



Scottish Information
Commissioner

**129/2007 MacRoberts Solicitors and Aberdeenshire
Council**

*Request for copies of notices pursuant to section 80 of the
Environmental Protection Act 1990*

**Applicant: MacRoberts Solicitors
Authority: Aberdeenshire Council
Case Nos: 200501328 and 200502226
Decision Date: 7 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
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Decision 129/2007 MacRoberts Solicitors and Aberdeenshire Council

Request for copies of notices pursuant to section 80 of the Environmental Protection Act 1990 – information withheld – Commissioner held that Aberdeenshire Council had failed to comply with the requirements of the EIRs in responding to MacRoberts' information request – disclosure of information required

Relevant Statutory Provisions and Other Sources

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (interpretation), 5(1) and (2) (duty to make available environmental information on request), 10(5)(b) (exceptions from duty to make environmental information available), 11(2) (Personal data),.

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (general entitlement), 34(1) (investigations by Scottish public authorities and proceedings arising out of such investigations).

Data Protection Act 1998 (DPA) sections 1(1) (definition of "personal data") (Basic interpretative provisions), Schedule 1, Part 1, paragraph 1 (the first data protection principle).

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

Facts

MacRoberts Solicitors (MacRoberts) made two separate requests for information to Aberdeenshire Council (the Council). The first request sought copies of notices or orders made or served prior to 31 December 2004, and which remained extant at 1 January 2005, under or pursuant to section 80 of the Environmental Protection Act 1990 (the EPA). The second request sought copies of notices made, served, discharged or released since 1 March 2005 pursuant to section 80 of the EPA.



In responding to each request, the Council withheld relevant information on the basis that it was exempt under section 34(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). In each case, the Council subsequently upheld its decision following an internal review. MacRoberts remained dissatisfied with the Council's responses and made applications for decision by the Commissioner in relation to each of the information requests.

Following an investigation, the Commissioner concluded that the information requested by MacRoberts was environmental information, and therefore, MacRoberts' two requests should have been considered under the terms of the Environmental Information (Scotland) Regulations 2004 (EIRs) rather than FOISA.

The Commissioner found that the Council had failed to deal with each of MacRoberts' requests for information in accordance with the EIRs. He required the Council to supply the information withheld from MacRoberts, subject to removal of the names and addresses of individuals to whom the notices were sent.

Background

1. This decision concerns two separate applications for decision made by MacRoberts concerning Aberdeenshire Council's responses to two similar requests for information. I will describe these as MacRoberts' first and second information requests in what follows below.

MacRoberts' first information request

2. On 7 January 2005, MacRoberts emailed the Council requesting copies of all notices or orders made or served prior to 31 December 2004 and which remained extant as at 1 January 2005 under or pursuant to section 80 of the EPA. MacRoberts requested that, insofar as the requested information contained personal data, disclosure of which is exempted under section 38 of FOISA, the information be provided with the personal data redacted.
3. Section 80 of the EPA concerns statutory nuisances and imposes a duty on a local authority to serve an abatement notice in circumstances where a local authority is satisfied that a statutory nuisance exists. If the person on whom an abatement notice is served contravenes or fails to comply with any requirement imposed by the notice, they are guilty of an offence. Matters that constitute "statutory nuisances" for the purposes of the EPA are set out in section 79(1) of the EPA. These include, for example, circumstances where fumes, odours, light or noise that is generated by human activity is considered to be prejudicial to health or a nuisance.



