

Decision Notice

Decision 157/2018: Company A and the Scottish Ministers

Planning application and World Heritage Site

Reference No: 201702286

Decision Date: 8 October 2018



Scottish Information
Commissioner

Summary

The Ministers were asked about a proposed development at Hyndford Quarry and about the decision by UNESCO to designate the Forth Bridge as a World Heritage Site. The Ministers provided some information, stating other information was excepted from disclosure under the EIRs as internal communications or unfinished documents.

Following investigation, the Commissioner accepted that some of the information was excepted from disclosure; it comprised internal communications and the public interest favoured maintaining the exception.

He also found, however, that the Ministers were not entitled to withhold other information and failed to respond to the request and requirement for review within the time allowed.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (f) of definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (4)(d) and (e) (Exceptions from duty to make environmental information available); 13 (a), (b) and (d) (Refusal to make information available); 16(3), (4) and (5) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 19 January 2017, Company A made a request for information to the Scottish Ministers (the Ministers). The information requested was:
 - a) *All communications from and to Scottish Government officials, the Reporters and/or the Scottish Ministers in connection with the proposed development (NOD-SLS-001) [Hyndford Quarry] from the date of issue of the Reporters' report (20 February 2015) until the issue of the decision letter (7 December 2016).*
 - b) *All communications from and to Scottish Government officials, the Scottish Ministers and UNESCO in connection with the decision of UNESCO to designate the Forth Bridge as a World Heritage Site in the period from 20 February 2015 to 5 July 2015.*
 - c) *All information not within the scope of the above requests which informed or was used in the Scottish Ministers' decision-making process in relation to the proposed development (NOD-SLS-001).*

Company A advised the Ministers that they could exclude certain documents from the scope of its request.

2. On 14 February 2017, the Ministers wrote to Company A and advised that they were taking longer than expected to deal with the request, due to the volume and location of the documentation to be accessed. The Ministers apologised for the delay, stating they would respond as soon as possible.

3. On 10 March 2017, the Ministers wrote to Company A and again apologised for the delay in responding, again stating they would respond as soon as possible.
4. On 7 April 2017, Company A wrote to the Ministers, requesting a review of their failure to respond to the request within the time allowed.
5. Following further communications, in which Company A complained about the time the Ministers were taking to respond, the Ministers finally notified Company A of the outcome of their review on 3 July 2017. The Ministers provided some information, noting that they believed the request fell to be considered under the EIRs. They advised that, having considered the public interest test, they were withholding some information in terms of regulation 10(4)(d) (unfinished documents, etc.), 10(4)(e) (internal communications) and 11(2) (personal data), with explanations in relation to each.
6. On 21 December 2017, Company A wrote to the Commissioner. Company A applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 specified modifications.
7. Company A stated it was dissatisfied with the outcome of the Ministers' review because they had failed to comply with the timescales allowed by regulation 5(2)(a) and 16 of the EIRs.
8. Company A further stated that it disagreed with the withholding of information under regulation 10(4)(d) and (e) of the EIRs. Company A did not challenge the withholding of any personal data.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Company A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 18 January 2018, the Ministers were notified in writing that Company A had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Company A. The Ministers provided some information and the case was allocated to an investigating officer.
11. On 13 March 2018, the investigating officer wrote to the Ministers and advised that it was evident the Commissioner had not been provided with all of the information withheld from Company A. The Ministers were again asked to provide all of the information that had been withheld from Company A under the exceptions contained in regulations 10(4)(d) and (e) of the EIRs.
12. Following further correspondence, the Ministers provided the information that had been withheld from Company A. Unfortunately, it took until 9 July 2018 for the correct set of information, with an accurate schedule of documents, to be provided to the Commissioner in full.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 24 August 2018, the Ministers were invited to comment on this application and answer specific questions. In addition to the Ministers' reasons for claiming the exceptions in regulation 10(4)(d) and (e) of the EIRs, these asked about their overall handling of the request.

14. The Ministers responded and acknowledged that their handling of the request made by Company A fell significantly below the standard expected of a public authority. They also apologised for their poor record keeping, including a failure to collate and retain an unredacted set of the information, which contributed to the delay in providing the Commissioner with the withheld information and the poor quality of submissions provided in relation to that withheld information.
15. The Ministers also informed the Commissioner that they only wished to rely on regulation 10(4)(e) of the EIRs to withhold some of the information, which they considered subject to legal advice privilege.
16. The Ministers also advised that they no longer wished to claim regulation 10(4)(d) or (e) of the EIRs to withhold the remaining information previously withheld. They confirmed that they had disclosed this information to Company A, although it turned out that this had not been done fully and further intervention from the Commissioner's office was necessary to secure the intended disclosure. The Commissioner was satisfied that all this information had been disclosed by 20 September 2018.
17. Company A confirmed it had received the information disclosed by the Ministers and wished the Commissioner to come to a decision on the application.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Company A and The Ministers. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

19. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information relates substantially to a planning application regarding the development of a specific site (a substantial extension to a quarry near the New Lanark World Heritage Site) and the decision by UNESCO to designate the Forth Bridge as a World Heritage site. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1). Company A has not disputed the Ministers' decision to handle the request under the EIRs (its request specifically referred to the EIRs) and the Commissioner will consider the information in what follows solely in terms of the EIRs.
20. The Commissioner will first of all consider whether the Ministers were entitled to withhold any of the information under regulations 10(4)(d) and 10(4)(e) of the EIRs. He will then go on to consider the Ministers' overall handling of the request submitted by Company A.

