

Decision Notice



Decision 168/2012 Patrick Strain and East Renfrewshire Council

Legal Opinions and Memorials

Reference No: 201200167 and 201200987

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www.itspublicknowledge.info

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Summary

Mr Strain asked East Renfrewshire Council (the Council) for three legal opinions and memorials relating to the Braidbar Quarries. The Council withheld all of the information, on the basis that it was confidential.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information from Mr Strain.

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) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(d) (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. The parcel of land referred to collectively as the "Braidbar Quarries" is located in Giffnock and was the site of mining and quarrying operations during the late 19th and early 20th centuries. Houses were built upon parts of the former quarry site during the 1950s and 1980s. There have been several engineering surveys conducted on the land since 1983, and it is agreed that parts of the "Braidbar Quarry" land are at risk of collapse due to mineral instability as a result of the abandoned mine works. The engineering surveys have established a "safety line" where on one side land is safe from collapse and on the other side it is at risk. Some of the houses built on the former quarry land sit very close to, or have gardens which encroach upon, this "safety line".



- In the 1980s, the Council amended the existing property enquiry certificates of certain houses in the Braidbar Quarries area, noting that the properties are within an area which could be affected by a collapse of the former mine workings and could not be regarded as satisfactory from a mineral support aspect. As a result, the affected homeowners are unable to sell their properties as they are deemed unsafe.

Request 1

- On 10 January 2012, Mr Strain wrote to the Council with the following request:

"I understand that the Council holds several Legal Opinions in relation to the former Braidbar Quarries at Giffnock: please send me copies of the three counsels' opinions".
- The Council responded the same day. In its response the Council noted that it had obtained legal advice in 1983, 1990 and 1998, but considered the legal opinions and accompanying memorials to fall under the exception contained in regulation 10(5)(d) of the Environmental Information (Scotland) Regulations 2004 (the EIRs).
- On 11 January 2012, Mr Strain wrote to the Council requesting a review of its decision, arguing that it was in the public interest for these documents to be disclosed.
- The Council notified Mr Strain of the outcome of its review the same day. The Council maintained its earlier decision to withhold the information, on this occasion stating that it considered the requested information to fall under the exceptions contained in both regulations 10(5)(b) and (d) of the EIRs.
- On 17 January 2012, Mr Strain wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
- The application was validated by establishing that Mr Strain 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.
- On 8 February 2012, the Council was notified in writing that an application had been received from Mr Strain and was asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
- In further correspondence with the Council, it became apparent that, while the Council had responded to Mr Strain's information request by advising that both the legal opinions *and* memorials were excepted from disclosure, Mr Strain had asked only for the legal opinions. (A memorial in this context refers to the questions that were put to Counsel by the authority, and which were responded to by way of legal opinion. Essentially, the memorials ask the questions and the legal opinions provide answers.)



11. Both the Council and Mr Strain were advised that the Commissioner could not consider the memorials as falling within the scope of Mr Strain's request. After consulting with the Council and Mr Strain (who indicated that he also wanted the memorials), it was agreed that Mr Strain would make a new request for the memorials accompanying the legal opinions and that both requests would be considered together.

Request 2

12. Consequently, on 30 April 2012, Mr Strain wrote to the Council and asked:

"I would like to formally request the Memorials relating to the Opinions which I had previously requested".
13. The Council responded to this request on 1 May 2012, advising that it considered the memorials to be excepted from disclosure under regulation 10(5) of the EIRs.
14. On 7 May 2012, Mr Strain wrote to the Council requesting a review of its decision.
15. The Council notified Mr Strain of the outcome of its review on 11 May 2012. It maintained its earlier decision, stating that it considered the requested information to fall under the exceptions contained in regulations 10(5)(b) and (d) of the EIRs.
16. On 16 May 2012, Mr Strain wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
17. The application was validated by establishing that Mr Strain had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

18. The Council was given an opportunity to provide comments on each of the applications (as required by section 49(3)(a) of FOISA), and to respond to specific questions.
19. During the course of the investigation, submissions were sought and received from Mr Strain, on why he considered that the public interest lay in disclosure of the legal opinions and memorials he had requested. The Council also provided submissions on the public interest in disclosing or withholding the information requested by Mr Strain.
20. Submissions from the Council and Mr Strain are summarised and considered in the Commissioner's analysis and findings section below (where relevant).