4. On 9 February 2005, the Council issued a refusal notice which informed MacRoberts that the information requested was considered exempt in terms of section 34(1) of FOISA (Investigations by Scottish public authorities and proceedings arising out of such investigations) and was therefore being withheld. The Council explained that it considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
5. MacRoberts subsequently emailed the Council requesting a review of this decision.
6. On 1 April 2005, the Council notified MacRoberts of the outcome of its review. In its response, the Council reiterated its view that the requested information was exempt under section 34(1) of FOISA, and it upheld its original decision in full.
7. On 5 April 2005, MacRoberts wrote to my Office, stating that they were dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of the FOISA (which also deals with applications under the EIRs).
8. In their application to me, MacRoberts stated that they were dissatisfied with the Council's interpretation of section 34 of FOISA, and its application in relation to the requested information. MacRoberts argued that the possibility of criminal proceedings being pursued in relation to the specific information requested was too remote to permit the application of the section 34 exemption.
9. The application was validated by establishing that MacRoberts had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

MacRoberts' second information request

10. MacRoberts made a second request for information to the Council on 10 May 2005. This request asked for all notices or orders made, served, discharged or released since 1 March 2005 [to the date of the request] under or pursuant to section 80 of the EPA. MacRoberts again requested that, insofar as the requested information contained personal data, disclosure of which is exempted under section 38 of FOISA, the information be provided with the personal data redacted.
11. The Council responded on 30 May 2005. This request was also refused by the Council on the basis that the exemption contained in section 34(1) of FOISA applied.



12. MacRoberts requested a review of this decision on 1 June 2005. Their initial request for review expressed dissatisfaction with the application of the exemption in section 34(1) of FOISA. When invited to make further submissions to the Council's review panel, MacRoberts claimed that the information requested was environmental information and consequently should be considered by the Council in accordance with the EIRs.
13. The Council notified MacRoberts of the outcome of its review on 29 June 2005. The Council upheld its earlier decision to withhold the information in terms of section 34(1) of FOISA. It also stated that, in its opinion, an exception under the EIRs would have applied to this information and that the public interest in maintaining the exception outweighed the public interest in disclosure. The Council did not specify which exception from disclosure within the EIRs it considered applied to the information.
14. On 1 July 2005, MacRoberts wrote to my office requesting a further decision in terms of section 47(1) of FOISA in relation to its second information request.
15. This application was also validated by establishing that MacRoberts had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

16. Given that the subject matter and submissions received in these cases overlapped almost entirely, the two cases were conjoined for the purposes of investigation and decision.
17. On 20 April 2005, the Council was notified in writing that MacRoberts' first application had been received and it was asked to provide my office with the information withheld and further information required for the purposes of the investigation. A response to this letter was received on 10 May 2005.
18. The Council was notified on 12 July 2005 that MacRoberts' second application had been received and was asked to provide my office with the information withheld and further information required for the purposes of the investigation. A response to this letter was provided on 4 August 2005.
19. In each case, the Council was asked to specify which of the exemptions within section 34(1) of FOISA had been judged to apply, and to provide details of its consideration of the public interest.



20. In the letter of 12 July, the Council was also asked to comment on the question of whether MacRoberts' request should have been handled under FOISA or the EIRs. Its response provided submissions on this matter, and indicated that the information requested by MacRoberts would fall under the scope of the exception in regulation 10(5)(b) of the EIRs.
21. The Council's responses identified and provided my office with copies of 10 notices relevant to MacRoberts' two information requests. Six of these fell under the scope of their first information request, and the remaining four fell under the scope of their second information request.
22. Further submissions in relation to relevant points were sought and received from both the Council and MacRoberts during the course of the investigation.

The Commissioner's Analysis and Findings

23. In coming to a decision in this matter, I have considered all of the information and the submissions that have been presented to me by both MacRoberts and the Council and I am satisfied that no matter of relevance has been overlooked.

Does the information constitute environmental information?

24. The first issue to be considered in relation to these cases is whether the Council acted correctly in processing MacRoberts' request under FOISA as opposed to the EIRs.
25. MacRoberts' applications to my office did not express dissatisfaction with the Council's handling of the two information requests under the terms of FOISA (although this point was raised when seeking a review of their second information request). Nonetheless, where information is requested which constitutes "environmental information" for the purposes of the EIRs, that request should be processed in accordance with the EIRs regardless of whether the request or a subsequent request for review makes reference to those regulations. My decision, in turn, must be made in accordance with the appropriate law.