Regulation 5(1) of the EIRs

21. 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.
22. 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. In its response to Company A's requirement for review, and in providing the withheld information to the Commissioner, the Ministers advised that it considered certain information to be excepted from disclosure in terms of regulation 10(4)(d) and (e) of the EIRs.

Regulation 10(4)(d) – material in the course of completion, unfinished documents or incomplete data

23. As mentioned above, the Ministers withdrew their reliance on regulation 10(4)(d) during the investigation. In the absence of submissions from the Ministers, the Commissioner must conclude that the information in question was not excepted from disclosure under regulation 10(4)(d) of the EIRs and therefore was incorrectly withheld by the Ministers. In doing so, the Ministers breached regulation 5(1) of the EIRs.
24. Given that the information concerned was provided to Company A during the investigation, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Company A's application.

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

25. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. As with all exceptions under the EIRs, however, regulation 10(4)(e) is subject to the public interest test.
26. As mentioned above, during the investigation the Ministers withdrew their reliance on regulation 10(4)(e) of the EIRs for some of the information withheld from Company A, confirming this information had been disclosed to Company A. In the absence of submissions from the Ministers, the Commissioner must conclude that the information in question was not excepted from disclosure under regulation 10(4)(e) of the EIRs and was therefore incorrectly withheld by the Ministers. In doing so, the Ministers breached regulation 5(1) of the EIRs.
27. Given that the information concerned was provided to Company A during the investigation, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Company A's application.
28. The Ministers confirmed that they still wished to claim regulation 10(4)(e) to withhold some internal communications, which they considered subject to legal advice privilege.
29. Having considered the information still withheld under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He must go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Public Interest Test

30. In common with all the other exceptions in the EIRs, regulation 10(4)(e) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under this exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

The Ministers' submissions

31. In their submissions to the Commissioner, the Ministers stated that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question was only shared between the Ministers and their legal adviser. They considered the information was confidential at the time they dealt with the request, and that it remained so during the Commissioner's investigation.
32. The Ministers recognised some public interest in disclosure of the withheld information, as part of open, transparent and accountable government and to inform public debate. They also acknowledged a strong public interest in relation to the proposed development of Hyndford Quarry, and more broadly in planning considerations in Scotland, and that releasing this information could help greater public understanding of the decision making processes in respect of planning applications.
33. On the other hand, the Ministers submitted there was a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and their clients or other legal advisers. They stated that it remained important in all cases that lawyers could provide free and frank legal advice which considered and discussed all issues and options, without fear that the advice might be disclosed.
34. The Ministers submitted that in areas which were the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective. They identified a strong public interest in protecting the confidentiality of legal advice in order to ensure that the Ministers were able to consider legal advice privately so that the Ministers could reach a fully considered position consistent with that advice.
35. The Ministers concluded that while they recognised some public interest in releasing the information, they did not believe that it was sufficient to outweigh the very strong public interest in maintaining the confidentiality of legal advice in this case.

Company A's submissions

36. In its application to the Commissioner, Company A advised that it did not challenge the application of the exception in regulation 10(4)(e) where the information related to internal legal advice, disclosure of which would breach professional legal privilege. However, it wished the Commissioner to examine whether the information withheld for this reason actually constituted legal advice or simply comprised internal communications relating to such advice but not themselves legally privileged.
37. In its application, Company A recognised a strong public interest in high quality decision making on planning applications but also considered it apparent that, in the case of Hyndford Quarry, the considerations on matters in a private space by Ministers and officials did not lead to decision making of high quality. It explained the context in which it considered the decision-making process to be flawed and stated that it believed it to be in the interest of the public to be able to access information to understand how such flawed decision making came about and whether the Scottish Ministers were adequately discharging their planning functions.

38. Company A further submitted that it was unable, in the absence of the withheld information, to verify whether the essential components of the relevant Local Development policies and other relevant material considerations for the determination of the application had been met in the decision making process. It stated that disclosure would allow the effective scrutiny of the actions of Ministers and officials and the material considered by them in making decisions, which it submitted was in the public interest. The information requested did not affect individuals significantly and therefore (in Company A's view) less weight should be attached to the public interest in non-disclosure.
39. Company A also noted the passage of time since the decision was taken by the Ministers to part approve the application on 7 December 2016 (before the decision was quashed in the courts) meant the balance had shifted in favour of disclosure. It submitted that scrutiny of the withheld information should lead to better quality decision making by the Ministers in the future and was supported by the basic tenets of the EIRs, bearing in mind the presumption in favour of disclosure in regulation 10(2).