Commissioner's analysis and findings

21. 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 Mr Strain and the Council and is satisfied that no matter of relevance has been overlooked.
22. In this case, the Council responded to Mr Strain's information request solely in terms of the EIRs. In its submissions to the Commissioner, the Council confirmed that it did so having judged that the information requested was environmental information, as defined in the EIRs, and so exempt from disclosure in terms of section 39(2) of FOISA.
23. For this exemption to apply, the information under consideration must be environmental information as defined in regulation 2(1) of the EIRs. The relevant parts of that definition are reproduced in the Appendix to this decision.
24. The Commissioner's views on the relationship between FOISA and the EIRs are represented in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not be repeated in full here.
25. The Commissioner agrees with the Council that the information under consideration in this case is environmental information. The withheld information comprises three legal opinions and the three memorials associated with each opinion. The information contained in the legal opinions and memorials relates to Braidbar Quarries, and covers such topics as the state and stability of the land. The Commissioner therefore considers it to be information on measures and activities affecting, or likely to affect, the elements of the environment, in particular land and landscape. As such, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a) and (c) of that definition.
26. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
27. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently considered this case solely in terms of the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



Regulation 10(5)(d)

28. The exception in regulation 10(5)(d) has been applied to all the legal opinions and the memorials in their entirety. Regulation 10(5)(d) states that 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 the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
29. In its publication "The Aarhus Convention: an implementation guide"², the Economic Commission for Europe notes at page 59 that the convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
30. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
31. The first matter to be addressed by the Commissioner, therefore, is whether the information relates to proceedings, the confidentiality of which are protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.
32. In many cases where this exception applies, there exists a specific statutory provision prohibiting the release of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.
33. The withheld information comprises legal advice and requests for legal advice, which, if disclosed, would reveal the nature of the advice likely to be received. The Council noted that the advocates who provided the legal advice were acting in their professional capacity and the communications occurred in the context of a professional relationship with the client at the time. The Council submitted that legal advice privilege also applies to the preliminary legal research undertaken by in-house staff (i.e. the memorials), which were produced with a view to contributing to the final legal advice provided by Counsel.

² <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>



34. The Commissioner is satisfied that the withheld information is a record of legal advice requested from, and provided by, a legal adviser, all within the context of a professional relationship in circumstances in which legal professional privilege could apply. The Commissioner takes the view that a claim for confidentiality of communications could be maintained in legal proceedings in respect of the withheld information. The substance of the legal advice has not been disclosed; consequently, the confidentiality of the advice has been maintained.
35. The Commissioner will therefore go on to consider whether disclosure of the privileged information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the proceedings of the Council in terms of regulation 10(5)(d) of the EIRs. In this connection the Commissioner accepts, as she has in previous similar cases, that the process of obtaining legal advice in this case can be accepted as relevant proceedings for the purposes of regulation 10(5)(d).
36. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. In this case, the Commissioner accepts that the issues discussed in the privileged information remain current (despite the age of some of the information), and could give rise to litigation. In these circumstances, given the content of the information and its privileged nature, the Commissioner accepts that disclosure would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings and that the exception in regulation 10(5)(d) therefore applied to that information at the time the Council dealt with Mr Strain's information requests and requests for review.
37. Having concluded that the exception in regulation 10(5)(d) of the EIRs applies to the withheld information, the Commissioner must consider, as required by regulation 10(1)(b), whether the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest test

38. The Council submitted that in discharging its statutory functions and exercising discretionary powers, it must ensure that it does not act *ultra vires* or in a way which would undermine its ability to function for the greater public good. The Council stated that there are, and will continue to be, occasions when it has to obtain impartial and expert legal advice to ensure the legitimacy of its actions, which may be subject to legal challenge by groups who hold conflicting views. The Council submitted that the right to obtain and consider comprehensive and frank legal advice in private on such occasions is essential if public authorities are not to be disadvantaged.
39. The Council acknowledged the public interest in disclosure of information which would promote a greater awareness of environmental matters, more effective participation by the public in environmental decision-making, and a better environment. However, it did not consider that the information covered by Mr Strain's requests would further any of these aims, being an assessment of factual environmental information (which had already been disclosed) in a legal context for the purpose of assessing liability and power to take remedial measures.



