying the exemption in section 39(2), on the basis that the information requested was environmental information and therefore subject to the EIRs.

She also finds that, while the Council was entitled to withhold the information under regulation 10(4)(e) of the EIRs, it failed to comply with the requirements of regulations 5, 13 and 16 of the EIRs in responding to Ms Christie's request and requirement for review.

The Commissioner does not require the Council to take any action regarding these failings.

Appeal

Should either Ms Christie or Highland 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.

Decision 103/2013
Ms Carol Christie
and Highland Council



Rosemary Agnew
Scottish Information Commissioner
3 June 2013



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.

...



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;

...

(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.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
- ...
- (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- ...
- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

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-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (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);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and



- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.