

Decision Notice



Decision 115/2010 Mr William Brown and the Scottish Ministers

Report of a Public Local Inquiry into the Baillie Wind Farm

Reference No: 201000087
Decision Date: 5 July 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr William Brown (Mr Brown) requested from the Scottish Ministers (the Ministers) specified parts of the report arising from a particular Public Local Inquiry (PLI). The Ministers responded by advising Mr Brown that they considered the information excepted from disclosure under the Environmental Information (Scotland) Regulations 2004 (EIRs) on the basis that disclosure would involve making available internal communications. The report was subsequently published. However, following a review, the Ministers upheld their decision to withhold this information prior to its publication. Mr Brown remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Brown's request for information in accordance with 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); 39(2) (Health, Safety and the Environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2) (Duty to make environmental information available on request); 10(1), (2) and 4(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. On 14 December 2009, Mr Brown emailed the Ministers requesting the conclusions and recommendations of the report submitted to the Ministers following a public local inquiry (PLI) regarding the proposed Baillie wind installation in Caithness (the report).
2. The Ministers responded to this request, which had been considered under the terms of the EIRs, on 21 December 2009. They withheld the information under the exception in regulation 10(4)(e) of the EIRs, on the basis that it was an internal communication. The response noted that the Reporter's recommendations were currently under consideration by the Ministers, and would be published once the case was determined, which was hoped to be early in 2010.



3. On 30 December 2009, Mr Brown emailed the Ministers requesting a review of their decision. In particular, Mr Brown pointed out that the report had already been written and that it would be made available in due course. He noted that the report would still incorporate the internal communications referred to when made available at that later stage and stated that he could see no problem about the supplying of that information to him at that time.
4. The Ministers notified Mr Brown of the outcome of their review on 14 January 2010. They upheld their previous decision to withhold the information at the time. However, they advised Mr Brown that the report had since then been published in full on the Scottish Government's website.
5. On 14 January 2010, Mr Brown emailed the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and 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. Mr Brown noted that, although he now had the information he had requested, he did not accept the Ministers' initial decision to withhold this information in advance of their determination with respect to the PLI.
6. The application was validated by establishing that Mr Brown 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

7. On 18 January 2010, the Ministers were notified in writing that an application had been received from Mr Brown. However, further progress on the investigation was delayed awaiting the conclusion of discussions with the Ministers about the validity of certain information requests and applications to the Commissioner that were under consideration at the time of receipt of Mr Brown's application.
8. These discussions were prompted by the Ministers' consideration of comments contained in the Court of Session Opinion in the case of Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73¹, which was issued in September 2009.
9. On 31 March 2010, the Ministers confirmed that they considered Mr Brown's information request to be valid, and the investigation was then allocated to an investigating officer.

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



10. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested. The Ministers provided their submissions on 28 April 2010.
11. The investigating officer also sought submissions from Mr Brown, in particular on the public interest test. Mr Brown provided submissions in response.
12. Both parties' submissions are summarised where relevant below.

Commissioner's analysis and findings

13. 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 Brown and the Ministers and is satisfied that no matter of relevance has been overlooked.
14. In this case, the information under consideration was published after Mr Browns' request for review was submitted to the Ministers, after they reached their determination with respect to the relevant PLI. The Ministers therefore no longer sought to withhold this information when notifying Mr Brown of the outcome of their review. However, they maintained that they had been entitled to do so when first responding to his information request. It is this conclusion that will be the subject of this decision.

Handling under the EIRs - section 39(2) of FOISA

15. As noted above, the Ministers responded to Mr Brown's information request in terms of the EIRs. During the investigation, the Ministers confirmed that, in so doing, they wished also to apply the exemption in section 39(2) of FOISA to the information under consideration.
16. The effect of this exemption is that environmental information, as defined in regulation 2(1) of the EIRs, is exempt information under FOISA, allowing such information to then be considered solely under the EIRs.
17. The Commissioner agrees is that the information under consideration is clearly environmental information. This concerns planning and consents for a wind farm (each being relevant measures), which would affect the state of the elements of the environment referred to in paragraph (a) and the factors referred to in paragraph (b) of the definition. This therefore falls within paragraph (c) of the wide definition of environmental information set out in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in the Appendix to this Decision).
18. The Commissioner therefore concludes that the Ministers correctly applied the exemption in section 39(2) of FOISA.



19. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate right to environmental information available to Mr Brown, the Commissioner also accepts that the public interest in maintaining the exemption under section 39(2) of FOISA and dealing with the information requested under the EIRs outweighs any public interest there may be in considering the disclosure of the information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Regulation 10(4)(e) – Internal communications

20. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. The Ministers applied this exception to all of the information withheld in this case.
21. As with all of the exceptions contained in regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)).
22. For information to fall within the scope of this exception, it need only be established that the information is an internal communication.
23. In this case, the Commissioner is satisfied that the information under consideration is an internal communication, being the conclusions and recommendations of a report that was communicated by an Inquiry Reporter to the Ministers, to inform their decision with respect to the relevant PLI. The Commissioner notes that the Reporter is a civil servant employed within the Scottish Government's Directorate for Planning and Environmental Appeals, and consequently that the communication of the report was internal to the Scottish Government.
24. Mr Brown submitted that the report was not, in his view, an internal communication, but instead was a completed report which would in the course of time become public knowledge. The Commissioner has noted these comments, and he acknowledges that once the report was published, it could no longer be considered to be simply an *internal* communication. However, he considers the report to clearly constitute a communication (setting out the reporter's findings and recommendations), which, at the time of Mr Brown's request and the Ministers' response, remained internal.
25. The Commissioner therefore accepts that, at the relevant time, the report clearly fell within the terms of regulation 10(4)(e) and was an internal communication for the purposes of the EIRs.

Public interest test

26. Regulation 10(4)(e) is subject to the public interest test contained in regulation 10(1)(b) of the EIRs, so the request might legitimately be refused only if, in all the circumstances, the public interest in making the information available was outweighed by that in maintaining the exception.



27. The Ministers accepted that there was a public interest in the conclusions of the report of the PLI, particularly given the topicality and high profile afforded to wind farm consent, and particularly to the communities directly affected by the proposals.
28. However, they also pointed out that the purpose of a Public Local Inquiry is to allow evidence for and against a proposal to be gathered, which would allow them to reach an informed conclusion. The Ministers noted that there is a standard process for holding and reporting PLIs, and that the resulting report is always published following the Ministerial determination.
29. They went on to argue argued that there is a strong public interest in decision-making in significant infrastructure proposals to be made on the basis of high quality advice and with full consideration of the available information and options. The Ministers maintained that being able to do so in an environment in which full consideration can be given to differing opinions, without pressure from either side, is central to ensuring that the settled view of the Ministers can be arrived at and submitted without fear of misinterpretation or misrepresentation caused by early release of the advice. The Ministers concluded that, on balance, the public interest was best served by supporting the ability of Ministers and officials rigorously to discuss and debate the options and implications of the report.
30. Mr Brown argued that it was the local community and residents near a wind farm who were affected by it, and in his view that they (rather than the Ministers) constituted the public concerned. He maintained that it was in their interests to receive the information at the stage it had been requested. He added that residents had the right to know what recommendations were being made by a Reporter after a PLI as it would affect their lives directly if a wind farm were built near them. Mr Brown maintained that it was a matter of public interest that the Ministers were seeking to withhold from the public information that would directly affect their lives and well-being. He added that the report should have been released at the earliest opportunity to allow the public to “correct the matter” if the approval of the development was recommended to be allowed to go ahead despite its significant long term affect on local residents’ amenity.
31. The Commissioner accepts that Mr Brown has identified a substantial public interest in disclosure of information that would reveal the Reporter’s recommendations and conclusions in the light of the evidence presented at the PLI. This public interest is particularly relevant for residents of the community that would be affected by the relevant development, which would have significant effects on that community, its landscape and environment. The publication of the report ultimately satisfied that public interest.
32. However, the Commissioner must decide whether the public interest identified by Mr Brown outweighed that in maintaining the exception prior to the Ministers’ determination. Mr Brown has maintained that making the report available prior to that decision would serve the public interest by allowing those affected by the proposed development to assess and potentially challenge the recommendations, and to make representations as to the appropriate determination of the case.



33. While the Commissioner accepts that there is some public interest in allowing such engagement prior to the Minister's determination, he notes that the PLI itself provides a forum in which it is all interested parties have an opportunity to make representations about the proposed development. The task of the Reporter is then to assess all of the evidence and representations, alongside relevant statute and guidance, and present a report setting out recommendations to the Ministers to inform their determination. The Ministers may then either accept or reject these recommendations.
34. Mr Brown has made comments to suggest that the Reporters' findings should not be considered impartial, given their relationship with Ministers. However, the Commissioner would note that the arrangements for administering PLIs are not a matter for the Commissioner to address.
35. Given the role of the Ministers in determining PLIs, and the nature of the process followed, the Commissioner agrees that there is a public interest in allowing them to consider the report in and reach their decision prior to communicating their views on the report in the public arena. Doing so, he has concluded, facilitates the discussion and making of important public infrastructure decisions by Ministers, for which he considers there is a very strong public interest.
36. Overall, the Commissioner has concluded that there would be only limited public benefit in allowing public access to and discussion of the report in advance of the Ministers' decision. In reaching this view, the Commissioner has noted that the PLI process allows interested parties to make representations and have these taken into consideration by the Reporter in preparing their report. Any party who is aggrieved by the Ministers' decision has a right of appeal to the Court of Session.
37. Having balanced the public interest both for and against disclosure in this case, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the information at the time it was requested was outweighed by the public interest in maintaining the exception in regulation 10(4)(e). The Commissioner has concluded that the Ministers were entitled at that time to withhold the information under the exception in regulation 10(4)(e).

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) acted in accordance with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Brown.



Appeal

Should either Mr Brown or the 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.

Kevin Dunion
Scottish Information Commissioner
5 July 2010



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)–

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (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.