26. The EIRs sit alongside FOISA and separately govern access to that information which falls within the definition of “environmental information” as set out in regulation 2(1) of the EIRs. Information which falls within this definition is exempt from release under section 39(2) of FOISA for the reason that access rights to that information are separately provided under the EIRs. The full definition of “environmental information” contained within the EIRs is reproduced within the appendix to this decision.
27. As described at paragraph 3 above, an abatement notice under section 80 of the EPA will be served in circumstances where the local authority considers that the by-products of human activity, such as fumes, odour, smoke, dust, effluvia, insects, light or noise may be prejudicial to health or a nuisance.
28. Aberdeenshire Council provided my office with copies of all notices falling within the scope of MacRoberts’ two information requests. These notices each contain a description of the statutory nuisance which was considered to exist by the Council in relation to the property to which the notice relates. The notices each go on to describe the abatement action that is required to be taken in order to ensure that the relevant statutory nuisances are addressed.
29. The Council submitted that it did not consider these notices to constitute environmental information because they relate to nuisances caused by actions (or inactions) of a person (including companies) affecting another person. The Council noted that it would not issue such notices in circumstances where the environment is affected but another person was not.
30. I have noted all the Council’s comments on these notices. However, having considered these in detail it is my view that they clearly fall within the scope of the definition of environmental information contained in regulation 2 of the EIRs.



31. The notices in question are substantially composed of information relating to noise and odour emissions, factors which will affect the elements of the environment and which, as such, fall within the definition of environmental information contained in regulation 2(1)(b) of the EIRs. Indeed, it seems that it is the fact that these factors are having an effect on the surrounding environment, which has in turn affected other person(s), which has led to the Council issuing a section 80 notice in the first place. I also consider the EPA, and a notice under the terms of section 80 of EPA, to be measures relevant for the purposes of the definition contained in regulation 2(1)(c) of the EIRs. I acknowledge that a notice would only be issued where the nuisance concerned affects another person. Nonetheless, it seems clear to me that the nuisances concerned are specifically of an environmental nature. Furthermore, I would also note that regulation 2(1)(f) of the EIRs explicitly refers to “the state of human health and safety” and “conditions of human life” inasmuch as they are or may be affected by the matters referred to in regulation 2(1)(b) and (c). Given that the notices under section 80 will be issued where there is an environmental nuisance that has an impact on another person, it is also my view that notices under section 80 of the EPA fall under the definition of environmental information in regulation 2(1)(f).
32. Given that it is my view that the requested information falls within the scope of the definition of environmental information contained in Regulation 2 of the EIRs, I conclude that MacRoberts’ requests should have been considered by the Council in accordance with the terms of the EIRs as opposed to FOISA.
33. I will now go on to consider whether the Council’s responses to MacRoberts complied with the requirements of the EIRs.

Is the information excepted from release under the EIRs?

34. The Council’s initial submissions to my office justifying its position in favour of the non-disclosure of the information were made in terms of the exemption under section 34(1)(b) of FOISA. Information will fall within the scope of section 34(1)(b) in circumstances where that information has at any time been held by an authority for the purposes of an investigation, conducted by the authority, which may lead to a report being made to the procurator fiscal to enable the fiscal to determine whether criminal proceedings should be instituted. Therefore, under section 34(1)(b) of FOISA, information must merely be held by an authority for such a purpose for it to fall within the scope of the exemption.
35. The most closely corresponding exception under the EIRs however, requires that a different, and arguably higher, test be applied. Regulation 10(5)(b) of the EIRs states:



(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.....