The Commissioner's view

40. The Commissioner has considered carefully the submissions made by both Company A and the Ministers, alongside the withheld information.
41. The Commissioner recognises the public interest in transparency and accountability in the decision making processes of public authorities, and in understanding how particular decisions are reached. He acknowledges that disclosure of the information would assist such accountability and understanding, and has considered whether the passage of time should have a bearing on where the public interest lies.
42. However, the Commissioner also accepts that there is a considerable public interest in maintaining confidentiality of communications between legal adviser and client, where applicable. In such circumstances, Ministers and officials should be able to receive, obtain and consider legal advice in confidence, to ensure comprehensive advice is given and decision making is thus fully informed.
43. In the particular circumstances of this case, having considered the information that has been withheld (which the Commissioner is satisfied meets all the requirements for attracting legal advice privilege) and the submissions provided by both Company A and the Ministers, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers the Ministers to have been justified in withholding the information they still refuse to disclose, under that exception.

Handling of the request

44. The Commissioner notes that Company A raised dissatisfaction with the procedural aspects of Minister's handling of their request. In this regard, the Commissioner is satisfied that there are significant issues he should consider further.
45. 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 qualifications which are not relevant in this case.
46. Regulation 13 of the EIRs provides, subject to regulations 10(8) and 11(6), that 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, as appropriate, 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)).
 - if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers the information will be finished or completed (regulation 13(d)).
47. Given that the Ministers did not respond to Company A's request of 19 January 2017 within the required 20 working days, or issue a refusal notice meeting the requirements of regulation 13 within that time, it is apparent that the Ministers failed to comply with the requirements of regulations 5(2)(a) and 13 of the EIRs.
48. Company A's email of 7 April 2017 clearly expresses dissatisfaction with the Ministers' failure to provide a response to the request of 19 January 2017. It makes representations to the Ministers submitting that Company A is not satisfied it has received a compliant response. It is clearly a requirement for review for the purposes of regulation 16 of the EIRs.
49. 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)).
50. The Commissioner notes that in remedying the initial failure to respond to Company A's request, by applying regulation 10(4)(d) of the EIRs, the Ministers had a duty to advise when the information would be finished or completed, as outlined above.
51. The Commissioner must find that in failing to respond to the requirement for review within the time allowed and by failing to remedy the earlier breach of duty, the Ministers failed to meet the requirements of section 16(4) and (5) of the EIRs.
52. The Commissioner does not consider the Ministers' overall handling of the request received from Company A to have been acceptable: the Ministers, having received a valid request for information on 19 January 2017, and a requirement for review on 7 April 2018, did not provide any kind of substantive response until 3 July 2017.
53. In addition, the Commissioner notes that on being asked to provide him with the withheld information, the Ministers were unable to do so in a satisfactory manner. This resulted in considerable delay to the Commissioner's investigation.
54. The Commissioner would point out that paragraph 6.2.3 in Part 2 of the Scottish Ministers' own Code of Practice¹ states:
- “Authorities should, where appropriate, maintain a record of searches conducted, including details of who carried out the searches and the systems that were checked. Records of searches provide helpful evidence to reviewers and, in the event of an appeal, to the Commissioner.”

¹ <http://www.gov.scot/Resource/0051/00510851.pdf>

55. In addition, paragraph 11.1.2 provides good practice guidance on providing the Commissioner with the withheld information, within the timescales requested, detailed in a schedule of documents and (where applicable) clearly indicating what has been disclosed already: the Ministers' (acknowledged) failures in record keeping meant this guidance could not be followed when an application was made to the Commissioner.
56. The Commissioner must also express his concern that the Ministers' initial statement that information had been disclosed to Company A during the investigation was not wholly accurate, requiring further intervention on the Commissioner's part.
57. The handling failures identified above do not reflect the level of good practice the Commissioner would expect of a Scottish public authority experienced in the handling of requests. The Commissioner would urge the Ministers to reflect on the failures in record keeping identified in this case, in particular, to ensure that any relevant lessons are learned and acted upon across the authority.

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 Company A UK Operations Limited.

The Commissioner finds that the Ministers were entitled to withhold some information as excepted from disclosure under regulation 10(4)(e) of the EIRs.

He also finds, however, that the Ministers were not entitled to withhold the information they disclosed during the investigation: in doing so, they breached regulation 5(1) of the EIRs. He also finds the Ministers failed to comply with the requirements of regulations 5(2) and 16(4) and (5) of the EIRs in responding to the request and requirement for review.

The Commissioner does not require the Scottish Ministers to take any action in respect of these failures in response to Company A's application, given the responses provided by the Ministers and the information disclosed during the investigation.

Appeal

Should either Company A or the Ministers wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement

8 October 2018

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;

...

(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;

...

(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–

(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
 - ...
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves making available internal communications.

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);
- ...
- (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
- ...

16 Review by Scottish public authority

- ...
- (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.

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