40. The Council provided the Commissioner with a copy of the factual environmental information it has disclosed on this matter. The Council argued that there was no wider general public interest in the release of legal information relating to this case (as opposed to what might be termed the factual information and opinion on technical environmental matters in the purest sense). Given that the issue remains current and could still give rise to litigation, the Council considered that release of the opinions in this case would potentially jeopardise its position.
41. The Council stated that, in considering the public interest test, it had taken into account the age of the legal opinions and memorials that are being withheld. Given that the matters discussed within the documents were still relevant, the Council took the view that the terms of all of the opinions and memorials remained pertinent. The Council was satisfied that the public interest arguments outlined above are not prejudiced by the passage of time since the legal opinions and memorials were created. The factual state of affairs to which the legal advice relates remains current.
42. Mr Strain has argued that, given the importance of the issue to the broader community and the length of time it has gone on for, the public interest lies in as full a disclosure as possible. He took the view that the general public interest in access to information was relevant in this case. Although he understood that the Council was still considering how best to address the “Braidbar issue”, he argued that the broader community, empowered by the full resource of knowledge, would be better able to make that happen. He believed that disclosure of the requested information would contribute to the debate on a matter of significant public interest.
43. Mr Strain submitted that there are various householders living in properties blighted by the underground workings who have been unable to sell their house without a satisfactory property enquiry certificate. Mr Strain noted that “[a]cres of what should be prime land” is unavailable for development or leisure. He argued that the situation at Braidbar has gone on “long enough” and that only full disclosure by the Council of all the facts could allow the community to work towards a resolution of the issues.
44. Mr Strain asked for the age of the information to be taken into account, and queried whether the Council could really claim that documents created almost thirty years ago must remain secret.
45. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, she considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
46. On the basis of evidence presented by the Council, the Commissioner accepts that future litigation on this matter remains an active possibility. This adds weight to the argument that it is in the public interest to protect the confidentiality of privileged communications.



47. The Commissioner acknowledges that there is significant public concern about the Braidbar Quarries, especially from householders whose land encroaches on the established “safety line”, and who have consequently suffered considerable distress and anxiety for many years. However, having examined the withheld information, she is not persuaded that its disclosure would empower the public in the way suggested by Mr Strain (in paragraphs 42 and 43 above). The Commissioner cannot give detailed reasons for this view, as to do so would be to disclose information which has been withheld, but her view is based on the content of the withheld information.
48. The Commissioner notes that some of the information falling under the scope of Mr Strain’s request is almost thirty years old. However, having considered the content of the withheld information, and being mindful of the issues currently affecting the Braidbar Quarry site, she is satisfied that age has not lessened the relevancy or confidentiality of these documents to any significant extent.
49. The Commissioner has also considered the “factual information” concerning the former quarry site that has already been publicly disclosed by the Council. The Commissioner considers that the Council has, to a large extent, satisfied the public interest in making available information about the safety of the Braidbar Quarry site by this disclosure, and finds little within the withheld legal opinions and memorials that would contribute further to a public debate on this subject.
50. The Commissioner has considered carefully the concerns of the householders and other people affected by the instability of the quarry site, and has sympathy for the position in which they are placed. However, having examined the withheld information, the Commissioner does not accept that its disclosure would clearly have consequences which would be so strongly in the public interest as to outweigh the public interest in maintaining legal privilege for the disclosure of information from privileged communications. Consequently, she finds that the public interest in maintaining the exception outweighs the public interest in disclosure.
51. Given that the Commissioner has accepted that the Council was entitled to withhold the memorials and opinions under regulation 10(5)(d) of the EIRs, she is not required to (and will not) go on to consider whether the Council was also entitled to withhold the information under regulation 10(5)(b).

DECISION

The Commissioner finds that the Council complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr Strain.



Appeal

Should either Mr Strain or East Renfrewshire 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.

Rosemary Agnew
Scottish Information Commissioner
16 October 2012



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;

..

(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.

...

- (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;

...