(b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature”

36. When asked to comment on the application of the EIRs to the information requested by MacRoberts, the Council confirmed that it believed it to be excepted from disclosure under the terms of regulation 10(5)(b). It asserted that the exception applied because disclosure of the information would, or would be likely to, prejudice substantially the ability of a public authority to conduct an inquiry of a criminal nature.
37. It is my view that, in order for the test of substantial prejudice to be met, the likelihood of harm occurring as a result of the release of the relevant information must be real, actual and of significant substance.
38. The Council pointed out that a failure to comply with an abatement notice is a criminal offence under section 80(4) of the EPA. The Council further submitted that, in such circumstances, it would prepare and submit a report to the procurator fiscal who would then decide whether criminal proceedings should be commenced. The Council argued that the release of the information would prejudice substantially its own ability to conduct inquiries with regard to offences under section 80(4) of the EPA. The Council argued that the release of information relating to those on whom notices have been served could prejudice inquiries. The Council argued that releasing information about notices would be likely to lead to less co-operation with the Council in dealing with these matters, which would be contrary to the public interest.
39. In their submissions to my office, MacRoberts argued that the possibility of prosecution following the issue of a notice under section 80 of EPA is too remote to allow the application of the exemption in section 34(1)(b) of FOISA. I have also considered this point insofar as it is relevant to the case made by the Council for the application of the exception in regulation 10(5)(b) of the EIRs.
40. While I acknowledge that the service of a notice under section 80 of the EPA might ultimately lead to a criminal investigation and prosecution, I note that this outcome is rare. Indeed, the Council’s submissions confirmed that only one incident in the last three years has resulted in a report being made to the procurator fiscal.



41. I would consider the Council's investigations and activities undertaken with a view to making a report to the procurator fiscal in circumstances where an individual has failed to comply with a notice under section 80 of the EPA to be investigations of a criminal nature. However, I would not consider the Council's activities in respect of such notices to be investigations of a criminal nature before this point is reached.
42. In these circumstances, I do not accept that the Council undertakes an investigation of a criminal nature in the vast majority of cases where a notice is issued under section 80 of the EPA.
43. The Council's comments with respect to the likelihood of substantial prejudice to their investigations appear to me to concern the willingness of the recipients of these notices to co-operate with that process as a whole.
44. I accept the Council's view that the prospect of disclosure of a notice under section 80 of the EPA might be a factor contributing to an individual's assessment of whether to co-operate with the Council when it contemplates or issues a notice under section 80 of the EPA. I also accept that disclosure may have some effect on the relationship between the recipients of notices under section 80 of EPA and the Council. However, I am not satisfied that the Council has demonstrated that this effect would be likely to be substantially prejudicial insofar as it relates to the conduct of investigations of a criminal nature.
45. Furthermore, it seems to me that a converse argument can also be made: that disclosure would lead to individuals being more likely to co-operate with the Council in such inquiries as the disclosure of information into the public domain as to the properties subject to the notices would create an additional incentive for the recipients of abatement notices to take appropriate and prompt remedial action.
46. I also note that when providing property enquiry certificates, the Council will confirm for any property whether there is any notice under the EPA outstanding in relation to a specified property. The Council has made clear in the course of my investigations that its consideration of a request for particular notices under section 80 of EPA would differ from its consideration of MacRoberts' more general requests. However, I am not persuaded that the difference between a specific and general request is such that the exception cited by the Council would apply in this case.
47. Having considered the submissions made by the Council, I am of the view that it has failed to adequately demonstrate that the release of the information sought by MacRoberts' two information requests would, or would be likely to, prejudice substantially its ability to conduct an inquiry of a criminal nature under the EPA. I therefore find that the exception under regulation 10(5)(b) of the EIRs should not be considered to apply to the requested information.



48. As I have concluded that the exception in regulation 10(5)(b) does not apply, I am therefore not required to go on to consider the public interest test.

Personal data

49. MacRoberts' two requests indicated that the information provided should be redacted to remove any personal data that would be exempted under the provisions of section 38 of FOISA. As these requests should have been considered under the terms of the EIRs, I have considered this reference to section 38 of FOISA to refer to the directly equivalent regulation 11 in the EIRs.
50. Regulation 11(2), read in conjunction with regulation 11(3)(a)(i) or 11(3)(b), provides that a public authority shall not make third party personal data available where its disclosure would breach any of the data protection principles contained in the DPA.
51. In the course of my investigation, the Council was invited to make a submission on the application of the exemption in section 38 of FOISA, but it declined to do so, stating that it believed its arguments for the application of the exemption in section 34(1)(b) of FOISA were compelling, and that it wished to stand by these.
52. Having rejected the Council's arguments with respect to the application the exception in regulation 10(5)(b), I have judged it appropriate in the circumstances to consider the application of regulation 11(2) in this case. The notices requested by MacRoberts are issued in respect of a specified property or specified land. They also contain, however, a section marked "To:" which details the name and address of the recipient of the notice. In some cases this recipient is a company, and in others it is an individual.
53. "Personal data" are defined in section 1(1) of the DPA 1998 as follows:

data which relate to a living individual who can be identified:

- a) from those data
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.



54. Where the name and address to which the notice was issued is (or appears to be) an individual rather than a company, I consider this information (the name and address) to be personal data. Where it relates to a company, this information does not relate to a living individual, and so I do not consider it to be personal data.
55. Of the 6 notices falling under the scope of MacRoberts' first information request, three of these were addressed to companies rather than individuals. These are those numbered 1.3, 1.4 and 1.6 in the schedule and documents provided to my Office. I have not found any of the contents of these notices to be subject to regulation 11(2) of the EIRs, and so these notices should be provided to MacRoberts in full.
56. The remaining three notices falling under the scope of MacRoberts' first information request (1.1, 1.2 and 1.5) and all 4 notices falling under the scope of MacRoberts' second information requests contain names and addresses of individuals within the section marked "To:".
57. I am satisfied that the disclosure of the names and addresses of these individuals would be unfair for the purposes of the first data protection principle, which states that personal data should be processed fairly and lawfully.
58. I am satisfied that general disclosure of the identity of individuals who have received notices under the terms of section 80 of the EPA would be an unfair intrusion into their private lives. I am aware that in most instances the issue of such a notice will lead to the resolution of the matter to which they relate. Where it does not, the responsible individual's identity may become public in the court process. Until this stage is reached, however, I believe it would be an unwarranted intrusion into the private life of the individual concerned to reveal their identity. As such, I am satisfied that it would breach the first data protection principle to make this information generally available.
59. Therefore, I find that regulation 11(2) applies to the names and addresses of individuals (but not companies) to whom the notices requested by MacRoberts were issued. As MacRoberts indicated that they did not wish to be provided with information that was exempt from disclosure under the equivalent provision within FOISA, I consider this information to fall outwith the scope of their requests
60. I now require the Council to provide MacRoberts with copies of the requested notices, subject to the redaction of the names and addresses of individuals to whom they were addressed under the heading "To:". The notices listed in paragraph 55 were sent to companies rather than individuals and so should be provided with no information removed. I require this information to be provided to MacRoberts within 45 days of the receipt of this notice.



Decision

I find that Aberdeenshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to MacRoberts' first and second information requests.

I have concluded that the information sought by MacRoberts is environmental information, and so the Council acted incorrectly by responding to these requests under the terms of the Freedom of Information (Scotland) Act 2002.

In relation to both of the information requests under consideration in this decision, I have found that the Council incorrectly applied the exception in regulation 10(5)(b) of the EIRs to the information withheld from MacRoberts. By withholding this information, the Council failed to comply with regulation 5(1) of the EIRs.

I require Aberdeenshire Council to provide the information withheld from MacRoberts (as set out in paragraph 60 above) within 45 days of the receipt of this decision.

Appeal

Should either MacRoberts or the 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
7 August 2007



Appendix

Relevant statutory provisions

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);

...

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—

- (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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.



(3) The first condition is-

(a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and; in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so; and

(b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

"personal data" means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

Schedule 1: The data protection principles

Part 1: The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and



(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

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.

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of –

...

- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or